U.S. Court of International Trade

Slip Op. 15–73

BELL SUPPLY COMPANY, LLC, Plaintiff, v. UNITED STATES, Defendant, and BOOMERANG TUBE LLC, TMK IPSCO TUBULARS, V&M STAR L.P., WHEATLAND TUBE COMPANY, MAVERICK TUBE CORPORATION, and UNITED STATES STEEL CORPORATION, Defendant-Intervenors.

Before: Claire R. Kelly, Judge
Court No. 14–00066
Public Version

[Granting Plaintiff's motion for judgment on the agency record and remanding to Commerce.]

Dated: July 9, 2015

Donald Bertrand Cameron, Morris, Manning & Martin, LLP, of Washington, DC, argued for Plaintiff. With him on the brief were *Julie Clark Mendoza*, *Rudi Will Planert*, *Brady Warfield Mills*, *Mary Shannon Hodgins*, and *Sarah Suzanne Sprinkle*.

Loren Misha Preheim, Trial Attorney, Commercial Litigation Branch, Civil Division, U.S. Department of Justice, of Washington, DC, argued for Defendant. With him on the brief were *Joyce R. Branda*, Acting Assistant Attorney General, *Jeanne E. Davidson*, Director, and *Claudia Burke*, Assistant Director. Of counsel on the brief was *Whitney Marie Rolig*, Attorney, Office of the Chief Counsel for Trade Enforcement and Compliance, U.S. Department of Commerce, of Washington, DC.

Roger Brian Schagrin, Schagrin Associates, of Washington, DC, argued for Defendant-Intervenors Boomerang Tube LLC, TMK IPSCO Tubulars, V&M Star L.P., and Wheatland Tube Company. With him on the brief was *John Winthrop Bohn.*

Robert Edward DeFrancesco, III, Wiley Rein, LLP, of Washington, DC, argued for Defendant-Intervenor Maverick Tube Corporation. With him on the brief were *Alan Hayden Price* and *Tessa Victoria Capeloto.*

Jeffrey David Gerrish, Skadden Arps Slate Meagher & Flom, LLP, of Washington, DC, argued for Defendant-Intervenor United States Steel Corporation. With him on the brief were *Robert E. Lighthizer* and *Nathaniel B. Bolin.*

OPINION AND ORDER

Kelly, Judge:

Plaintiff Bell Supply Company, LLC ("Plaintiff" or "Bell Supply") brings this action pursuant to 28 U.S.C. § 1581(c) (2012)[1] and section

[1] Further citations to Title 28 of the U.S. Code are to the 2012 edition.

516A of the Tariff Act of 1930, 19 U.S.C. § 1516a(a)(2)(B)(vi) (2012),[2] for judicial review of the Final Scope Ruling on Green Tubes Manufactured in the People's Republic of China and Finished in Countries Other than the United States and the People's Republic of China, PD 174–76 at bar codes 3179952–01–03 (Feb 7, 2014) ("Final Scope Ruling")[3] issued by the United States Department of Commerce ("Commerce" or "the Department") to interpret the scope language from the antidumping duty order on *Certain Oil Country Tubular Goods From the People's Republic of China*, 75 Fed. Reg. 28,551 (Dep't Commerce May 21, 2010) (amended final determination of sales at less than fair value and antidumping duty order) ("ADD Order"), and the countervailing duty order on *Certain Oil Country Tubular Goods From the People's Republic of China*, 75 Fed. Reg. 3,203 (Dep't Commerce Jan. 20, 2010) (amended final affirmative countervailing duty determination and countervailing duty order) ("CVD Order") (collectively "Orders").

Plaintiff moves for judgment on the agency record pursuant to USCIT Rule 56.2 on the grounds that the Final Scope Ruling unlawfully expanded the scope of the Orders and unlawfully ignored the statutory circumvention criteria in 19 U.S.C. § 1677j for when Commerce may include merchandise finished in a third country within the scope of an order. Further, Plaintiff claims that Commerce's substantial transformation analysis was not supported by substantial evidence and otherwise not in accordance with law. Br. Pl. Supp. Mot. J. Agency R. 2, 9–11, Sept. 26, 2014, ECF No. 40–1 ("Pl.'s Mot."). Defendant United States ("Defendant" or "United States") argues that Commerce was not required to conduct a circumvention inquiry pursuant to § 1677j here because that statute "simply provide[s] an *additional* means for Commerce to administer and enforce its orders." Def.'s Resp. Pl.'s Rule 56.2 Mot. J. Agency R. 9, Jan. 14, 2015, ECF No. 51 ("Def.'s Resp."). Instead, Defendant argues that because the scope ruling required a country of origin determination, Commerce merely "filled a statutory gap by applying its substantial transformation analysis" in its determination that certain oil country tubular goods ("OCTG") from the People's Republic of China ("PRC" or "China") finished in Indonesia were still subject to the Orders. *Id.* at 9. Defendant also contends that its extra-statutory use of substantial transformation analysis was supported by substantial evidence. *Id.* at 10. The court finds Commerce failed to interpret the scope of the Orders

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

[3] The scope inquiry at issue here was initiated for the parallel antidumping duty and countervailing duty cases. Unless otherwise necessary, the court will cite to the administrative record for the antidumping duty proceeding.

and improperly expanded the scope language when it used a substantial transformation analysis to include OCTG finished in third countries without analyzing the language of the relevant Orders.

BACKGROUND

The Orders cover certain OCTG from the PRC. CVD Order, 75 Fed. Reg. at 3,203; ADD Order, 75 Fed. Reg. at 28,551. The scope of the Orders define the subject merchandise as

> certain oil country tubular goods ("OCTG"), which are hollow steel products of circular cross-section, including oil well casing and tubing, of iron (other than cast iron) or steel (both carbon and alloy), whether seamless or welded, regardless of end finish (e.g., whether or not plain end, threaded, or threaded and coupled) whether or not conforming to American Petroleum Institute ("API") or non-API specifications, whether finished (including limited service OCTG products) or unfinished (including green tubes and limited service OCTG products), whether or not thread protectors are attached. The scope of the order also covers OCTG coupling stock. Excluded from the scope of the order are: casing or tubing containing 10.5 percent or more by weight of chromium; drill pipe; unattached couplings; and unattached thread protectors.

CVD Order, 75 Fed. Reg. at 3,203–04; ADD Order, 75 Fed. Reg. at 28,553. As Plaintiff claims that Commerce has acted contrary to law and that Commerce's statements regarding its analysis sometimes differ, the court's discussion of the administrative proceedings below is extensive.

Request for Scope Ruling

Defendant-Intervenors United States Steel Corporation, TMK IPSCO, Wheatland Tube Company, Boomerang Tube LLC, and V&M Star L.P. ("Defendant-Intervenors" or "Petitioners"), Petitioners below, requested the scope ruling at issue to determine "whether unfinished [OCTG] (including green tubes) produced in the PRC, regardless of where the finishing of such OCTG takes place, are expressly included in the scope of the antidumping and countervailing duty *Orders* on OCTG from the PRC." Preliminary Scope Ruling on Green Tubes Manufactured in the People's Republic of China (PRC) and Finished in Countries Other than the United States and the PRC at 1, CD 48 at bar codes 3138529–01 (May 31, 2013) ("Preliminary Scope Ruling"). Petitioners requested the ruling after U.S. Customs and Border Protection ("CBP") determined that the country of origin for

"green tube and unfinished seamless steel pipe made in India, China or Russia" subsequently heat treated in certain third countries was a product of that third country. Petitioner's Application for Scope Ruling at Ex. 2, PD 1–3 at bar code 3065185–01 (Mar. 26, 2012) (CBP Ruling N118180: The country of origin of steel tubing processed in Korea or Japan from green tubes originating in India, China or Russia) ("Petition").

On March 26, 2012, Petitioners sought an expedited ruling from Commerce. *Id.* at 6, 20. Petitioners asserted "CBP's determination that unfinished OCTG from China that is finished in third countries through heat treatment is substantially transformed into products of those third countries directly conflicts with the scope of the . . . [O]rders on OCTG from China . . . ." *Id.* at 5. Petitioners feared "that the CBP ruling [was] likely to create confusion" and "lead to the improper designation of the country of origin of Chinese OCTG that is finished in any third country." *Id.*

Petitioners claimed that under the factors enumerated pursuant to 19 C.F.R. § 351.225(k)(1) (2013),[4] "the plain language of the . . . [O]rders expressly covers unfinished OCTG produced in China, regardless of where such OCTG is finished."[5] *Id.* at 6. Petitioners argued that "[t]he language of the . . . antidumping or countervailing duty order is the cornerstone of the analysis of the order's scope," and that the plain language of the Orders must therefore govern whether the merchandise is covered by the scope. *Id.* at 6–7. Petitioners also maintained that the scope of an order "is defined by the type of merchandise and by the country of origin," and that Commerce uses its substantial transformation test to determine the country of origin. *Id.* at 7. Petitioners argued that the substantial transformation analysis further bolstered the conclusion that OCTG finished in third countries is within the scope. *See id.* at 11–12, 20. Petitioners also claimed that the plain language of the Orders was clear, and, therefore, Commerce did not need to do an analysis using the § 351.225(k)(2) factors.[6] *See id.* at 10. Nonetheless, Petitioners argued even if Commerce reached the (k)(2) factors, they would show OCTG heat treated and finished in third countries is within the scope of the Orders. *Id.*at 10, 20–23.

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[4] Further citations to Title 19 of the Code of Federal Regulations are to the 2013 edition.

[5] For scope inquiries conducted pursuant to 19 C.F.R. § 351.225(k)(1), Commerce is to consider the following: "The descriptions of the merchandise contained in the petition, the initial investigation, and the determinations of [Commerce] (including prior scope determinations) and the Commission." 19 C.F.R. § 351.225(k)(1).

[6] Per regulation, when the criteria under 19 C.F.R. § 351.225(k)(1) are not dispositive, Commerce is to consider the 19 C.F.R. § 351.225(k)(2) factors, which include "(i) The physical characteristics of the product; (ii) The expectations of the ultimate purchasers; (iii)

Petitioners further claimed that "where the scope covers both finished and unfinished merchandise, it is the Department's practice to treat such merchandise as in the scope of the order regardless of whether it is finished in third countries prior to importation into the United States, so long as substantial transformation does not take place in the third country." Preliminary Scope Ruling at 7; *see also* Petitioner's Response to Comments on Scope Inquiry at 17–18, PD 18 at bar code 3079599–01 (June 5, 2012). Petitioners asserted that "the well-established rule at the time of the filing of the petitions was that heat treatment of OCTG in a third country was not enough to substantially transform the OCTG to a product of the third country," and, therefore, "explicit reference to third-country processing was not necessary in order to include OCTG from the PRC that was heat treated in third countries within the scope of the *Orders*." Preliminary Scope Ruling at 8.

In response, Bell Supply, a U.S. importer of OCTG sourced from Chinese green tubes but heat treated and finished in Indonesia, argued that "nowhere in the very specific and carefully crafted scope language of the[] . . . [O]rders, or in any prior antidumping or countervailing duty investigation of OCTG, has the Department ever indicated that OCTG that is finished and heat-treated in third countries is intended to be covered." Bell Supply's Response to Petition for Scope Ruling at 3, PD 11 at bar code 3071885–01 (Apr. 26, 2012). Bell Supply claimed that "where the Department intends to include merchandise finished in third countries within an AD or CVD order the Department's practice is to do so expressly." *Id.* Bell Supply asserted that CBP's ruling did "not in fact 'conflict' with any language in the OCTG [O]rders, which do not by their terms apply to OCTG finished and heat treated in third countries," and that it "did no more than reaffirm the country of origin rule that had been in effect at the time of the OCTG [O]rders, and which stretches back more than 20 years." *Id.* at 5. Based on CBP determinations and the International Trade Commission's ("ITC") treatment of U.S.-finished OCTG sourced from subject green tube, Bell Supply contended "that the long established rule is that heat treatment and finishing determines country of origin for OCTG." Preliminary Scope Ruling at 11; *see also* Bell Supply's Response to Scope Initiation at 3–4, PD 33 at bar code 3086198–01 (July 13, 2012) (citing HQ 088224 (Jan. 31, 1991)).

On June 20, 2012, Commerce found that "it [could not] determine whether the scope of the . . . [O]rders . . . expressly includes PRC-produced green tubes that are further processed in a third country

The ultimate use of the product; (iv) The channels of trade in which the product is sold; and (v) The manner in which the product is advertised and displayed." 19 C.F.R. § 351.225(k)(2)(i)–(v).

prior to shipment to the United States based upon Petitioners' application for a scope clarification as contemplated by 19 CFR [§] 351.225(d) and the subsequently submitted interested party comments." Scope Initiation Letter at 1, PD 25 at bar code 3082712–01 (June 20, 2012). Commerce therefore initiated a formal scope inquiry pursuant to 19 C.F.R. § 351.225(e).[7] *See generally id.*; *see also* Preliminary Scope Ruling at 1–2.

The Preliminary Scope Ruling

After receiving comments, Commerce noted its basis of authority in the Preliminary Scope Ruling and stated it was "conducting this scope inquiry pursuant to 19 CFR [§] 351.225(k)." Preliminary Scope Ruling at 5. Commerce also stated it would consider the language of the Orders and the (k)(1) factors. *Id.* at 4.

Consistent with the regulatory language, Commerce recognized that if the § 351.225(k)(1) factors were dispositive, Commerce would issue a final determination on the matter, but if not, Commerce would proceed to consider the § 351.225(k)(2) factors. *Id.* at 4. Yet, after acknowledging the language of 19 C.F.R. § 351.225(k)(1) and (k)(2), Commerce proceeded to forgo the § 351.225(k)(1) and (k)(2) analyses, stating "[o]ur analysis concerns whether the processing that takes place in third countries constitutes a substantial transformation . . . ."[8] *Id.* at 5.

Commerce stated that "[t]he scope of an order describes the merchandise that is subject to the order. That description must be applied in conjunction with the country subject to the order." *Id.* at 13. Therefore, Commerce reasoned that "the merchandise in the scope must be a product of the country under order." *Id.*(citing *E.I. Du Pont de Nemours & Co. v. United States*, 22 CIT 370, 375, 8 F. Supp. 2d 854, 859 (1998)).

Commerce framed Petitioners' argument as a request that Commerce "determine that PRC-sourced, unfinished OCTG is within the scope of the *Orders*, regardless of where it is finished." *Id.* Commerce refuted this argument, stating that

> [a]lthough PRC-sourced unfinished OCTG imported into the

[7] When Commerce "finds that the issue of whether a product is included within the scope of an order or a suspended investigation cannot be determined based solely upon the application and the descriptions of the merchandise referred to in paragraph (k)(1) of this section, the Secretary will notify by mail all parties on the Department's scope service list of the initiation of a scope inquiry." 19 C.F.R. § 351.225(e).

[8] Commerce then proceeded to outline the five factors used in its substantial transformation analysis to determine "whether conversion in third countries of unfinished OCTG (or green tube) imported from the PRC constitutes a substantial transformation ...." *Id.* at 5–6.

> United States is clearly covered by the *Orders*, it does not necessarily follow that unfinished OCTG that is finished in third countries is also covered by the *Orders*, because the processing performed in the third country may substantially transform the merchandise such that the country of origin is not the PRC.

Id. Commerce explained that despite Petitioners' arguments, "[t]he circumstances at issue in this inquiry, and those which the Department must consider, are too varied and nuanced to permit a simple, blanket statement which assumes that anything produced from PRC-sourced green tube is within the scope of the *Orders*." *Id.*

Commerce concluded that "Petitioners have not pointed to any discussion of these issues from the investigations of these cases, nor has the Department found or reviewed such discussion in the records of the investigations related to these *Orders* that would resolve this issue." *Id.* Based on its review, Commerce determined that "[a]ccordingly, we must investigate whether the third-country processing at issue here is substantial enough to confer a new country of origin upon the product, or whether the processing is such to maintain the original country of origin, and maintain coverage of the *Orders*." *Id.* Finally, Commerce concluded that

> seamless unfinished OCTG manufactured in the PRC and finished in countries other than the United States and the PRC *(i.e.*, third countries) is within the scope of the *Orders* where 1) the finishing consists of heat treatment by quenching and tempering, upsetting and threading (with integral joint), or threading and coupling; and 2) the products are made to the following specifications and grades: API specification 5CT, grades P-110, T-95 and Q-125.

Id. at 32.

In Bell Supply's comments to the Preliminary Scope Ruling, it argued that Commerce's determination improperly expanded the scope of the Orders to cover OCTG finished in third countries. Bell Supply claimed that Commerce failed to identify language in the actual Orders as a predicate for its interpretation. Bell Supply's Comments on the Preliminary at 2–3, CD 50 at bar code 3141676–01 (June 24, 2013) (citing Preliminary Scope Ruling at 13). Bell Supply further argued that "in light of the established industry practice that the country of origin is the country where the heat treatment takes place, the scope language recommended by the Petitioners and adopted by the Department cannot reasonably be interpreted to cover

OCTG that has been heat treated and finished in third countries." *Id.* at 4. However, Bell Supply contended that even if one assumed "the scope language of the . . . [O]rders alone fails conclusively to establish that OCTG heat treated and finished in Indonesia is outside the scope of the [O]rders, the Department's regulations require it to resolve any ambiguity in the stated scope by first considering" the § 351.225(k)(1) factors, which confirmed that the Orders were not intended to cover OCTG finished in third countries. *Id.* at 5–6. Relying upon the language of the Orders and the underlying Commerce and ITC investigations, Bell Supply argued the Petition intended to cover finished OCTG from China only. *Id.* at 6–12.

The Final Scope Ruling

In the Final Scope Ruling, Commerce once again invoked its regulations governing scope inquiries in 19 C.F.R. § 351.225, including specifically the § 351.225(k)(1) and (k)(2) considerations. *See* Final Scope Ruling at 4. But Commerce again shifted its inquiry to a substantial transformation analysis. *Id.* at 4, 7–8. In rejecting Bell Supply's arguments that the language of the Orders did not support the Preliminary Scope Ruling, Commerce stated that Bell Supply's argument "forget[s] the fact that we are analyzing a country-of-origin question in this scope inquiry, not a question pertaining to the interpretation of the scope under 19 CFR [§] 351.225(k) or the line of cases such as *Duferco Steel, Inc. v. United States*." *Id.* at 7. In Commerce's view, "[w]hether or not the scope language is clear under 19 CFR [§]351.225(k) is irrelevant to the separate question of whether subject merchandise was substantially transformed such that it is now the product of a different, non-subject country." *Id.* at 9.

Commerce reasoned that "the physical merchandise and the country-of-origin are two separate parameters for defining merchandise subject to an order." *Id.* According to Commerce, the scope unambiguously covered finished and unfinished OCTG from China and that was "why [Commerce was] examining whether substantial transformation has occurred in a third country." *Id.* Commerce found that, since there was no substantial transformation, "the Department's Preliminary Scope Ruling has not interpreted the scope of these *Orders* in any manner which alters the scope itself." *Id.* Furthermore, Commerce stated that it was not conducting a circumvention analysis pursuant to 19 U.S.C. § 1677j because "Petitioners' original request was not restricted to a particular third-country or manufacturer or processor, and, therefore, [§ 1677j(b)] was not applicable." *Id.* at 15.

Commerce determined that OCTG finished via heat treatment was not substantially transformed and the country of origin was still the PRC. *See generally id.* Thus, Commerce reasoned that the finished OCTG processed in a third country using heat treatment would still be subject to the Orders on OCTG from the PRC. Commerce concluded

> seamless unfinished OCTG manufactured in the PRC and finished in third countries is within the scope of the *Orders,* where 1) the finishing consists of heat treatment by quenching and tempering, upsetting and threading (with integral joint), or threading and coupling; and 2) the products are made to [certain enumerated] specifications and grades . . . .

Id. at 24.

JURISDICTION AND STANDARD OF REVIEW

The court has jurisdiction over Plaintiff's claim under 28 U.S.C. § 1581(c) and 19 U.S.C. § 1516a(a)(2)(B)(vi). The court must "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).

DISCUSSION

In interpreting the scope of the Orders, Commerce is limited to clarifying the scope based on the actual words of the Orders. *See* 19 C.F.R. § 351.225(k); *Duferco Steel, Inc. v. United States*, 296 F.3d 1087, 1097 (Fed. Cir. 2002). Plaintiff argues Commerce unlawfully expanded the scope of the Orders because Commerce failed to identify scope language to include green tube heat treated in third countries. Pl.'s Mot. 8, 12–19. Defendant argues that Commerce's determination was lawful because it has inherent authority to determine country of origin based on its power to enforce and administer the antidumping and countervailing duty laws. Therefore, Defendant contends Commerce was not constrained to the words of the Orders in making its determination. Def.'s Resp. 9–10, 21–25. Here, Commerce did not look to the words of the Orders to find that green tube from China later heat treated in Indonesia was within the scope, and by doing so Commerce acted contrary to law.

The language of an order dictates its scope. Commerce has broad authority "to interpret and clarify its antidumping duty orders." *Ericsson GE Mobile Commc'ns, Inc. v. United States*, 60 F.3d 778, 782 (Fed. Cir. 1995) (citing *Smith Corona Corp. v. United States*, 915 F.2d

683, 686 (Fed. Cir. 1990)), *as corrected on reh'g* (Sept. 1, 1995). *See also King Supply Co., LLC v. United States*, 674 F.3d 1343, 1349 (Fed. Cir. 2012). However, Commerce may not interpret an order "so as to change the scope of that order, nor can Commerce interpret an order in a manner contrary to its terms." *Eckstrom Indus., Inc. v. United States*, 254 F.3d 1068, 1072 (Fed. Cir. 2001) (citing *Wheatland Tube Co. v. United States*, 161 F.3d 1365, 1370 (Fed. Cir. 1998)). Furthermore, "[s]cope orders may be interpreted as including subject merchandise only if they contain language that specifically includes the subject merchandise or may be reasonably interpreted to include it." *Duferco*, 296 F.3d at 1089. Although the petition and the investigation proceedings may aid in Commerce's interpretation of the final order, the order itself "reflects the decision that has been made as to which merchandise is within the final scope of the investigation and is subject to the order." *Id.* at 1096–97. Therefore, if Commerce conducts a scope ruling without reference to the language of an order it is not interpreting that order.

In its regulations, Commerce specifies the circumstances and procedures when clarifying the scope of an order may be necessary. *See generally* 19 C.F.R. § 351.225. In identifying when the scope of an order may need clarification, Commerce's regulations provide:

> Issues arise as to whether a particular product is included within the scope of an antidumping or countervailing duty order or a suspended investigation. Such issues can arise because the descriptions of subject merchandise contained in the Department's determinations must be written in general terms. At other times, a domestic interested party may allege that changes to an imported product or the place where the imported product is assembled constitutes circumvention under [§ 1677j]. When such issues arise, the Department issues "scope rulings" that clarify the scope of an order or suspended investigation with respect to particular products.

19 C.F.R. § 351.225(a).[9] Commerce's regulations then provide the following guidance regarding the interpretation of the scope language of an order:

[9] The regulations provide that Commerce may self-initiate a scope inquiry, stating that if Commerce "determines from available information that an inquiry is warranted to determine whether a product is included within the scope of an antidumping or countervailing duty order or a suspended investigation, [Commerce] will initiate an inquiry . . . ." 19 C.F.R. § 351.225(b).

> [I]n considering whether a particular product is included within the scope of an order or a suspended investigation, [Commerce] will take into account the following:
>
> (1) The descriptions of the merchandise contained in the petition, the initial investigation, and the determinations of [Commerce] (including prior scope determinations) and the Commission.
>
> (2) When the above criteria are not dispositive, [Commerce] will further consider:
>
> (i) The physical characteristics of the product;
> (ii) The expectations of the ultimate purchasers;
> (iii) The ultimate use of the product;
> (iv) The channels of trade in which the product is sold; and
> (v) The manner in which the product is advertised and displayed.

19 C.F.R. § 351.225(k). Thus, in interpreting the words of an order, Commerce may look to the petition, the investigation and past scope determinations to aid it in its interpretation of the scope language. *Id.* § 351.225(k)(1); *see Smith Corona*, 915 F.2d at 685. If the considerations outlined in § 351.225(k)(1) are not dispositive, then Commerce may consider the factors outlined in § 351.225(k)(2). 19 C.F.R. § 351.225(k)(2).

The scope of an order necessarily includes not just the class or kind of merchandise covered by an order but also the countries subject to an order. When Commerce determines that dumping has occurred and the ITC finds injury, Commerce must issue an order that "includes a description of the subject merchandise, in such detail as the administering authority deems necessary." 19 U.S.C. § 1673e(a)(2); *see also* 19 U.S.C. § 1673d(c)(2). Thus, an order contains the description of the merchandise to which the order will apply. *See generally Duferco*, 296 F.3d at 1096. The statute further defines subject merchandise as "the class or kind of merchandise that is within the scope of an investigation, a review, a suspension agreement, an order under this subtitle or section 1303 of this title, or a finding under the Antidumping Act, 1921." 19 U.S.C. § 1677(25). By definition, the scope defines the subject merchandise with reference to more than just a description of its class or kind. Antidumping and countervailing duties orders are country specific because they only apply to merchandise from particular countries. *See generally* 19 U.S.C. § 1673; *see also* 19 U.S.C. §§ 1677j, 1677b(a)(3). Thus, the scope of an order necessarily includes the subject country or countries in addition to a description of the subject merchandise.

Under the statute and regulations, as interpreted by the U.S. Court of Appeals for the Federal Circuit, the words of an order must serve as a basis for the inclusion of merchandise within the scope of the order. *Duferco*, 296 F.3d at 1096–97. Commerce may use the § 351.225(k)(1) factors to clarify the words of an order. *Id.* at 1097 (citing *Smith Corona*, 915 F.2d at 686). If the (k)(1) factors are not dispositive, then Commerce considers the factors under (k)(2) to clarify the order. 19 C.F.R. § 351.225(k)(2). Given this framework, if the words of the order, as clarified by the (k)(1) and (k)(2) factors, do not support the inclusion of the merchandise within the scope of the order, then the merchandise is outside the order. Commerce may nonetheless seek to include merchandise outside the scope of an order through specific statutory provisions set forth by Congress, in this case through 19 U.S.C. § 1677j(b). Section 1677j(b) allows Commerce to include merchandise of the same class or kind as subject merchandise that is "completed or assembled in other foreign countries . . . within the scope of [an antidumping or countervailing duty] order," as long as the merchandise meets certain enumerated statutory requirements.[10] *See* 19 U.S.C. § 1677j(b).

Here, Commerce did not look to the words of the Orders to include the merchandise nor did it seek to include the merchandise pursuant to 19 U.S.C. § 1677j(b). In fact, initially Commerce found no scope language that expressly included OCTG finished in third countries. *See* Scope Initiation Letter at 1. Although Commerce professed to be analyzing descriptions of the merchandise pursuant to 19 C.F.R. § 351.225(k), in its Preliminary Ruling, Commerce found that "[a]lthough PRC-sourced unfinished OCTG imported into the United States is clearly covered by the *Orders*, it does not necessarily follow that unfinished OCTG that is finished in third countries is also covered by the *Orders*. . . ." Preliminary Scope Ruling at 13. Commerce further found that it could not make "a simple, blanket statement which assumes that anything produced from PRC-sourced green tube is within the scope of the *Orders*." *Id.*

Commerce, apparently continuing to track the criteria in § 351.225(k)(1), looked to the record of the investigation for interpretive guidance, but found nothing that indicated whether OCTG finished in third countries should be included in the scope of the Orders.[11] *Id.* In concluding that its (k)(1) analysis was not dispositive, Commerce

[10] Commerce's own regulations further clarify this authority. *See* 19 C.F.R. § 351.225(h).

[11] Commerce's analytical lens changes throughout its determination. At times it is unclear whether Commerce was looking for interpretive guidance under either the § 351.225(k)(1) factors, the § 351.225(k)(2) factors, both or neither. Ultimately, in its Final Scope Ruling, Commerce disclaimed any such interpretive efforts, stating that an interpretive analysis was irrelevant. Final Scope Ruling at 9.

stated that "Petitioners have not pointed to any discussion of these issues from the investigations of these cases, nor has the Department found or reviewed such discussion in the records of the investigations related to these *Orders* that would resolve this issue."[12] *Id.*

Unable to conclude that the Orders covered the merchandise by virtue of its analysis up to that point, rather than proceeding to a consideration of the (k)(2) factors, Commerce shifted its focus to a substantial transformation analysis, stating that ". . . we must investigate whether the third-country processing at issue here is substantial enough to confer a new country of origin upon the product, or whether the processing is such to maintain the original country of origin, and maintain coverage of the *Orders*." *Id.* Commerce's substantial transformation analysis led it to conclude that OCTG finished in Indonesia was not substantially transformed. *See id.* at 13–32. Thus, Commerce found that OCTG finished in the same manner in any third country was still a product of China and, consequently, subject to the Orders. *See id.* at 32.

After at least attempting to apply the (k)(1) and (k)(2) factors in its preliminary finding, Commerce abandoned the interpretive framework entirely in the Final Scope Ruling in favor of a substantial transformation test. In the Final Scope Ruling, Commerce found § 351.225(k) inapplicable in its entirety stating that "[t]his is not a case where [Commerce is] called on to analyze and determine the meaning of the scope language pursuant to 19 CFR [§] 351.225(k)," but "[r]ather, this is a case involving a country-of-origin determination, *i.e.*, whether there was a substantial transformation in a third country." Final Scope Ruling at 9. In Commerce's opinion, "[w]hether or not the scope language is clear under 19 CFR [§] 351.225(k) is irrelevant to the separate question of whether subject merchandise was substantially transformed such that it is now the product of a different, non-subject country." *Id.*

Although Commerce identified its substantial transformation analysis as distinct from an analysis of the words of the Orders, it did not identify adequate authority for performing such an analysis given the existence of 19 U.S.C § 1677j(b). Commerce found the words in the Orders clearly covered OCTG from China, and, therefore, Commerce

[12] Prior to the Preliminary Scope Ruling, the parties to the scope inquiry argued extensively about whether the § 351.225(k)(1) factors evidenced an intent that the scope included OCTG finished in third countries, including the language of the petition, the focus of the investigation, and various determinations by Commerce and the ITC. *See* Petition at 6–7. Petitioners also argued that an interpretation of the scope language in light of the (k)(2) factors confirmed that the scope of the Orders meant to include OCTG finished in third countries. *See id.* at 10–11.

had the power to find OCTG finished in third countries within the scope if the finishing process did not constitute a substantial transformation. *Id.* Commerce inferred this authority to substitute substantial transformation analysis for the factors provided in the statute and its regulations for itself rather than basing it on any interpretation of the words of the Orders. *Cf. Mid Continent Nail Corp. v. United States*, 725 F.3d 1295, 1303–1305 (Fed. Cir. 2013) (holding that Commerce could attempt to develop a standard for interpreting scope language in a mixed media situation based on both the (k)(1) factors and the (k)(2) factors to the extent they were relevant to the mixed media inquiry).[13] In both the Preliminary and Final Scope Rulings, Commerce referred to the need to look to the language of the Orders and even made reference to the interpretive factors provided by its regulations, but then eschewed an interpretive analysis in favor of a substantial transformation analysis. Preliminary Scope Ruling at 13–14; Final Scope Ruling at 3–4, 9. Commerce simply concluded that it could conduct this analysis instead of applying the statutory framework mandated by 19 U.S.C. § 1677j(b) based upon its practice of employing a substantial transformation analysis in cases that did not implicate 19 U.S.C. § 1677j(b). Final Scope Ruling at 15. It failed to adequately explain why 19 U.S.C. § 1677j(b) did not apply to this case or why the words of the Orders supported the inclusion of the merchandise or the use of the substantial transformation analysis.[14]

Congress enacted 19 U.S.C. § 1677j(b) to specifically address situ-

[13] It may be that Commerce's substantial transformation analysis could be appropriate in an interpretive context if such an analysis were triggered by words in an order. *Cf. Mid Continent Nail*, 725 F.3d at 1303 (providing that Commerce's interpretive analysis must be drawn from the words of the order). However, the possibility that Commerce could justify a substantial transformation analysis based upon the words of the Orders is not before the court because Commerce abandoned its interpretive efforts

[14] It is debatable whether there is in fact any scope language that could reasonably be interpreted to support a finding that Chinese green tubes heat treated and processed into finished OCTG in third countries were intended to be included in the scope of the Orders, or whether a substantial transformation test could be used to answer the question. Defendant appears to concede that Commerce has already reviewed the language of the scope and the record of the investigation, but it found the language does not suggest that unfinished green tube from the PRC that is subsequently heat treated and finished into OCTG in a third country was covered by the Orders. Oral Arg., 37:06–37:27, May 8, 2015, ECF No. 75. In response to written questions posed by the court to the parties, counsel for Defendant stated the following:

> Um I think question . . . question three was . . . is it Commerce's position that it could not, pursuant to 225(k) and *Duferco*, interpret the scope language as written . . . to find that green tube from China was green tube um . . . would be covered by the orders? That's correct . . . because of everything I said earlier . . . whether or not this is in fact from China.

See id.; *see also* Questions for Oral Argument scheduled for May 8, 2015 4, April 8, 2015, ECF No. 74. However, whether there is substantial evidence in the record to support a

ations where merchandise is further processed in a third country. *See* H.R. Rep. No. 100–576, at 599–600 (1988), *reprinted in* 1988 U.S.C.C.A.N. 1547, 1632–33. Commerce incorrectly claimed that § 1677j(b) could only apply in response to allegations of circumvention in a petition. *See* 19 C.F.R. § 351.225(b); *see also* Preliminary Scope Ruling at 30; Final Scope Ruling at 15. Since § 1677j(b), by its terms, expressly applies where merchandise is further processed in a third country, Commerce does not have discretion to employ an alternative analysis. In order to include merchandise that is otherwise outside of an order, Commerce must apply the statute Congress enacted for that purpose and must satisfy the enumerated requirements within the statute.

Defendant makes several arguments that Commerce can conduct a substantial transformation analysis to reach the result it did here without reference to the words of the Orders. First, Defendant claims Commerce power stems from its gap filling authority to define "foreign merchandise" as that term is used in 19 U.S.C. § 1673(1). *See* Def.'s Resp. 13–15, 21–22. Defendant further claims that the scope of the Orders here was silent on multi-country production, and, therefore, Commerce did not need to interpret any of the actual language of the scope. *Id.* at 16–17. Second, Commerce claims that its inherent power to administer antidumping and countervailing duty orders empowers it to employ a substantial transformation test. *Id.* at 21–22. Third, Defendant asserts Commerce was not required to do a circumvention analysis under 19 U.S.C. § 1677j(b) instead of its own substantial transformation analysis in a scope ruling because the two analyses serve different purposes. *Id.* at 22–24. Finally, Defendant argues that the physical description and the country of origin of merchandise are two distinct aspects of scope and Commerce can forgo the constraints of *Duferco* in favor of a substantial transformation analysis for the latter. *Id.* at 13–15, 24–25. Defendant's arguments are unavailing in the face of *Duferco*, Commerce's own regulations, and § 1677j(b).

Defendant claims that Commerce's authority stems from two separate gaps: one gap in the statute and the other in the Orders. *See* Def.'s Resp. 13–15, 21–22. In support of the argument that Commerce is filling a statutory gap, Defendant cites *E.I. Du Pont de Nemours & Co. v. United States*, claiming Commerce has gap filling authority to define "foreign merchandise" in the statute. *See E.I. Du Pont*, 22 CIT at 373–74, 8 F. Supp. 2d at 858; Def.'s Resp. 14, 21 (citing *E.I. Du*

decision by Commerce that the Orders could have been interpreted to include OCTG processed in third countries is not before the court. Commerce's Final Scope Ruling does not rely upon the language of the Orders.

Pont, 22 CIT at 373–74, 8 F. Supp. 2d at 858). *See also* Def.-Intervenor Maverick Tube Corp.'s Resp. to Pl.'s Br. Supp. Mot. J. 22, Jan. 14, 2015, ECF No. 60 (citing *E.I. Du Pont*, 22 CIT at 373–74, 8 F. Supp. 2d at 858) ("Maverick's Resp."); Mem. in Opp'n to Pl.'s Mot. J. Agency R. by Def.-Intervenor United States Steel Corp. 15–16, Jan. 14, 2015, ECF No. 57 (citing *E.I. Du Pont*, 22 CIT at 373– 74, 8 F. Supp. 2d at 858) ("U.S. Steel's Resp."). In *E.I. Du Pont*, the domestic importer Du Pont manufactured polyvinyl alcohol ("PVA") in Taiwan using its domestically produced vinyl acetate monomer ("VAM"). *E.I. Du Pont*, 22 CIT at 372, 8 F. Supp. 2d at 857. Commerce found the final processing in Taiwan substantially transformed the domestic VAM into foreign PVA, subjecting it to the antidumping duty order. *E. I. Du Pont*, 22 CIT at 372, 8 F. Supp. 2d at 857. The court held that the word "foreign" in 19 U.S.C. § 1673(1) was undefined, giving Commerce discretion to employ the substantial transformation test to determine whether domestic VAM had become foreign PVA. *E. I. Du Pont*, 22 CIT at 373–74, 8 F. Supp. 2d at 858.

Here, Defendant can point to no such ambiguity that would empower Commerce to employ a substantial transformation analysis. In other words, whether the OCTG is foreign is not at issue in this case. The question here is whether subject merchandise subsequently processed in third countries can be included in an order. Congress has spoken to the precise issue in this case. The statute in 19 U.S.C. § 1677j(b) speaks to the situation where subject merchandise is further processed in a foreign country.

Defendant also argues the silence in the Orders creates a separate gap for it to fill. Def.'s Resp. 16. Defendant theorizes that the scope's silence regarding multi-country production empowers Commerce to conduct a substantial transformation analysis. *Id.* However, a gap in an order written by Commerce is not the same as a gap in a statute written by Congress. Commerce cannot delegate to itself the power to expand the reach of an order through silence. Moreover, the Court of Appeals for the Federal Circuit has emphasized that "Commerce's order must be enforced based on what the order actually says, not on what Commerce wished the order had said." *Belgium v. United States*, 551 F.3d 1339, 1348 (Fed. Cir. 2009) (citing *Duferco*, 296 F.3d at 1097–98).

Second, Defendant argues Commerce's power stems from its inherent authority to administer the antidumping and countervailing duty statute, effectively unconstrained by *Duferco*. Def.'s Resp. 21–22; *see also* Final Scope Ruling at 11–12. Commerce's authority to administer the antidumping and countervailing duty laws is broad, but it is not unlimited. Commerce administers the statute in the first instance

when it writes an order. *See Duferco*, 296 F.3d at 1097. In doing so, Commerce identifies the subject country or countries in the language of an order. Additionally, Commerce can, where appropriate, describe in the words of an order any further processing operations that are performed in third countries, thereby including those specific production processes occurring in third countries within the order's scope. *See, e.g.*, *Crystalline Silicon Photovoltaic Cells, Whether or Not Assembled Into Modules, From the People's Republic of China*, 77 Fed. Reg. 73,018, 73,018–19 (Dep't Commerce Dec. 7, 2012) (amended final determination of sales at less than fair value and antidumping duty order); *Dynamic Random Access Memory Semiconductors from the Republic of Korea*, 68 Fed. Reg. 47,546, 47,546 (Dep't Commerce Aug. 11, 2003) (notice of countervailing duty order). Thereafter, Commerce administers an order by interpreting the language it wrote to determine whether particular merchandise is included within the scope of the order. Commerce undoubtedly has authority to administer the Orders in these ways, but its authority is ultimately constrained by parameters set by Congress and the Court of Appeals for the Federal Circuit.

Congress's enactment of 19 U.S.C. § 1677j(b) expressly authorizes Commerce to administer an order in those cases where merchandise produced in a country subject to an order has been subsequently processed in third countries, which forecloses Commerce's discretion to employ a substantial transformation analysis in such cases. *See generally* 19 U.S.C. § 1677j(b). Section 1677j(b) requires Commerce to make five findings in order to include merchandise not already included in an antidumping or countervailing duty order because it is completed or assembled in other foreign countries and subsequently imported into the United States. *Id.*§ 1677j(b)(1)(A)–(E). First, the merchandise must be "of the same class or kind as any merchandise produced in a foreign country that is the subject of [an antidumping or countervailing duty order] . . . ." *Id.*§ 1677j(b)(1)(A). Second, the merchandise must be "completed or assembled in another foreign country from merchandise which--(i) is subject to such order or finding, or (ii) is produced in the foreign country with respect to which such order or finding applies . . . ." *Id.* § 1677j(b)(1)(B). Additionally, Congress bound Commerce's discretion by also requiring that

> (C) the process of assembly or completion in the foreign country referred to in subparagraph (B) is minor or insignificant,
>
> (D) the value of the merchandise produced in the foreign country to which the antidumping duty order applies is a significant portion of the total value of the merchandise exported to the United States, and

> (E) the administering authority determines that action is appropriate under this paragraph to prevent evasion of such order or finding,

before Commerce "may include such imported merchandise within the scope of such order . . . ." *Id.* § 1677j(b)(1)(C)–(E).[15] The court is not prepared to accept that Congress would have provided such a detailed list of requirements and considerations binding Commerce's discretion to include merchandise completed or assembled in third countries in an order if Congress intended substantial transformation and anticircumvention to apply concurrently with Commerce having discretion to choose whichever framework it sees fit. Thus, even if the court were to read *Duferco* narrowly and hold that *Duferco* only applied to the Orders' physical description of merchandise, which the court is not inclined to do, the court could not ignore Congress's mandate in the anticircumvention statute.

Third, in order to avoid the requirements of § 1677j but yet to include the OCTG heat treated in third countries within the scope of the Orders, Defendant claims that § 1677j serves a different purpose and therefore is not applicable here. Defendant argues "Commerce conducts substantial transformation inquiries pursuant to its authority to clarify an order's scope, while it conducts circumvention inquiries pursuant to 19 U.S.C. § 1677j in response to allegations by parties that evasion of an order is occurring." Def.'s Resp. 21. Defendant's response assumes the very point at issue, *i.e.*, whether OCTG heat treated in third countries is within the scope of the Orders. In other words, according to Defendant, Commerce can conduct a sub-

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[15] The statute lists various considerations Congress intended Commerce to weigh in its § 1677j(b)(1)(C) determination of "whether the process of assembly or completion is minor or insignificant," including

> (A) the level of investment in the foreign country,
> (B) the level of research and development in the foreign country,
> (C) the nature of the production process in the foreign country,
> (D) the extent of production facilities in the foreign country, and
> (E) whether the value of the processing performed in the foreign country represents a small proportion of the value of the merchandise imported into the United States.

19 U.S.C. § 1677j(b)(2). In exercising its discretion "to include merchandise assembled or completed in a foreign country," Commerce further

> shall take into account such factors as-
>
> (A) the pattern of trade, including sourcing patterns,
> (B) whether the manufacturer or exporter of the merchandise described in paragraph (1)(B) is affiliated with the person who uses the merchandise described in paragraph (1)(B) to assemble or complete in the foreign country the merchandise that is subsequently imported into the United States, and
> (C) whether imports into the foreign country of the merchandise described in paragraph (1)(B) have increased after the initiation of the investigation which resulted in the issuance of such order or finding.

Id. § 1677j(b)(3).

stantial transformation analysis to find that the OCTG heat treated in third countries is covered by the scope of the Orders because OCTG heat treated in third countries is within the scope of the Orders. The cases cited by Defendant and Defendant-Intervenors do not support their position that Commerce had the authority to employ a substantial transformation test to find OCTG heat treated in third countries to be within the scope of the Orders.[16] Defendant also contends that Commerce's use of substantial transformation is necessary because § 1677j is only applied in response to allegations of circumvention. *See* Def.'s Resp. 21, 24. This is simply not the case; Commerce may self-initiate a § 1677j(b) inquiry pursuant to its own regulations. *See* 19 C.F.R. § 351.225(b).

The circumvention analysis under § 1677j(b) is the required statutory framework for analyzing the scope of an order when the merchandise is completed or assembled in third countries from subject merchandise or components produced in the subject country. A country of origin analysis utilizing the substantial transformation test could only be applicable, if at all, where the circumvention test of § 1677j(b) could not apply. That is to say, there may be situations in which § 1677j(b) does not apply, and thus Commerce may have the

[16] Defendant cites to *Smith Corona Corp. v. United States*, 17 CIT 47, 811 F. Supp. 692 (1993), stating that there the court held "that Commerce's substantial transformation test 'reasonably identif[ied] the country in which parts or components are 'produced.'" *See* Def.'s Resp. 14 (citing *Smith Corona*, 17 CIT at 50, 811 F. Supp. at 695). This quotation is inapposite. *Smith Corona* dealt with whether third country parts used to make portable electric typewriters could be considered for value comparison purposes in a 19 U.S.C. § 1677j(a)(1)(B) circumvention inquiry. The relevant portion of the statute required Commerce to compare the value of "parts or components produced in the foreign country with respect to which . . . [the antidumping] order . . . applies." See 19 U.S.C. § 1677j(a)(1)(B). The court determined that Commerce had developed reasonable standards for determining where parts or components were produced. *Smith Corona*, 17 CIT at 50, 811 F. Supp. at 695. Whether or not Commerce could forgo a circumvention inquiry by virtue of a substantial transformation analysis was not before the court. In fact, the court clarifies that 19 U.S.C. § 1677j(b) provides the requisite criteria for merchandise further finished in third countries to be included within the scope of an antidumping order. *Id.* at 50 n.3, 811 F. Supp. at 696 n.3.

Similarly, *Appleton*, *Advanced Tech.*, *Ugine*, and *Belgium* do not aid Defendant's and Defendant-Intervenors' argument because in those cases the subject merchandise was exported from a third country to the country subject to the applicable order before being imported. Thus, unlike this case, in each of the cases cited by Defendant, 19 U.S.C. § 1677j was not applicable because the merchandise was exported from a third country to the country subject to an antidumping duty order. As a result, these cases do not provide Commerce with the authority to engage in a substantial transformation analysis where facts are so distinguishable. *See Belgium*, 551 F.3d at 1344–45; *Appleton Papers Inc. v. United States*, 37 CIT __, __, 929 F. Supp. 2d 1329, 1333 (2013); *Advanced Tech. & Materials Co., Ltd. v. United States*, Slip Op. 11–122, 2011 WL 5191016, at *4–5 (CIT Oct. 12, 2011); *Ugine and ALZ Belgium, N.V. v. United States*, 31 CIT 1536, 1541–42, 517 F. Supp. 2d 1333, 1337–38 (2007).

discretion to utilize a substantial transformation analysis for some purpose relating to the scope of an order. Section 1677j(b) does apply here, however, so the court declines to address the appropriateness of utilizing a substantial transformation analysis. However, the court notes that the cases cited by Defendant to support its use of the substantial transformation test involve scenarios where § 1677j(b), by its terms, would not apply, *i.e.*, where merchandise manufactured in a third country is subsequently processed in a subject country. *See Belgium*, 551 F.3d at 1344–45; *Appleton Papers Inc. v. United States*, 37 CIT __, __, 929 F. Supp. 2d 1329, 1333 (2013); *Advanced Tech. & Materials Co., Ltd. v. United States*, Slip Op. 11–122, 2011 WL 5191016, at *4–5 (CIT Oct. 12, 2011); *Ugine and ALZ Belgium, N.V. v. United States*, 31 CIT 1536, 1541–42, 517 F. Supp. 2d 1333, 1337–38 (2007). It is difficult to imagine why Congress would have enacted § 1677j(b) if Commerce, as it claims it can here, could simply have found that merchandise processed in a third country had not undergone a substantial transformation to bring it within the scope of the order. *See* H.R. Rep. No. 100–576, at 599–600 (1988), *reprinted in* 1988 U.S.C.C.A.N. 1547, 1632–33. Where Congress writes a statute with specific substantive standards, the court is hard pressed to say that it is merely an alternative to an agency-created device to achieve the same purpose. Such a result would render § 1677j(b) superfluous. The court is not prepared to accept Defendant's argument that substantial transformation and anticircumvention provide Commerce with two distinct approaches to achieve the same result, giving Commerce discretion to choose whichever framework it sees fit.

Finally, Defendant attempts to explain Commerce's statements in its Preliminary and Final Scope Rulings, in which Commerce stated that the language of the Orders "irrelevant." *See* Def.'s Resp. 13–15, 24–25; Final Scope Ruling at 9. As discussed above, Commerce indicated that it was not relying upon the words of the Orders to make its determination. Therefore, in Commerce's view, "[w]hether or not the scope language is clear under 19 CFR [§] 351.225(k) is irrelevant to the separate question of whether subject merchandise was substantially transformed such that it is now the product of a different, non-subject country." Final Scope Ruling at 9.

In its brief, Defendant argues that Plaintiff has mischaracterized Commerce's approach, and Defendant states that Commerce was not refusing to analyze the Orders' scope, but rather finding that the subsection (k) factors only addressed the nature of the merchandise

itself and not the country of origin of that merchandise. *See* Def.'s Resp. 15. But Defendant argues "Commerce was expressing the basic fact that 'the physical merchandise and the country-of-origin are two separate parameters for defining merchandise subject to an order.'" *Id.* (quoting *Ugine*, 31 CIT at 1551, 517 F. Supp. 2d at 1345). "Doing so did not expand the scope of the *Orders*; it simply meant that Commerce was analyzing a different aspect of the scope." *Id.*

Accepting Defendant's characterization of Commerce's rationale in its rulings, Commerce still did not look to the words of the Orders to reach its conclusion.[17] Defendant is again trying to argue that it does not need to look to the words of the Orders (words that Commerce wrote) because *Duferco* does not apply to the question of whether the goods are from China. The court understands Defendant's position and, in the absence of 19 U.S.C. § 1677j(b), perhaps one could muster an argument in favor of it. But there is no principled way to justify Congress's enactment of § 1677j(b) with Defendant's position that it can bifurcate its analysis into two "different aspect[s] of the scope," physical description of merchandise and country of origin, so that it can utilize an extra-statutory test. If Defendant's bifurcation theory were correct, there would be no need, indeed no purpose, for § 1677j(b). Moreover, while Defendant now contends that the regulations under 19 C.F.R. § 351.225(k) do not provide Commerce with the tools for analyzing the "separate parameter" of country of origin, Commerce in fact began its analysis employing the (k)(1) and (k)(2) factors and abandoned it in favor of the substantial transformation test. It is unclear to the court why Commerce believed that the (k)(1) and (k)(2) factors provided for in its own regulations were not useful in answering the interpretive question before it. Certainly, Defendant-Intervenors, Petitioners below, thought (k)(1) and (k)(2) were useful to address the interpretive question. Petition at 6–7, 10 (explaining 19 C.F.R. § 351.225(k) is the applicable legal standard and claiming (k)(1) is dispositive). Whatever reason Commerce had for abandoning an interpretive approach in conducting its scope inquiry, it acted contrary to law when it did so.

Defendant's only argument addressing the interpretation of the scope language is that "absent affirmative evidence that such products were meant to be *excluded*, Commerce may lawfully consider those products using the substantial transformation criteria." Def.'s

[17] Indeed, Defendant's only interpretive argument that addresses the scope language seems to be a burden shifting argument to avoid responsibility in interpreting the scope of an order. *See* Def.'s Resp. 18. Defendant suggests requiring the party arguing for exclusion of merchandise to show exclusionary language from the scope, but such a result is incompatible with *Duferco*. *See id.*; *see also Duferco*, 296 F.3d at 1096 (providing that Commerce does not presumptively have authority where such authority is not expressly denied).

Resp. 18. To the extent Defendant is arguing the burden to interpret scope language to exclude certain merchandise is on the party arguing for its exclusion, Defendant's argument misunderstands *Duferco*. Under *Duferco*, "Commerce cannot find authority in an order based on the theory that the order does not deny authority." *Duferco*, 296 F.3d at 1096.

When the scope language does not clearly include the merchandise in question, Commerce cannot require an interested party to provide additional evidence that the scope language was not meant to include the merchandise. Furthermore, Defendant's position would mean Petitioners could omit any reference to the third country processing during the investigation, and then after publication of the final order seek a scope ruling to add merchandise processed in third countries to the scope of an order based on Commerce's discretionary substantial transformation factors. Such a result would undermine the petition process. When there is no written language in the scope or in the record to confirm the existence of such a practice, the failure to clearly incorporate such an intent in the scope language cannot create the presumption of inclusion.

Defendant-Intervenor Maverick argues that the scope language clearly and unambiguously covers OCTG finished in third countries. Maverick's Resp. 12–22. Maverick believes that the scope language covers OCTG "regardless of where finished." *Id.* at 12. Plaintiff takes issue with Maverick's argument regarding the meaning of the scope language. Reply Br. Pl. Supp. Mot. J. Agency R. 11–12, 18, Feb. 11, 2015, ECF No. 68. The court does not need to address this disagreement because Commerce did not base its ruling on the scope language. *See generally* Final Scope Ruling. Rather, Commerce found that it could not determine that the language of the Orders reached the product and after embarking on an interpretive analysis under the (k)(1) and (k)(2) factors it abandoned that analysis in favor of a wholly extraneous test. Final Scope Ruling at 4, 7, 9.

Defendant-Intervenors Boomerang and U.S. Steel both argue that Commerce may utilize a substantial transformation analysis to find Plaintiff's merchandise within the scope of the Orders. Their arguments are based upon their view that the scope is composed of both the "physical characteristics of the product" and the origin of the merchandise. Br. Def.-Intervenors Boomerang Tube LLC Opp'n Pl's Mot. J. Agency R. 3–4, Jan. 14, 2015, ECF No. 55 ("Boomerang's Resp."); U.S. Steel's Resp. 18–19. Boomerang assumes that Commerce is free to determine where merchandise is from using a substantial transformation test, regardless of what the language of the scope actually says. Boomerang's Resp. 3–4. As noted above, this

position is contrary to the holding of *Duferco*, which requires Commerce to interpret the actual words of an order when it conducts a scope inquiry, and directly conflicts with Congress's mandate pursuant to 19 U.S.C. § 1677j(b). U.S. Steel, on the other hand, argues that Commerce is actually interpreting the language in the Orders that refers to finished and unfinished OCTG from China. U.S. Steel's Resp. 18–19. Although U.S. Steel's argument would at least be consistent with *Duferco's* requirement that Commerce interpret the actual language of the Orders, Commerce did not interpret the language of the Orders. In fact, Commerce conceded it was not doing an interpretive analysis at all. On remand Commerce must identify actual language from the scope of the Orders that could be reasonably interpreted to include OCTG finished in third countries in order to find that the merchandise is covered by the scope of the Orders.

CONCLUSION

The court determines that Commerce failed to interpret the scope language of the Orders, and, in so doing, Commerce impermissibly expanded the scope of the Orders. In accordance with the foregoing, it is hereby

ORDERED that Commerce's determination is remanded for further consideration consistent with this opinion; and it is further,

ORDERED that Commerce shall file its remand determination with the court within 60 days of this date; and it is further,

ORDERED that Plaintiff shall have 30 days thereafter to file objections; and it is further,

ORDERED that Defendant and Defendant-Intervenors shall have 15 days thereafter to file their respective responses.

Dated: July 9, 2015
New York, New York

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

Slip Op. 15–76

NTN BEARING CORPORATION OF AMERICA, et al., Plaintiffs, and JTEKT CORPORATION, et al., Plaintiff-Intervenors v. UNITED STATES, Defendant, and THE TIMKEN COMPANY, Defendant-intervenor.

Before: Timothy C. Stanceu, Chief Judge
Court No. 10–00286

JUDGMENT

The court has reviewed the amended determination on remand ("Amended Remand Redetermination") issued by the International Trade Administration, U.S. Department of Commerce ("Commerce" or the "Department") in this litigation. *Am. Results of Remand Redetermination* (May 7, 2015), ECF No. 101 ("*Am. Remand Redetermination*").[1] The court concludes that the Amended Remand Redetermination complies with the court's opinion and order in *NTN Corp. of America v. United States,* 39 CIT __, 46 F. Supp. 3d 1375 (2015) ("*NTN*"), to reconsider the final determination in *Ball Bearings and Parts Thereof From France, Germany, Italy, Japan, and the United Kingdom: Final Results of Antidumping Duty Administrative Reviews, Final Results of Changed-Circumstances Review, and Revocation of an Order in Part,* 75 Fed. Reg. 53,661 (Int'l Trade Admin. Sept. 1, 2010) ("*Final Results*"). In *NTN*, the court granted defendant's request for a voluntary remand to Commerce for correction of certain errors in the credit expenses used in the calculation of constructed export price for plaintiffs (collectively, "NTN").[2] *NTN*, 39 CIT at __, 46 F.Supp.3d at 1388–89. The court also held unlawful the Department's policy, rule, or practice of issuing liquidation instructions to U.S. Customs and Border Protection fifteen days after the date of publication of the final results of an administrative review and stated the court's intention of granting a declaratory judgment to this effect when final judgment is entered in this case. *Id.* at __, 46 F.Supp.3d at 1388.

During the remand proceeding, Commerce revised its calculation of NTN's U.S. credit expenses to correct the errors and recalculated the weighted-average dumping margin for NTN. *Am. Remand Redetermination* 1. The changes to the calculation, however, did not result in a change in the weighted-average dumping margin calculated for NTN, which Commerce continued to determine to be 13.46%. *Id.* The Timken Company, defendant-intervenor in this action, filed comments in support of the Amended Remand Redetermination. *The Timken Co.'s Comments on the U.S. Dep't of Commerce's May 7, 2015 Am. Results of Remand Redetermination Pursuant to Ct. Remand* (June 5, 2015), ECF No. 102. No other party to this action filed

[1] Commerce filed the remand redetermination on May 4, 2015, *Results of Remand Redetermination*, ECF No. 98, and on the same day sought leave to file an amended remand redetermination noting that The Timken Company, defendant-intervenor in this action, had commented on the draft remand redetermination, Def.'s Consent Mot. for an Extension of Time, ECF No. 99. The court granted this request on May 5, 2015. Order, ECF No. 100.

[2] The plaintiffs are NTN Bearing Corp. of Am., NTN Corp., NTN Bower Corp., Am. NTN Bearing Mfg. Corp., NTN–BCA Corp., and NTN Driveshaft, Inc. (collectively "NTN"). Pl.'s Am. Compl. 1 (Oct. 17, 2011), ECF No. 66.

comments on the Amended Remand Redetermination and no party disputes that the redetermination complies with the court's directive in *NTN*. Therefore, upon consideration of the Amended Remand Redetermination, all comments thereon, and all other filings and proceedings had herein, and upon due deliberation, it is hereby

ORDERED that the Department's decision to apply the "zeroing" methodology in the *Final Results*, be, and hereby is, affirmed; it is further

ORDERED that the Amended Remand Redetermination be, and hereby is, affirmed; it is further

ORDERED that the Department's policy, rule, or practice of issuing liquidation instructions to U.S. Customs and Border Protection fifteen (15) days after the date of publication of the final results of an administrative review be, and hereby is, declared to have been unlawful as applied to NTN in the implementation of the *Final Results*; and it is further

ORDERED that entries of merchandise that are affected by this litigation shall be liquidated in accordance with the final and conclusive court decision in this action.

Dated: July 14, 2015
New York, New York

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

Slip Op. 15–77

FRESH GARLIC PRODUCERS ASSOCIATION, CHRISTOPHER RANCH, L.L.C., THE GARLIC COMPANY, VALLEY GARLIC, and VESSEY AND COMPANY, INC., Plaintiffs, v. UNITED STATES, Defendant, and SHENZHEN XINBODA INDUSTRIAL CO., LTD. and HEBEI GOLDEN BIRD TRADING CO., LTD., Defendant-Intervenors.

Before: Richard K. Eaton, Judge
Court No. 13–00236

[The Department of Commerce's Final Results are sustained.]

Dated: July 16, 2015

John M. Herrmann, Kelley Drye & Warren LLP, of Washington, DC, argued for plaintiffs. With him on the brief was *Michael J. Coursey*.

Richard P. Schroeder, Trial Attorney, Commercial Litigation Branch, Civil Division, United States Department of Justice, of Washington, DC, argued for defendant. With him 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 *Justin Ross Becker*, Attorney, Office of the Chief Counsel for Trade Enforcement & Compliance, United States Department of Commerce, of Washington, DC.

Gregory S. Menegaz, deKieffer & Horgan, PLLC, of Washington, DC, argued for defendant-intervenor Shenzhen Xinboda Industrial Co., Ltd. With him on the brief was *J. Kevin Horgan*.

Robert T. Hume, Hume & Associates LLC, of Ojai, CA, argued for defendant-intervenor Hebei Golden Bird Trading Co., Ltd.

OPINION

EATON, Judge:

Before the court is the USCIT Rule 56.2 motion for judgment on the agency record of plaintiffs Fresh Garlic Producers Association and several of its individual members, Christopher Ranch, L.L.C., The Garlic Company, Valley Garlic, and Vessey and Company, Inc. (collectively, "plaintiffs"). Pls.' Mot. for J. on the Agency R. (ECF Dkt. No. 35). By their motion, plaintiffs challenge the United States Department of Commerce's ("Commerce" or the "Department") final results of the seventeenth annual administrative review of the antidumping duty order on fresh garlic from the People's Republic of China ("PRC"). Fresh Garlic From the PRC, 78 Fed. Reg. 36,168 (Dep't of Commerce June 17, 2013) (final results of antidumping duty administrative review; 2010–2011), and accompanying Issues and Decision Memorandum, PD 297 at bar code 3139858–01 (June 10, 2013), ECF Dkt. No. 28 ("Issues & Dec. Mem.") (collectively, "Final Results").

Defendant-intervenors Shenzhen Xinboda Industrial Co., Ltd. ("Xinboda") and Hebei Golden Bird Trading Co., Ltd. ("Golden Bird") (together, "mandatory respondents" or "respondents") are the two largest exporters of Chinese fresh garlic by volume and were the two mandatory respondents selected by Commerce for individual examination in the administrative review. Mem. from Christian Marsh to Ronald K. Lorentzen at 3, PD 189 at bar code 310874301 (Dec. 3, 2012), ECF Dkt. No. 28.

Plaintiffs argue that the source Commerce selected to establish the price for the surrogate value of the raw garlic bulbs was less specific to the level of trade at which respondents purchased their garlic bulbs than other record evidence. *See* Mem. of Law in Supp. of Pls.' Mot. for J. on the Agency R. 25 (ECF Dkt. No. 35–1) ("Pls.' Br."). Thus, according to plaintiffs, the value was not based on the best available information as to the surrogate price for the raw garlic bulbs. Defendant United States and mandatory respondents maintain, among other things, that, because the selected source used to price the garlic bulbs was based on a broad market average, it represented the best available information. *See* Def.'s Resp. to Pls.' Mot. for J. upon the Agency R. 1–2, 5 (ECF Dkt. No. 39); Def.-int. Shenzhen Xinboda Industrial

Co., Ltd.'s Resp. to Pls.' Mot. for J. upon the Agency R. 1 (ECF Dkt. No. 41); Resp. of Def.-int. Hebei Golden Bird Trading Co., Ltd. to Pls.' Mot. for J. on the Agency R. 2 (ECF Dkt. No. 40). The court has jurisdiction pursuant to 28 U.S.C. § 1581(c) and 19 U.S.C. § 1516a(a)(2)(B)(iii).

For the reasons set forth below, the Final Results are sustained.

BACKGROUND

In 1994, Commerce issued an antidumping duty order on imports of fresh garlic from the PRC. Fresh Garlic From the PRC, 59 Fed. Reg. 59,209 (Dep't of Commerce Nov. 16, 1994) (antidumping duty order) (the "Order").[1] On November 30, 2011, plaintiffs asked Commerce to conduct an administrative review of the Order. Letter from Michael J. Coursey & John M. Herrmann, Kelley Drye & Warren LLP, to Secretary of Commerce, U.S. Department of Commerce at 1, PD 12 at bar code 3043695–01 (Nov. 30, 2011), ECF Dkt. No. 28. Commerce then began its seventeenth annual administrative review of the Order for the period of review November 1, 2010 through October 31, 2011 ("POR"), choosing Golden Bird and Xinboda as mandatory respondents. *See* Issues & Dec. Mem. 1, 4.

During the review, as proposed sources from which to calculate the surrogate value for the raw garlic bulbs, the primary input for the subject merchandise, the parties placed on the record several sets of data from various sources, including (1) 2009 Ukrainian garlic producer prices provided by the United Nations' Food and Agricultural Organization's Statistical Division ("FAO")[2] and (2) daily garlic prices from eight regional markets in Ukraine during the POR, published by

[1] The products subject to the Order "are all grades of garlic, whole or separated into constituent cloves, whether or not peeled, fresh, chilled, frozen, provisionally preserved, or packed in water or other neutral substance, but not prepared or preserved by the addition of other ingredients or heat processing. The differences between grades are based on color, size, sheathing and level of decay." Order, 59 Fed. Reg. at 59,209.

[2] The FAO data is "compiled with the cooperation of governments, who provide the data in the form of replies to annual . . . questionnaires," and is comprised of "prices received by farmers (called Producer prices) for primary crops . . . at the point of initial sale (prices paid at the farm-gate)." Issues & Dec. Mem. at 13 (quoting Letter from Gregory S. Menegaz, deKieffer & Horgan, PLLC, to Hon. Rebecca M. Blank, Acting Secretary of Commerce at Ex. 8, PD 140 at bar code 3091369–03 (Aug. 10, 2012), ECF Dkt. No. 28) (internal quotation marks omitted). The FAO website, however, "notes that, when countries do not collect farm-gate prices, they also may provide wholesale prices and unit values compiled for national accounts." Issues & Dec. Mem. at 13.

Fruit-Inform[3] ("FI"). *See* Mem. from David Lindgren, International Trade Compliance Analyst, to The File at 4, PD 193 at bar code 3108863–02 (Dec. 3, 2012), ECF Dkt. No. 28 ("Prelim. Surrogate Values Mem.").

In the Final Results, Commerce found that the FAO price "represent[ed] the broadest market average" because it was "a single annual price intended to represent all Ukrainian garlic production." Issues & Dec. Mem. at 15. Commerce concluded that the FAO price represented a broader market average than the FI data because "while the FI price data represent[ed] 18 percent of all Ukrainian production, the [FAO] price [was] intended to represent all Ukrainian-produced garlic." Issues & Dec. Mem. at 15.

Commerce also found that, although the FAO price was "intended to be a farmgate price," i.e., a price that includes the costs of production, but not additional costs such as processing, it "may reflect some other measures as well," i.e., could reflect some shipping, processing, or storage of the garlic bulbs.[4] *See* Issues & Dec. Mem. at 14. As to the FI prices, Commerce characterized these as being closer to wholesale prices, because the garlic had gone through "some level of prepara-

[3] "Fruit-Inform . . . is [a] consulting fruit and vegetable business agency" that "provides services to agrarian companies throughout the world and specializes in market information, market analyses, and in coordinating and organizing high-profile fresh produce industry events." *About Us*, FRUIT-INFORM, http://www.fruit-inform.com/en/about (last visited June 24, 2015).

[4] Commerce seems to have based this finding on information from the FAO website:

> The [FAO] data are compiled with the cooperation of governments, who provide the data in the form of replies to annual FAO questionnaires. These data are "prices received by farmers (called Producer prices) for primary crops . . . at the point of initial sale (prices paid at the farm-gate)." The [FAO] website notes that, when countries do not collect farm-gate prices, they also may provide wholesale prices andunit values compiled for national accounts. Likewise, the organization notes that, in some cases, the data provided in the questionnaire responses are also supplemented with official country publications and institutional databases.

Issues & Dec. Mem. at 13 (alteration in original) (footnotes omitted) (quoting Letter from Gregory S. Menegaz, deKieffer & Horgan, PLLC, to Hon. Rebecca M. Blank, Acting Secretary of Commerce at Ex. 8, PD 140 at bar code 3091369–03 (Aug. 10, 2012), ECF Dkt. No. 28 ("FAO Submission")). Indeed, the FAO website printout on the record states that "[w]hen countries do not collect farm-gate prices they provide an alternative set of data, mainly: (1) wholesale prices; (2) unit values compiled for national accounts." FAO Submission. The court notes that plaintiffs are correct that, because the FAO website printout on the record states that reported wholesale prices are indicated as such, the FAO data does not likely include wholesale prices. *See* FAO Submission ("In a few cases, countries have supplied wholesale prices. These exceptions are documented in connection with the countries in question (footnotes)."). In other words, there is at least some indication that, when reported prices are not farmgate prices, it is noted. The printout on the record, however, does not state that any other "alternative" or supplemental data would be clearly identified as such. Moreover, the FAO website submission does reveal the potential for "other measures" to be reflected in its prices in a list of limitations, including differences between countries as to point-of-sale, product-specific practices, and "methods of arriving at national averages."

tion, transport and possibly storage" prior to sale. *See* Issues & Dec. Mem. at 14.

As to the level of trade at which mandatory respondents acquired their garlic bulbs, Commerce found "that the raw garlic purchased by both Golden Bird and Xinboda [was] not farmgate in nature." Issues & Dec. Mem. at 15. As shall be seen, this conclusion was based on the Department's finding that the raw garlic had undergone at least some processing. When it tried to match the level of trade of mandatory respondents' purchases to the surrogate value on the record, therefore, Commerce concluded that both the FAO and FI prices were at a different level of trade than those purchases and the Department did not have enough information to determine which one was more similar to respondents' purchases. *See* Issues & Dec. Mem. at 15. In other words, for Commerce, neither source represented data at precisely the level of trade at which the respondents bought their garlic.

Relying on the FI data, in the Preliminary Results, Commerce calculated weighted average margins of $1.96/kg for Xinboda and $1.65/kg for Golden Bird. Fresh Garlic From the PRC, 77 Fed. Reg. 73,980, 73,981 (Dep't of Commerce Dec. 12, 2012) (preliminary results of antidumping duty administrative review; 2010–2011) ("Preliminary Results"). In the Final Results, however, Commerce relied on the FAO data for garlic bulb input prices and calculated dumping margins of zero for both mandatory respondents. Final Results, 78 Fed. Reg. at 36,169.

STANDARD OF REVIEW

"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 'such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.'" *Huaiyin Foreign Trade Corp. (30) v. United States*, 322 F.3d 1369, 1374 (Fed. Cir. 2003) (quoting *Consol. Edison Co. of N.Y. v. NLRB*, 305 U.S. 197, 229 (1938)). "The existence of substantial evidence is determined 'by considering the record as a whole, including evidence that supports as well as evidence that fairly detracts from the substantiality of the evidence.'" *Fuyao Glass Indus. Grp. Co. v. United States*, 30 CIT 165, 167 (2006) (quoting *Huaiyin*, 322 F.3d at 1374) (internal quotation marks omitted). The court's function, however, "is not to reweigh the evidence but rather to ascertain 'whether there was evidence which could reasonably lead to the [agency's] conclu-

See FAO Submission. Thus, as Commerce noted, the exact level of trade and processing of the garlic sold for the prices reported to the FAO, and on which the average Ukrainian price used here was based, is not clearly stated.

sion.'" *See Am. Bearing Mfrs. Ass'n v. United States*, 28 CIT 1698, 1700, 350 F. Supp. 2d 1100, 1104 (2004) (quoting *Matsushita Elec. Indus. v. United States*, 750 F.2d 927, 933 (Fed. Cir. 1984)). Moreover, "[t]he possibility of drawing two equally justifiable, yet inconsistent conclusions from the record does not prevent the agency's determination from being supported by substantial evidence." *Zhejiang Native Produce & Animal By-Products Imp. & Exp. Grp. Corp. v. United States*, 32 CIT 673, 674 (2008) (citing *Consolo v. Fed. Mar. Comm'n*, 383 U.S. 607, 620 (1966); *Altx, Inc. v. United States*, 370 F.3d 1108, 1116 (Fed. Cir. 2004)).

DISCUSSION

I. LEGAL FRAMEWORK

As part of its unfair trade regime, "[t]he United States imposes duties on foreign-produced goods that are sold in the United States at less-than-fair value." *Clearon Corp. v. United States*, 37 CIT __, __, Slip Op. 13–22, at 4 (2013). Under 19 U.S.C. § 1675(a)(1)(B), once an antidumping duty order has been issued, "[a]t least once during each 12-month period beginning on the anniversary of the date of publication of . . . an antidumping duty order," Commerce shall, upon request and after publication of notice of review, "review, and determine . . . the amount of any antidumping duty." 19 U.S.C. § 1675(a)(1)(B). The Department is responsible for making the fair value determination, and is directed by statute to make a "comparison . . . between the export price or constructed export price[5] and normal value.[6]" *Id.* § 1677b(a). Where, as here, the merchandise in question is exported from a nonmarket economy country,[7] "the nor-

[5] "Export price" and "constructed export price" are defined as follows:

> The term "export price" means the price at which the subject merchandise is first sold (or agreed to be sold) before the date of importation by the producer or exporter of the subject merchandise outside of the United States to an unaffiliated purchaser in the United States or to an unaffiliated purchaser for exportation to the United States . . . . . .
>
> The term "constructed export price" means the price at which the subject merchandise is first sold (or agreed to be sold) in the United States before or after the date of importation by or for the account of the producer or exporter of such merchandise or by a seller affiliated with the producer or exporter, to a purchaser not affiliated with the producer or exporter . . . .

19 U.S.C. § 1677a(a), (b).

[6] "The [normal value] of subject merchandise is 'the price at which the foreign . . . product is first sold . . . for consumption . . . in the usual commercial quantities and in the ordinary course of trade . . . at the same level of trade as the export price . . . .'" *Sichuan Changhong Elec. Co. v. United States*, 30 CIT 1481, 1485, 460 F. Supp. 2d 1338, 1343 (2006) (alterations in original) (quoting 19 U.S.C. § 1677b(a)(1)(B)(i)).

[7] A nonmarket economy country is a "foreign country that the [Department] 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." 19 U.S.C. §

mal value of the subject merchandise [is based on] the value of the factors of production utilized in producing the merchandise and [an-]added . . . amount for general expenses and profit plus the cost of containers, coverings, and other expenses." *Id.*§ 1677b(c)(1).

To value the factors of production in a nonmarket economy situation, Commerce is directed to use "the best available information regarding the values of such factors [of production] in a [comparable] market economy country or countries considered to be appropriate by the [Department]." *Id.* The Department's task is to "attempt to construct a hypothetical market value" of the subject merchandise in the nonmarket economy. *Nation Ford Chem. Co. v. United States*, 166 F.3d 1373, 1375 (Fed. Cir. 1999).

As it has done in the past and because "Golden Bird and Xinboda reported raw garlic bulb[] inputs, rather than garlic seed and growing factors, as [factors of production]," the Department "applied an intermediate input methodology to the [normal value] calculation." *See* Prelim. Surrogate Values Mem. at 2; *see also* Mem. from David Lindgren, International Trade Compliance Analyst, to Nicholas Czajkowski, Acting Program Manager at 2, PD 192 at bar code 3108863–01 (Dec. 3, 2012), ECF Dkt. No. 28 ("Intermediate Input Methodology Mem.") ("In this review, [Golden Bird] and [Xinboda] have reported in their questionnaire responses that their respective processors purchased raw garlic bulbs, the intermediate input, from local farmers and suppliers to produce the merchandise under review. As such, rather than attempt to construct the costs of production to arrive at a value of raw garlic bulb inputs, the Department will instead apply [surrogate values] to the raw garlic bulb in the [normal value] calculation."). "In other words, rather than basing normal value on the sum of the surrogate values for the upstream factors of production reported by respondents, such as costs associated with leasing land, fertilizer, irrigation, labor, and the like, Commerce assumed that these costs were all contained in the price of the intermediate product," here, the raw garlic bulb. *See Qingdao Sea-line Trading Co. v. United States*, 37 CIT __, __, Slip Op. 13–102, at 6 (2013).

Commerce selected data from Ukraine because (1) it was among the countries the Department had identified as economically comparable to the PRC, (2) it was a significant producer of comparable merchandise, and (3) there was Ukrainian data Commerce could use to value

1677(18)(A). Because the Department deems the PRC "to be a nonmarket economy country, Commerce generally considers information on sales in [the PRC] and financial information obtained from Chinese producers to be unreliable for determining, under 19 U.S.C. § 1677b(a), the normal value of the subject merchandise." *Shanghai Foreign Trade Enters. Co. v. United States*, 28 CIT 480, 481, 318 F. Supp. 2d 1339, 1341 (2004).

the factors of production that was "both available and reliable." *See* Issues & Dec. Mem. at 11 ("Once the Department has identified the countries that are the most economically comparable to the PRC, it identifies those countries which are significant producers of comparable merchandise. From the countries which are both economically comparable and significant producers the Department will then select a primary surrogate country based upon whether the data for valuing [factors of production] are both available and reliable."); *see also* 19 U.S.C. § 1677b(c)(4)(A) ("The [Department], in valuing factors of production . . . shall utilize, to the extent possible, the prices or costs of factors of production in one or more market economy countries that are . . . at a level of economic development comparable to that of the nonmarket economy country . . . .").

II. THE DEPARTMENT'S SELECTION OF THE SURROGATE VALUE FOR THE RAW GARLIC BULB INPUTS IS SUPPORTED BY SUBSTANTIAL EVIDENCE

In the Final Results, using its intermediate input methodology, Commerce selected a surrogate value for raw garlic bulbs from Ukraine based on the FAO price information. Because the information was for the period January 1, 2009 to December 31, 2009 and, thus, not precisely contemporaneous with the POR (November 1, 2010 through October 31, 2011), it then indexed the price using the Ukrainian Consumer Price Index. *See* Letter from David Lindgren, International Trade Compliance Analyst, to The File at 2, PD 299 at bar code 3139936–01 (June 10, 2013), ECF Dkt. No. 28.

Prior to its decision to use the FAO data, Commerce evaluated the proposed sources for raw garlic bulb prices on the record according to the five factors it typically considers when selecting the best available information: (1) public availability, (2) product specificity, (3) broad market average, (4) tax and duty exclusivity, and (5) contemporaneity of the data. Issues & Dec. Mem. at 12–17; *see also Jining Yongjia Trade Co. v. United States*, 34 CIT 1510, 1521 (2010) (citation omitted).

Plaintiffs challenge Commerce's determination to use the FAO data, rather than the FI data, to calculate the surrogate value for the raw garlic bulb inputs. At the outset, the court notes that no party challenges Commerce's finding that both the FAO and FI data are publicly available and reflect prices specific to the type of garlic that mandatory respondents buy.[8] Further, no party disputes Commerce's finding that the FAO data is tax exclusive and that it represents the

[8] Because Commerce "found that garlic harvested in Ukraine is typically of the large variety that is similar to respondents' Chinese garlic and no party [had] contest[ed] this conclusion," the Department found that "both the FI and [FAO] prices for Ukrainian garlic [were]

broadest market average. Rather, here, plaintiffs argue that the Department's selection of the FAO data is unsupported by substantial evidence because the data (1) reflects "farmgate" prices that "[a]re [*n*]*ot* [s]pecific to the [l]evel of [t]rade [a]t [w]hich the [r]espondents[] . . . [a]cquire [i]nput [b]ulbs" and (2) is not contemporaneous with the POR. *See* Pls.' Br. 25, 29.

A. The FAO Data is the Best Available Information

1. Broad Market Average

While there is no particular hierarchy employed by Commerce when assessing the five factors it typically uses when selecting the best available information to value factors of production, at times consideration of one factor can largely direct the Department's decision. Such is the case here.

With respect to broad market average, Commerce determined that the FAO price represents a broader market average for the raw garlic bulb input than the FI price. In the Final Results, Commerce determined that the "[FAO] price . . . represent[s] the broadest market average" because "the [FAO] price is a single annual price intended to represent all Ukrainian garlic production," whereas the FI price data only accounts for 18 percent of all Ukrainian garlic production. Issues & Dec. Mem. at 15. Commerce then stated that, in its Preliminary Results, it "used the FI data because [it had] found its eight markets, spread throughout the country, represented a broad market average," but that the Department had since discovered by way of "a declaration by the director of FI . . . that the FI prices represent about 18 percent of all garlic cultivated in Ukraine." Issues & Dec. Mem. at 15. This finding is supported by a letter on the record from FI's "Head of Project," which "caution[s] that merely 18% of fresh garlic cultivated in Ukraine arrives at the wholesale markets reported by [FI]." Letter from Gregory S. Menegaz, deKieffer & Horgan, PLLC, to Hon. Rebecca M. Blank, Acting Secretary of Commerce at Ex. 1 at 2, PD 216 at bar code 3119135–01 (Feb. 12, 2013), ECF Dkt. No. 28.

Commerce supported its finding that the FAO price was intended to represent all Ukrainian garlic production by referencing the FAO website submission on the record. *See* Issues & Dec. Mem. 13, 15; *see also* Letter from Gregory S. Menegaz, deKieffer & Horgan, PLLC, to Hon. Rebecca M. Blank, Acting Secretary of Commerce at Ex. 8, PD 140 at bar code 3091369–03 (Aug. 10, 2012), ECF Dkt. No. 28 ("FAO Submission") ("FAO collects annually the average prices from the

specific to Chinese garlic." *See* Issues & Dec. Mem. at 13, 15. Indeed, "[p]laintiffs do not contest the Department's findings with respect to the physical comparability of fresh garlic grown in Ukraine and China." Pls.' Br. 18.

countries on an annual basis. . . . The concept 'prices received by farmers' in the present data series refers to the national average prices of individual commodities comprising all grades, kinds and varieties received by farmers in the nearest market.").

Because the FAO price, as a national average annual price, represents all Ukrainian garlic production over the entire year, while the FI price only accounts for a small fraction of Ukrainian garlic production from regional markets, it was reasonable for Commerce to find that the FAO price represents a broader market average than the FI data and to favor the use of the FAO data to value the raw garlic bulbs. *See Ad Hoc Shrimp Trade Action Comm. v. United States*, 618 F.3d 1316, 1322 (Fed. Cir. 2010) ("Commerce's policy on using countrywide data, whenever available, is reasonable, as such data gives a broad overview of the relevant market."); *Jining Yongjia*, 34 CIT at 1527–28 (noting that "it is Commerce's practice to use country-wide data instead of regional data when the former is available" and finding Commerce's decision to use data as a broad market average to be supported by substantial record evidence (citations omitted)); *see also Jacobi Carbons AB v. United States*, 38 CIT __, __, 992 F. Supp. 2d 1360, 1368–69 (2014) (finding prices from a publication lacking countrywide data to be less representative of broad market averages than nationwide data for imports that entered the surrogate country from its global trading partners); *Since Hardware (Guangzhou) Co. v. United States*, 37 CIT __, __, 911 F. Supp. 2d 1362, 1377 (2013) (stating that Commerce explained that two data sources were "deficient," in part, by "fail[ing] to represent a broad market average because they [were] from only two companies").

Here, only a small proportion of the Ukrainian garlic bulb market is reflected in the FI data and that the data is based on regional prices, whereas the FAO data is for the whole country and represents an average price for all domestic garlic production. Thus, it is apparent, and no party disputes, that the broad market average factor strongly supports Commerce's selection of the FAO data over the FI data.

2. Tax and Duty Exclusivity

The tax exclusivity factor also favors the Department's determination. In the Final Results, Commerce found that, based on the record evidence, the FAO price was tax exclusive, but that "there [was] some lack of clarity regarding" whether the FI prices were tax exclusive. *See* Issues & Dec. Mem. at 16.

Specifically, Commerce found that,

> [w]ith respect to the [FAO] price, we concur with Xinboda that it necessarily must be tax exclusive, based on the statement on the [FAO's] website which states that "[p]rices of agricultural products and by-products have a significant influence on formulation of production plans and policy decisions relating to taxes levied on agricultural income and subsidies provided to farmers on agricultural inputs." It is reasonable to conclude that the [FAO] price would be tax exclusive if the data is utilized for the purposes of levying taxes. Accordingly, record evidence leads the Department to a determination that the [FAO] price is, in fact, tax exclusive.

Issues & Dec. Mem. at 16–17 (alteration in original) (footnote omitted) (quoting FAO Submission). Regarding the FI prices, on the other hand, Commerce found that

> FI's director clearly states on the record of this proceeding that the FI prices are tax exclusive because the small farmers and traders selling at the markets captured by FI are not required to pay VAT.[9] [Nonetheless,] Golden Bird contends that because Ukraine law requires a 20 percent VAT on agricultural products, the FI prices are obligated to include taxes. No party disagrees with the fact that Ukrainian law requires 20 percent VAT to be paid on agricultural products. However, FI's director states that the prices reported by FI are exclusive of VAT and no party has provided any evidence which demonstrates that any of the FI-reported prices are, in fact tax inclusive. While Xinboda does contend that because commercial farmers are selling garlic through markets reported by FI (their distance sales would necessarily include VAT), it is not clear that the distance sales made by commercial farmers in Ukraine are inclusive of VAT.

Issues & Dec. Mem. at 16 (footnotes omitted) (citing Letter from Michael J. Coursey & John M. Herrmann, Kelley Drye & Warren LLP, to Acting Secretary of Commerce at Ex. 1 ¶ 11, PD 248 at bar code 3119204–01 (Feb. 12, 2013), ECF Dkt. No. 28. ("FI Decl.")). Faced with evidence that (1) the FI director stated that the FI prices are tax exclusive, (2) it was clear that a 20 percent VAT was required

[9] ["The VAT, or the value-added tax, is '[a] tax on the estimated market value added to a [product] or material at each stage of its manufacture or distribution, ultimately passed on to the consumer,'" which "is normally a percentage of the estimated market value added." *Beijing Tianhai Indus. v. United States*, 39 CIT __, __ n.12, 52 F. Supp. 3d 1351, 1357 n.12 (2015) (alteration in original) (quoting AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE 1900 (4th ed. 2000)).]

by law, and (3) the argument that sales away from the farmgate must have included the VAT, Commerce determined that the record was unclear as to whether the FI garlic bulb prices are tax exclusive. *See* Issues & Dec. Mem. at 16 ("Therefore, while there is some lack of clarity regarding the VAT in FI, it is . . . uncontested that [FAO] data are tax exclusive.").

Commerce's findings regarding the tax exclusivity of the data were not unreasonable. Given the statement on the FAO website that "[p]rices of agricultural products and by-products have a significant influence on . . . policy decisions relating to taxes levied on agricultural income," Commerce's conclusion that, because the FAO data was used in levying taxes, it must be tax exclusive, was not unreasonable. *See* FAO Submission. Further, the court agrees with Commerce that the record is somewhat unclear as to whether the FI data is tax exclusive because Ukrainian law requires 20 percent VAT to be paid on agricultural products, such as those sold at the markets reporting to FI. Thus, while by no means free of ambiguity, and not as determinative as the broad market average factor, the tax exclusivity factor modestly favors Commerce's findings.

3. Level of Trade and Contemporaneity

As noted, plaintiffs argue that the Department's selection of the FAO data is unsupported by substantial evidence because the data is (1) for sales of garlic at a different level of trade than mandatory respondents' garlic bulb inputs and (2) not contemporaneous with the POR.

In the context of their level of trade argument, plaintiffs maintain that "the Department's reliance on the . . . prices for fresh garlic in Ukraine, as published by the FAO, is inconsistent with its findings in the immediately prior [fifteenth] and [sixteenth] administrative reviews," and, further, in the seventeenth review (i.e., for the POR), that Xinboda and Golden Bird did not purchase raw garlic bulbs at the farm gate. *See* Pls.' Br. 18. Thus, plaintiffs' argument is that the Department should not have relied on the FAO "farmgate" data because it (1) relied on wholesale price data in the two immediately preceding reviews and (2) determined that, in this review, mandatory respondents' garlic bulb inputs were not obtained at the farm gate.

Plaintiffs also argue that Commerce's "decision to use the non-contemporaneous FAO data over the contemporaneous [FI] data is . . . not based on substantial . . . evidence." Pls.' Br. 29. To support this argument, plaintiffs point to Commerce's statement in the Final Results that it generally "prefers contemporaneous data over non-

contemporaneous data, all other factors being equal." Pls.' Br. 29 (quoting Issues & Dec. Mem. at 15–16) (internal quotation marks omitted).

With respect to the fifteenth and sixteenth annual reviews, plaintiffs are correct that Commerce relied on wholesale (not farmgate) prices when constructing normal value. *See* Fresh Garlic From the PRC, 76 Fed. Reg. 37,321 (Dep't of Commerce June 27, 2011) (final results and final rescission, in part, of the 2008–2009 antidumping duty administrative review), and accompanying Issues and Decision Memorandum at cmt. 3; Fresh Garlic from the PRC, 77 Fed. Reg. 34,346 (Dep't of Commerce June 11, 2012) (final results of the 2009–2010 administrative review of the antidumping duty order), and accompanying Issues and Decision Memorandum at cmt. 5.[10]

Also, in this seventeenth annual review of the Order, Commerce "continue[d] to find that the raw garlic purchased by both Golden Bird and Xinboda is not farmgate in nature." Issues & Dec. Mem. at 15. In reaching this conclusion, the Department made the following observations:

> Department officials conducted verification of Golden Bird during the instant review and, as part of verification, visited some of Golden Bird's producer's suppliers. It is clear from verification that while the suppliers may be farmers, the garlic they are

[10] The Department stated in the sixteenth review that

> [t]he fact that a significant portion of the raw garlic inputs processed by the respondents must have also been cold/[cold atmosphere] stored further demonstrates that neither company makes its purchases at farmgate prices. Xinboda has stated that "in the months other than the harvest season, [Xinboda's processor] also purchased from farmers who rented space and stored the raw garlic inputs in cold storage facilities. . . ." Golden Bird has similarly stated that "no matter how long the raw garlic was kept in cold storage, the costs had been included in the purchase price" paid by Golden Bird's processor . . . . As noted in Xinboda's statement, farmers rented space for cold storage thus indicating that the cold storage facilities were not located on the farms that supplied the raw garlic inputs. While there is no evidence on the record showing where the cold storage facilities that stored the raw garlic inputs purchased by the respondents were located, the fact that the very use of the storage facilities would have resulted in additional costs being incurred on the part of the seller. Therefore, that both respondents report purchasing raw garlic inputs from local farmers does not address the issue that these local farms had to clean, sort and bag the harvested raw garlic, rent space to store the raw garlic, cover the costs of storing the raw garlic (*i.e.*, electricity, labor) and pay for the transportation and other related costs of moving the raw garlic to the cold storage facility and then sometimes delivering the raw garlic inputs from the cold storage facility to the respondent's processing plants. Regardless of the amount of the costs involved, it is reasonable to conclude that the party incurring these costs would have added them to any price charged for the corresponding garlic; Golden Bird's statements support this conclusion. As such, the prices paid by the respondents for any raw garlic inputs are not farmgate prices as defined in *Jinan Yipin*.

Fresh Garlic from the PRC, 77 Fed. Reg. 34,346, and accompanying Issues and Decision Memorandum at cmt. 5 (alteration in original) (footnotes omitted) (citation omitted).

> selling to Golden Bird's producer has already been cleaned, transported, and kept in cold storage.
>
> Likewise, while we did not verify Xinboda, we note that the fact that Xinboda was able to purchase garlic throughout the POR indicates that the garlic its producer purchases has been stored and therefore reflects a level of trade/processing beyond the farmgate. . . . As such, Xinboda's raw garlic has also been subject to some level of preparation (*i.e.*, bagging to be placed in storage) as well as transportation or labor to place the garlic in cold storage[]. *Accordingly, the Department continues to find that the raw garlic purchased by both Golden Bird and Xinboda is not farmgate in nature.*

Issues & Dec. Mem. at 14–15 (emphasis added). Based on these findings and consistent with its findings in the two prior reviews, here, Commerce continued to find that Xinboda's and Golden Bird's garlic bulb inputs were not obtained at the farm gate. Its use of the FAO price, which it determined "is closer to a farmgate price," in this review was therefore inconsistent with its use of wholesale prices to value the garlic bulb inputs in the prior reviews, seems to be at odds with its level of trade findings in this review, and, thus, requires at least some explanation. Issues & Dec. Mem. at 15.

In the Final Results, Commerce also discussed contemporaneity and addressed the noncontemporaneity of the FAO data, which is from calendar year 2009. Acknowledging that the FAO data was not contemporaneous to the POR, Commerce noted that the FAO data was close in time to the POR and argued that, although "the markets may have changed, there [was] no evidence indicating that the 2009 price, indexed to the POR, [was] any less indicative of the price of garlic in Ukraine as a result of market development in the intervening time period." Issues & Dec. Mem. at 16. The Department also stated that it had "placed information on the record in the Preliminary Results [that] provided a method of inflating non-contemporaneous prices" and that "no party ha[d] disputed [the] information." Issues & Dec. Mem. at 16. Put another way, Commerce found that the earlier FAO data was relatively close in time to the POR, that there was no record evidence that the market for garlic had gone through a substantial change that would have dramatically altered the price, and that, because none of the parties raised any questions concerning its method of inflating non-contemporaneous prices, it was reasonable for the Department to use that method to index the FAO data for inflation.

Commerce's findings as to both level of trade and contemporaneity were not unreasonable. First, as has been noted, Commerce determined that respondents' garlic bulb inputs were not purchased at farmgate prices. Rather, mandatory respondents paid prices at a more advanced level of trade. *See* Issues & Dec. Mem. at 14 ("While Xinboda and Golden Bird both contend that their garlic is obtained at the farmgate, . . . [i]t is clear from verification that while [Golden Bird's] suppliers may be farmers, the garlic they are selling to Golden Bird's producer has already been cleaned, transported, and kept in cold storage. Likewise, . . . the fact that Xinboda was able to purchase garlic throughout the POR indicates that [its] garlic . . . has been stored and therefore reflects a level of trade/processing beyond the farmgate.").

It is also apparent that the FAO prices are likely close to farmgate prices, although there is at least some evidence indicating that they reflect a more advanced level of trade themselves. That is, Commerce correctly noted that the FAO price used here "may reflect some other measures as well." *See* Issues & Dec. Mem. at 14. While there is some indication that there would be a note accompanying FAO data that contained costs beyond the farm gate, whether the actual data contains this level of detail is unclear. *See* FAO Submission ("Most of the data originated from country sources received through the FAO Questionnaire . . . on prices received by farmers. In some cases data was supplemented with official country publications and institutional databases. . . . In actual practice it has been noted that (a) data might not always refer to the same selling points depending on the prevailing institutional set-up in the countries, (b) different practices prevail in regard to sale of individual commodities, (c) methods of arriving at national averages also differ from one country to another, and (d) as many countries do not collect producer prices[(i.e., prices determined at the farm gate or first-point-of-sale transactions)], unit values used in the compilation of national accounts aggregates has been taken as the nearest approximation.").

As to the level of trade of the FI prices, website printouts of several of the regional markets on the record, as well as a declaration made by FI's editor-in-chief, support the conclusion that they are wholesale prices. *See* Letter from Michael J. Coursey & John M. Herrmann, Kelley Drye & Warren LLP, to Secretary of Commerce at Attachments 1–6, PD 144–148 at bar code 3091519–01–05 (Aug. 10, 2012), ECF Dkt. No. 28 ("Market Website Printouts"). That is, the prices were for garlic that had already been, at minimum, sorted by bulb size, packaged in mesh bags, stored, and transported to the market. *See* FI Decl. ¶¶ 12, 18–20 ("There are no price surcharges for transportation,

storage, or packaging costs. These expenses [(transportation, storage, and packaging costs)] are covered by the farmer selling at the market and reflected in the wholesale price. . . . Before it is sold on the wholesale markets, fresh garlic is sorted by bulb size and is packed in mesh bags.").

Importantly, however, the evidence found on these websites further indicates that the farmers selling their produce at each of these markets pay fees to the markets, including entrance fees and parking fees, that would likely be reflected in the prices paid by a buyer. *See* Market Website Printouts. This conclusion is supported by a declaration on the record made by FI's editor-in-chief, which states that "individuals or entities selling fresh garlic on the *wholesale* markets monitored by [FI] are required to pay an entrance fee (or a trading platform fee)" and "[t]he amount of the fee depends on the class and size of the seller's vehicle and, thus, is related to the volume of goods offered by the seller." FI Decl. ¶ 15 (emphasis added). Indeed, in the Preliminary Results, where Commerce used the FI data, the FI prices were adjusted to take into account (remove) the costs represented by these fees.[11] Thus, the FI prices likely included costs not paid by mandatory respondents when they purchased their raw garlic bulbs,[12] while the FAO data did not include costs that were included in respondents' purchase prices.

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[11] In the Preliminary Results, Commerce adjusted the FI prices downward to reflect added costs:

> Per the Department's practice, we find that it is appropriate to make adjustments to the [FI] price to offset any possible mark-ups and/or selling fee that may not be reflective of the respondent's experience. Petitioners have placed printouts from the websites of four of the eight markets on the record. *These websites all indicated that selling through middlemen in these markets would result in a mark-up of 10 to 30 percent at the market. Additionally, these websites indicate that farmers are charged* [*a*] *parking fee.* As noted above, it is not clear whether the [FI] prices include any taxes and/or duties. If the prices reflect any intermediary trading, there also exists a possibility that taxes and duties may have been added to the price. Therefore, to account for the possible mark-ups, fees, taxes[,] and duties that may be reflected in the [FI] price, the Department has determined that it will subtract the average of the possible mark-up as stated in the websites placed on the record by Petitioners. On this basis, the Department has removed 20 percent from the average POR price to account for any mark-ups, fees, etc. Finally, the Department subtracted 0.17 percent to account for the parking fee charged.

Prelim. Surrogate Values Mem. at 6–7 (emphasis added) (footnotes omitted).

[12] The court notes that the transactions involving the raw garlic bulbs actually occurred between mandatory respondents' respective processors and local farmers and suppliers. *See* Intermediate Input Methodology Mem. at 2 ("In this review, [Golden Bird] and [Xinboda] have reported in their questionnaire responses that their respective processors purchased raw garlic bulbs, the intermediate input, from local farmers and suppliers to produce the merchandise under review."). In other words, the raw garlic bulb inputs were acquired by respondents' processors and processed at their plants prior to being transferred to Xinboda and Golden Bird.

Although it departs from the nature of the surrogate prices used in the two prior administrative reviews, Commerce was not unreasonable in its conclusion that the FAO data was the best available information on the record to value the raw garlic respondents purchased.

Commerce found that "both the [FAO] price and the FI price data appear to be at a different level of trade and processing than respondents' purchases and, without more information, it is not possible to determine whether one is more similar to respondent[s'] purchases of processed garlic bulb over the other." Issues & Dec. Mem. at 15. That is, it is not clear at precisely what level of trade respondents' raw garlic was purchased or the level of trade the FAO and FI data each represent. Put another way, on a level of trade spectrum with garlic purchased at farmgate prices (i.e., garlic that has undergone no processing) as one extreme and garlic purchased at wholesale prices (i.e., garlic that has undergone significant processing, storage, transportation, and payment of brokers' fees) as the other, mandatory respondents' garlic bulb purchases appear to be somewhere in the middle. In like manner, where the FAO and FI transaction prices fall on the spectrum is not precisely known.

It may be the case that the evidence would shade mandatory respondents' purchases toward the wholesale end of the spectrum and that another fact-finder might have found the FI data to more closely reflect the level of trade at which respondents made their purchases. The level of trade reflected by the FI data is sufficiently vague, however, that, faced with the imperfect information on the record, Commerce's choice of the FAO data was not unreasonable. This is because the FAO data might well reflect prices for merchandise sold beyond the farm gate and the FI data appears to contain costs greater than those contained in the prices paid by mandatory respondents.

The court also agrees with the Department's contemporaneity conclusions and finds that, under the circumstances, indexing the FAO price to the POR was reasonable. This is because the FAO data was from calendar year 2009, which is relatively close in time to the POR (November 1, 2010 through October 31, 2011), no record evidence indicated that the market for garlic had substantially changed since 2009, and no party objected to Commerce's method of indexing the price for inflation.

More importantly, with respect to the Department's ultimate conclusions, however, plaintiffs' arguments ignore the other factors that Commerce typically considers when choosing the best available information to value factors of production and that Commerce considered those other factors in choosing the FAO price. That is, were it in

fact the case that all of the factors Commerce considers when choosing a source for a surrogate price were equal, contemporaneous data at a closer level of trade would have been preferred. Here, however, all other factors were not equal, as plaintiffs suggest, particularly with regard to the broad market average and tax exclusivity factors. Although the level of trade and contemporaneity of the FAO data may not be perfect, the broad market average factor compels its use in this case because it represents all Ukrainian garlic production, while the FI data covers a very small sample of the market. Moreover, as Commerce found, while there was evidence indicating that the FAO price was tax exclusive, the tax exclusivity of the FI data was unclear.

Plaintiffs' arguments seem to invite the court to find that level of trade considerations are necessarily more important than other factors considered by Commerce in making a best available information on the record determination. The record in this case, however, demonstrates that the factors must be considered together. Thus, while, if based solely on the level of trade and contemporaneity factors, Commerce might reasonably have concluded that they favored the use of the FI data, that the FAO data base was so much larger than that of the FI data directs the result determined by Commerce. In other words, while specificity as to the level of trade and contemporaneity may be equivocal or even favor the FI data, the broad market average factor (coupled with tax exclusivity) argues so strongly in favor of the FAO data that the Department cannot be said to have erred by preferring it as the source of the surrogate value for raw garlic. Therefore, when proper weight is given to each of the factors, it is apparent that the FAO data is the best available information.

Thus, because Commerce's selection of the surrogate value for raw garlic bulb inputs is supported by substantial evidence, it is sustained.

CONCLUSION

Based on the foregoing, it is hereby

ORDERED that the Department of Commerce's Final Results are sustained. Judgment will be entered accordingly.

Dated: July 16, 2015
New York, New York

/s/ Richard K. Eaton
RICHARD K. EATON