Decisions of the United States Court of International Trade

[PUBLIC VERSION]

(Slip Op. 02–10)

ACCIAI SPECIALI TERNI S.P.A. AND ACCIAI SPECIALI TERNI USA, PLAINTIFFS *v.* UNITED STATES, DEFENDANT, AND ALLEGHENY LUDLUM CORP., ET AL., DEFENDANT-INTERVENORS

Court No. 99–06–00364

[Remand Determination remanded for further investigation.]

(Decided February 1, 2002)

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OPINION

I

PRELIMINARY STATEMENT

WALLACH, *Judge:* Plaintiffs dispute the United States Department of Commerce International Trade Administration's ("Commerce" or "the Department") finding in the *Final Results of Redetermination Pursuant to Court Remand, Acciai Speciali Terni S.p.A. v. United States* (Dep't Commerce 2001) *("Remand Determination")* that the 1994 sale of Acciai Speciali Terni S.p.A. ("AST") to private parties did not extinguish governmental subsidies received prior to the sale and that the privatized company continued to benefit from these subsidies. Plaintiffs' challenge follows the voluntary remand of Commerce's decision in *Final Affirmative Countervailing Duty Determination; Stainless Steel*

Plate in Coils from Italy, 64 Fed. Reg. 15508 (1999) *("Final Determination").*

The court finds that Commerce, by failing to completely eliminate its earlier *per se* treatment of subsidy benefits following a change in ownership through its "same person" test, has not made its *Remand Determination* in accordance with the law.

II

STANDARD OF REVIEW

In reviewing Commerce's determination, the court "shall hold unlawful any determination, finding, or conclusion found * * * to be unsupported by substantial evidence on the record, or otherwise not in accordance with law." 19 U.S.C. § 1516a(b)(1)(B) (1994). The specific determination the court must make is "whether the evidence and reasonable inferences from the record support the finding." *Dae Woo Elecs. v. United States,* 6 F.3d 1511, 1520 (Fed. Cir. 1993) (quoting *Matsushita Elec. Indus. Co. v. United States,* 750 F.2d 927, 933 (Fed. Cir. 1984)). Substantial evidence consists of "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Matsushita,* 750 F.2d at 932 (quoting *Consolidated Edison Co. v. NLRB,* 305 U.S. 197, 229, 83 L. Ed. 126, 59 S. Ct. 206 (1938)).

III

BACKGROUND

On March 31, 1998, domestic steel producers Allegheny Ludlum Corp., *et al.,* filed a countervailing duty petition with Commerce that alleged that AST, a privatized corporation born out of the Government of Italy's ("GOI") restructuring of government-held steel corporations, continued to benefit from various subsidies bestowed upon its government-owned predecessors prior to its inception. *See Initiation of Countervailing Duty Investigations: Stainless Steel Plate in Coils From Belgium, Italy, the Republic of Korea and the Republic of South Africa,* 63 Fed. Reg. 23272 (Dep't Commerce 1998) ("Initiation Notice"). On September 4, 1998, Commerce published its *Preliminary Affirmative Countervailing Duty Determination and Alignment of Final Countervailing Duty Determination With Final Antidumping Duty Determination: Stainless Steel in Plate Coils From Italy,* 63 Fed. Reg. 47246 (Dep't Commerce 1998). On March 31, 1999, Commerce published its Final Determination, 64 Fed. Reg. 15508 (Dep't Commerce 1998). Following an affirmative injury determination by the United States International Trade Commission ("ITC"), *see* 64 Fed. Reg. 25515 (ITC 1999), Commerce issued a CVD order directed at stainless steel plate imported from Italy. *See* 64 Fed. Reg. 25288 (Dep't Commerce 1999).

That affirmative injury determination was based on Commerce's original countervailing duty ("CVD") methodology, which assumed that any subsidy and benefit conferred on an entity "passed through" regardless of any sale or change in ownership of that entity. It had been Commerce's practice to terminate its inquiry as to whether a "benefit"

exists at the time the subsidy was bestowed, thereby ignoring all subsequent events as irrelevant. Moreover, a change of ownership was deemed one such subsequent event and considered irrelevant in determining the existence of a "benefit", while the fact a purchaser may have bought the assets at fair market value was also deemed irrelevant.

Following the passage of the Uruguay Rounds Agreements Act, § 102(c)(1), 108 Stat. 4818, 19 U.S.C. §§ 3512(b)(2)(A), 3512(c)(1), however, the Tariff Act of 1930 ("the Act") was amended to reflect the changes stemming from that accord. Accordingly, the Act currently provides that before Commerce imposes a countervailing duty on merchandise imported into the United States, it must determine that a government is providing, directly or indirectly, a countervailable subsidy with respect to the manufacture, production, or export of that merchandise. *See* 19 U.S.C. § 1671(a)(1) (1994).

On February 2, 2000, the Federal Circuit ruled in *Delverde, SRL v. United States,* that Commerce could no longer rely upon its earlier *per se* rule under the amended Tariff Act. *See Delverde, SRL v. United States,* 202 F.3d 1360, 1364 (Fed. Cir. 2000) *("Delverde III").* The court concluded "the Tariff Act as amended does not allow Commerce to presume conclusively that the subsidies granted to the former owner of Delverde's corporate assets automatically 'passed through' to Delverde following the sale. Rather, the Tariff Act requires that Commerce make such a determination by examining the particular facts and circumstances of the sale and determining whether Delverde directly or indirectly received both a financial contribution and benefit from the government." *Id.* at 1364. At issue was the Act's subsidy definition, 19 U.S.C. §1677(5)(B). Paragraph (5)(B) provides the following "description" of a subsidy:

> (B) Subsidy described
>
> A subsidy is described in this paragraph in the case in which an authority—
>
> (i) provides a financial contribution,
>
> (ii) provides any form of income or price support within the meaning of Article XVI of the GATT 1994, or
>
> (iii) makes a payment to a funding mechanism to provide a financial contribution, or entrusts or directs a private entity to make a financial contribution, if providing the contribution would normally be vested in the government and the practice does not differ in substance from practices normally followed by governments
>
> to a person and a benefit is thereby conferred. For purposes of this paragraph * * *, the term "authority" means a government of a country or any public entity within the territory of the country.

19 U.S.C. § 1677(5)(B).

On August 14, 2000, Commerce was ordered by this court, pursuant to a motion for voluntary remand, to issue a determination in this matter, in accordance with U.S. law and specifically the Federal Circuit's de-

cision in *Delverde III*.[1] Following this decision, Commerce submitted questionnaires to AST and petitioners regarding the employed privatization methodology given the holding of *Delverde III*. On December 19, 2000, Commerce issued its *Remand Determination.*

In its *Remand Determination,* Commerce ostensibly renounced its earlier *per se* rule, and formulated a new test, the "same person" test, as a threshold inquiry prior to reaching the contribution and benefit analysis espoused by the Federal Circuit. Commerce has taken the position that "[i]n order to determine how the *Delverde III* court's holding applies to the facts before [Commerce], the first requirement is to determine whether the person to which the subsidies were given is, in fact, distinct from the person that produced the subject merchandise exported to the United States." *Remand Determination* at 6.

Using this analysis, Commerce maintains that where the pre-sale entity and the post-sale entity are effectively the "same person," as opposed to "distinct persons," further steps are unnecessary. Hence, where the post-sale entity is the "same person" as the pre-sale entity, the contribution and benefit enjoyed by the former, by definition, flows to the latter. "Where it is demonstrated that those two entities are the same 'person,' we will determine that all of the elements of a subsidy are established, i.e., we will determine that a 'financial contribution' and a 'benefit' have been received by the 'person' that is the firm under investigation." *Id.* at 7. Under this approach, "if the firm under investigation is the same person as the one that received the subsidies, nothing material has changed since the original bestowal of the subsidy, so that the statutory requirements for finding a subsidy are satisfied with regard to that person." *Id.*

On the basis of this test, Commerce determined that its original conclusion that KAI-owned AST reaped benefits of subsidies conferred upon GOI-owned AST was still valid. This new test, Commerce's determination based thereon, and Commerce's attendant determinations and calculations are the primary focus of this litigation.

B

History of Restructuring and Asset Liquidation that Gave Rise to AST

Prior to 1987, Terni, S.p.A, ("Terni"), was the sole producer of stainless steel plate in coils in Italy.[2] Finsider was a holding company that controlled all state-owned steel companies in Italy, in addition to Terni. The Italian Government, in turn, owned Finsider, through its own holding company, Istituto per la Ricostruzione Industriale ("IRI"). Under a

[1] In relevant part, the August 14, 2000 order provided "that the investigation at issue in this action, *Final Affirmative Countervailing Duty Determination: Stainless Steel Plate in Coils from Italy,* 64 Fed. Reg. 15508 (Mar. 31, 1999), is hereby remanded to the U.S. Department of Commerce for 120 days from the date of this order to issue a determination consistent with United States law, interpreted pursuant to all relevant authority, including the decision of the Court of Appeals for the Federal Circuit in *Delverde, SRL v. United States,* 202 F.2d 1360 (Fed. Cir. 2000) * * *."

[2] Unless otherwise specified, the discussion of the restructuring and liquidations that gave rise to AST is based on the *Final Determination,* 64 Fed. Reg. at 15508–09.

restructuring initiative in 1987, Terni transferred its assets to a new company, Terni Acciai Speciali ("TAS").

In 1988, another restructuring program was undertaken, liquidating Finsider and its main operating companies (TAS, Italsider, and Nuova Deltasider), and establishing a new company, government-owned ILVA S.p.A. ILVA S.p.A. succeeded and took over a mixture of assets and liabilities originally belonging to the liquidated companies. With respect to TAS, part of its liabilities and the majority of its viable assets, including all the assets associated with the production of plate, transferred to ILVA S.p.A. on January 1, 1989. ILVA S.p.A. became operational on the same day. On April 1, 1990, a further part of TAS's remaining assets and liabilities was transferred to ILVA S.p.A. After April 1, 1990, only certain non-operating assets remained in TAS; it no longer possessed any operating assets.

During 1989 to 1993, ILVA S.p.A. was comprised of several operating divisions. The Specialty Steels Division, located in Terni, produced the subject merchandise. ILVA S.p.A. was also the majority owner of a large number of separately incorporated subsidiaries, some of which produced various types of steel products. ILVA S.p.A.'s other subsidiaries included service centers, trading companies, and an electric power company, among others. ILVA S.p.A. together with its subsidiaries constituted the ILVA Group ("ILVA"), which in turn was wholly-owned by the Italian government holding company, IRI. All subsidies received prior to 1994 were received by ILVA or its predecessors.

ILVA eventually became ILVA Residua following a liquidation in 1993. Very soon thereafter, two of ILVA's divisions were demerged in order to separately incorporate them. However, the Italian government continued to own these separately incorporated divisions, AST and ILVA Laminati Piani ("ILP"). The ILVA specialty steels operations responsible for the production of stainless steel plate in coils was transferred to AST, while ILVA's carbon steel flat products operations were transferred to ILP. The remaining ILVA's assets and liabilities, stayed with ILVA Residua.

In December 1994, through a share transfer scheme, AST was sold to a private German-Italian holding company, KAI Italia S.r.L. ("KAI"). Between 1995 and the Period of Investigation (1995 to 1997), a number of further restructurings and changes in ownership of AST and its parent companies occurred. Ultimately, the German company, Krupp Thyssen Stainless GmbH owned 75 percent of AST, and the remaining 25 percent was owned by the Italian company, Fintad Securities S.A.

2

SUBSIDIZATION

The current subsidies occurred primarily during the 1988–90 restructuring of Finsider and the 1993–94 restructuring of ILVA. These restructuring programs were built upon debt forgiveness packages from the GOI, in addition to equity infusions made periodically during this time frame, and exchange rate guarantees pursuant to Law 796/76. The

EC maintained two of its own subsidy programs on AST's behalf, which included grants pursuant to the European Social Fund program and preferential loans pursuant to the ECSC Article 54 Loan program.

IV

ARGUMENTS

A

PLAINTIFFS

Plaintiffs maintain that Commerce completely sidestepped its obligations under the court's August 14th Order and the Federal Circuit's holding in *Delverde III*. In particular, Plaintiffs fault Commerce for devising a methodology that they claim has no basis in either the controlling statute or *Delverde III*. Moreover, they claim that such methodology runs counter to not only the *Delverde III* holding but also the World Trade Organization ("WTO") Panel and Appellate Body's interpretation of the WTO Agreement on Subsidies and Countervailing Measures ("SCM") Agreement in *UK Leaded Bars*,[3] which they further claim is a violation of the "United States' international obligations, and hence the U.S. statutory obligations under the *Charming Betsy* doctrine." Plaintiffs' Supplemental Brief Commenting on the Agency's Remand Determination ("AST's Supplemental Brief") at 30.

In addition, Plaintiffs claim that by the terms of Commerce's own test, Commerce erroneously concluded that KAI-owned AST benefitted from any subsidies bestowed upon GOI-owned AST. Plaintiffs base this assessment primarily on their assertion that "the fundamental flaw in the Department's superficial analysis is that it is premised on the notion that the proper basis of comparison for purposes of its 'distinct' person determination is between the GOI-owned AST (post-demerger but before privatization) and KAI-owned AST (post-privatization)." AST's Supplemental Brief at 23 (footnotes omitted). Plaintiffs also attack Commerce's findings on each one of the four prongs of Commerce's "same person" test, stating that "even assuming that the Department's 'same person' analysis had any validity to the analysis mandated by the *Delverde* Court, the Department's conclusions with respect to the application of this test to this case are clearly not supported by substantial evidence on the record." *Id.* at 27–28.

Finally, Plaintiffs claim that Commerce improperly raised AST's margins, allegedly resulting in an unduly high subsidy margin of 17.25 percent versus 15.16 percent. Plaintiffs point to Commerce's attribution of 100 percent of the subsidies in issue to privatized AST, without examining whether any portion of the purchase price was used to extinguish past subsidies. In particular, Plaintiffs fault Commerce for failing to "attribute any of the subsidies provided to state-owned ILVA to companies

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[3] The WTO Panel Body addressed the SCM agreement in *United States—Imposition of Countervailing Duties on Certain Hot-Rolled Lead and Bismuth Carbon Steel Products Originating in the United Kingdom,* WT/DS138/R, Report of the Panel (December 23, 1999). That decision was affirmed by the WTO Appellate Body in *United States—Imposition of Countervailing Duties on Certain Hot-Rolled Lead and Bismuth Carbon Steel Products Originating in the United Kingdom,* WT/DS138/AB/R, Report of the Appellate Body (May 10, 2000) *("UK Leaded Bars").*

that ILVA separately sold prior to AST's privatization," as well as failing to "attribute any subsidies to post-privatization arm's length ownership changes." AST's Supplemental Brief at 30 (citing *Remand Determination* at 24). Plaintiffs further claim that Commerce unfairly resorted to "facts otherwise available" in determining the applicable subsidy rates as "the prerequisite for the application of adverse facts available has not been met." *Id.* at 31.

On this basis, Plaintiffs urge the court to find Commerce's "same person" test contrary to law. Secondly, Plaintiffs urge the court to compel Commerce to engage in a full benefit and contribution investigation prior to the imposition of any countervailing duties.

B

DEFENDANT

Commerce avers throughout its papers that its "same person" methodology is in complete compliance with the Federal Circuit's holding in *Delverde III* and that, in fact, such a methodology is encouraged by that holding. As discussed, based on its reading of 19 U.S.C. § 1677(B)(5) and *Delverde III,* Commerce concludes that prior to engaging in a full contribution and benefit investigation, it must first determine whether the post-sale entity is the "same person" as the pre-sale entity. Moreover, according to Commerce, this reading is in full compliance with the United States' obligations under international law and *UK Leaded Bars*.

In short, Commerce stands by its "same person" test, claiming that the test is statutorily warranted and is sufficiently flexible and multifaceted to accurately determine whether the entities at issue are indeed the "same person." "[A]s a matter of law, Commerce's new privatization approach is consistent with the post-URAA CVD statute, as interpreted by the Federal Circuit in *Delverde III,* and that a series of arguments from AST to the contrary have no merit." Defendant's Memorandum In Opposition to the Rule 56.2 Motion for Judgment Upon the Agency Record Filed by Acciai Speciali Terni, S.p.A and Acciai Speciali Terni (USA) ("Defendant's Opposition") at 10 (citations omitted). With regard to the four prongs comprising the test, Commerce states:

> They do not, by themselves, dictate any particular outcome and certainly do not give rise to any kind of presumption. The criteria were carefully selected to enable Commerce to make as meaningful a comparison as possible between the nature of the government-owned company, upon which the subsidies were originally bestowed, and the privatized company, the current producer of the subject merchandise. Such an inquiry does not lend itself to a bright-line test because of the multi-faceted makeup of a legal person. Accordingly, Commerce selected those factors which it believed would provide it with a meaningful basis for distinguishing or not between the two entities in the CVD context.

Id. at 36–37 (citations omitted).

Commerce also maintains throughout its pleadings and papers that the Plaintiffs misconstrue and oversimplify the scope and character of

the "same person" test. Secondly, Commerce maintains that the statute itself mandates the "same person" determination and that Commerce merely supplied the framework for that determination. On this basis, Commerce concludes that "[i]n light of Commerce's finding that AST is the same person both before and after its privatization, all of the requirements for countervailing the pre-privatization subsidies continue to be met." *Id.* at 11.

V

ANALYSIS

A

A SUBSIDY CONTRIBUTION LIKELY TRAVELS FROM THE GOVERNMENT-OWNED ENTITY TO THE PRIVATIZED ENTITY WHERE THEY ARE THE "SAME PERSON" BUT THAT FINDING ALONE DOES NOT SUPPORT THE CONCLUSION THAT THE ASSOCIATED BENEFIT TRAVELS BETWEEN THESE ENTITIES AS WELL

The Federal Circuit in *Delverde III* did not provide specific guidance regarding a CVD methodology under these circumstances, so Commerce set out to develop appropriate criteria on its own. Commerce noted at the outset, moreover, that it was facing a complex task. Commerce explained that:

> in its experience, particularly when dealing with privatizations, it often does not encounter straightforward changes in ownership where the status of the firm under investigation is readily apparent. For example, it is not common for the Department to be confronted with a change in ownership accomplished through a simple sale of shares, which is the type of case that would most readily reveal no change in the legal person. Similarly infrequent are cases where the firm under investigation has simply purchased some but not all of another firm's subsidized assets outright, which, conversely, would normally mean that the firm under investigation was a different legal person from the original subsidy recipient. Rather, in the cases that the Department more usually sees, the transactions are complex and do not lend themselves to such straightforward analysis.

Remand Determination at 10.

Ultimately, Commerce formulated a test comprised of four non-dispositive prongs. Those factors are:

> [W]here appropriate and applicable, we would analyze factors such as (1) continuity of general business operations, including whether the successor holds itself out as the continuation of the previous enterprise, as may be indicated, for example, by use of the same name, (2) continuity of production facilities, (3) continuity of assets and liabilities, and (4) retention of personnel. No single factor will necessarily provide a dispositive indication of any change in the entity under analysis. Instead, the Department will generally consider the post-sale entity to be the same person as the pre-sale entity if, based on the totality of the factors considered, we determine that the entity sold in the change-in-ownership transaction can be considered a

> continuous business entity because it was operated in substantially the same manner before and after the change in ownership.

Id. at 13. These factors reflect the common sense principle that where a company is privatized in a manner specifically designed to preserve the company's original structure, the privatized company in some respects can be deemed to be in the position of its predecessor.

a

COMMERCE SELECTED THE PROPER ENTITIES, GOVERNMENT-OWNED AST AND KAI-OWNED AST, FOR COMPARISON

Plaintiffs claim that Commerce focused on the wrong business units for comparison in deriving its "distinct person." In particular, Plaintiffs argue that Commerce should have engaged in a comparison between GOI-owned ILVA and KAI-owned AST, as opposed to GOI-owned AST and KAI-owned AST. This conclusion is based on Plaintiffs' characterization of the 1993 demerger of AST from GOI-owned ILVA to form GOI-owned AST as "simply a spin-off of a division of ILVA into a wholly-owned subsidiary of the *same* state-owned corporation." AST's Supplemental Brief at 23 (emphasis added). In other words, according to Plaintiffs, GOI-AST was in essence the same person as ILVA and therefore ILVA as a whole should be the subject for comparison. Moreover, Plaintiffs cite to Commerce's own discussion of the significance of the demerger as support for Plaintiffs' comparison:

> [a]lthough the GOI on several occasions reconfigured the overall corporate environment within which AST's predecessors operated, there was no sale or ultimate change in ownership that would necessitate a reconsideration of who the subsidy recipient was prior to the 1994 privatization of AST. Rather, the specialty steel business itself, as well as the ultimate ownership of this business, remained essentially unchanged from the early 1980's through December 1994.

Id. at 24 (quoting *Remand Determination* at 33).

However, AST's creation must be viewed within the overall context of the Italian steel industry's restructuring process, as it remained, prior and subsequent to privatization, a specialty steel operation in essentially the same form. For example, although the specialty steel operations were dubbed variously as Terni, Terni Acciai Speciali ("TAS"), and its current name AST, the character and scope of its business did not change. Indeed, Commerce states that "[a]lthough the GOI on several occasions reconfigured the corporate environment, there was no sale or ultimate change in ownership that would necessitate a reconsideration of who the subsidy recipient was prior to the 1994 privatization of AST," Defendant's Response at 41, clarifying that such event is insignificant as far as the flow of subsidies received prior to 1994. Per Commerce's past practice regarding internal restructurings of this nature, "all of the subsidies that had been bestowed on the government-owned specialty steel operations over the years continued to benefit those operations af-

ter the 1993 demerger, when government-owned AST became separately incorporated." *Id.*[4]

Commerce was, in fact, indicating that throughout the time leading up to the 1994 privatization, the specialty steel operations remained the same person despite its position in the Finsider or ILVA corporate structure. As such, Commerce did not characterize the 1993 demerger as an event conferring distinct personhood on GOI-AST. *See Remand Determination* at 35. AST's argument that Commerce's characterization of the 1993 demerger legitimizes a comparison between ILVA and KAI-AST as the basis of the "same person" inquiry misconstrues the import of this characterization. Rather, Commerce in asserting that the 1993 demerger was a "non-event" was merely emphasizing the fact that the proper unit of comparison is the specialty steel division of ILVA, independent of whatever nominal transition it may have undergone in the corporate hierarchy. This is consistent with Commerce's past practice in applying the CVD statute, when it has routinely linked the benefit accompanying a subsidy to a specific operating division, as opposed to the entire corporation.

Commerce's approach is driven by the notion that it would be inaccurate to treat anything other than the specialty steel operations, in whatever corporate form they took prior to the 1994 privatization, as the proper comparison point. On the other hand, AST's logic would enable a corporate parent to "spin-off" the operation that benefitted from the given subsidy, without exposing the spun-off operation to a CVD inquiry. Under its approach, any inquiry would target the corporate shell, which, as here, would no longer produce the specialty product and most likely would not have reaped the benefit of the subsidy. Commerce's approach, which emphasizes substance over form, is amply warranted under the circumstances.

b

COMMERCE CORRECTLY APPLIED THE "SAME PERSON" TEST TO DEMONSTRATE THAT GOVERNMENT OWNED AST AND THE KAI-OWNED AST WERE INDEED THE SAME PERSON

Commerce properly applied and weighed the four prongs of its "same person" test, (1) continuity of general business operations, (2) continuity of production facilities, (3) continuity of assets and liabilities, and (4) retention of personnel, to determine that many material aspects of AST's operations remained unchanged following AST's privatization. Beginning with a brief synopsis of AST's restructuring history, Com-

[4] Commerce cites to its articulation of this approach in the 1993 steel cases, where it explained:

> One type of restructuring activity is the corporate reorganization in which, most typically, assets are shifted amongst and between various related corporate entities. New corporate structures and relationships are established through the liquidation of corporate entities, the creation of new corporate entities, and the "sale" or transfer of assets between such related entities. No truly "outside" parties enter the corporate organization; rather, a new "web" of corporate relationships is created between old and new corporate entities. However, regardless of what changes occur in the corporate structure, the ultimate shareholder remains unchanged.

General Issues Appendix, 58 Fed. Reg. at 37266. In accordance with this phenomenon, Commerce stressed that "internal corporate restructurings that transfer or shuffle assets among related parties to constitute a 'sale' * * *. Legitimate 'sales' * * * must involve unrelated parties, one of which must be privately owned." *Id. See Remand Determination* at 17.

merce asserts that "the business operations that eventually comprised AST basically existed intact as a discrete business entity since at least the 1980s (the period when the company was known as Terni or Terni Acciai Speciali, rather than the current name Acciai Speciali Terni.)" *Remand Determination* at 16. Based on its "same person" test, Commerce demonstrates that indeed AST's supply and customer structure, as well as its rights and obligations, remained intact following privatization.

i.

CONTINUITY OF BUSINESS OPERATIONS

As a general matter, AST was sold as a functional unit, complete with a preexisting customer base, supplier base, and market penetration. As AST itself states "[t]he company was attractive because of its portfolio of productive assets, manufacturing expertise and products. In addition, the company had access to desirable markets and customers for its production." *Remand Determination* at 20 (quoting AST Remand Questionnaire Response at 39). Hence AST was not purchased as a mere collection of assets but as a complete package that was, by design, meant to remain intact during and following the change in ownership. *See Remand Determination* at 19 (quoting AST Remand Questionnaire Response at 6 ("[b]y selling AST as an operating entity, rather than merely auctioning its individual assets, IRI expected to obtain a higher sale price and thereby to maximize the revenue from the sale to IRI.")).

As Commerce found, AST was maintained as a continuous uninterrupted enterprise that was intended to benefit from its existing infrastructure and market exposure. *See Remand Determination* at 19. This is notably evidenced by the fact that AST continued to operate under the AST name even following acquisition by KAI. In addition, with regard to AST's supply network, Plaintiffs state "[t]he Terni and Torino plants formerly owned by ILVA have largely continued to use a similar supplier base. This is unremarkable, as the plants produced specialty steels before and after their fair market value privatization." AST Remand Questionnaire Response at 34. Similarly, AST's customer network remained relatively intact as part of the general effort to maintain AST's operations. *See Remand Determination* at 20.

ii.

CONTINUITY OF PRODUCTION FACILITIES

The strategic value of AST's production facilities was not lost on its purchasers as part of its overall value and therefore these facilities remained functionally intact. The core of AST's operations as a specialty steel producer are the actual production facilities. Indeed, within the Propriety Planning Document (which was submitted as an attachment to AST's Remand Questionnaire Response) delineating AST's privatization, KAI states that AST:

> [Has certain material cost advantages due to the location of its production facilities.] *Remand Determination* at 21 (quoting AST's

Proprietary Planning Document at 4). These facilities remain in Terni, Torino.

iii.

CONTINUITY OF ASSETS AND LIABILITIES

Notably, AST's complete balance sheet of assets and liabilities were assumed in toto by KAI following the change in ownership. As per the GOI, "KAI assumed the whole of AST's indebtedness at the time the sale took place." *GOI First Remand Supplemental Response* at 3. Moreover, AST does not deny Commerce's assertion that all assets and liabilities were transferred intact. Rather, AST concludes that "[t]his finding is simply the inevitable result of the Department's improper focus on a division of ILVA (the 'demerged' AST) as opposed to ILVA as a whole." AST's Supplemental Brief at 26–27.

A business entity's liabilities are as telling of its overall structure as its physical assets and operations. Corporations are defined to a great extent by their debt as evidenced by the impact of debt in public corporate securitization. Therefore, the fact that AST's debt remained intact lends significant support to the assertion that, overall, AST remained relatively unchanged.

iv.

RETENTION OF PERSONNEL

It appears from the record evidence that AST's labor force was unscathed by the change in ownership. This is underscored by section 6.1 of the contract of sale governing AST's transfer to KAI. It provides that KAI would:

> [Guarantee to protect or approximate the status quo with regard to certain normative elements of AST's workforce composition and employment conditions, and abide by certain employment agreements already in existence.]

Remand Determination at 22 (quoting *Original Questionnaire Response*, Attachment A8–8 at 5). KAI was thus tasked by the GOI with maintaining the status quo of AST's labor force including the maintenance of and compliance of certain labor funds and privileges that were established prior to privatization.

Accordingly, Commerce's conclusion that there is no indication AST's labor force "changed substantially as a result of the privatization" appears warranted. Moreover, the court notes that Plaintiffs have failed to rebut the logical conclusions that spring from section 6.1.

B

THE IMPOSITION OF COUNTERVAILING DUTIES BASED ON THE "SAME PERSON" TEST HAS NO CLEAR BASIS IN LAW AND APPEARS TO BYPASS THE FEDERAL CIRCUIT'S INSTRUCTIONS IN *DELVERDE III*

Plaintiffs have vehemently attacked Commerce's new approach, claiming that it has no basis in the *Delverde III* decision or the statute

and is a transparent attempt by Commerce to shirk its statutory responsibility. Indeed, Plaintiffs claim that "the Department's position has no statutory basis whatsoever. The Department posits a concept of 'distinct' person that means something totally different and inconsistent with the term 'person' as defined in the statute." AST's Supplemental Brief at 9. They further claim that the "Department's definition includes a vague and self-serving concept of successorship." *Id.* Plaintiffs aver that in the statutory context, "'person' simply means entity." *Id.* at 10 (footnotes omitted). In support of this reading of the term, Plaintiffs cite the Statement of Administrative Action ("SAA") accompanying the URAA, which defines "person" as "the commercial entity, such as a firm or industry, to which the government * * * provides a financial contribution." H. Doc. 103–316, Vol. VI, 103d Cong., 2d Sess. (1994).

Despite the "same person" test's ability to demonstrate certain features of the privatized entity remain untouched, its analysis effectively presupposes that some benefit of a subsidy travels with the assets of a company. Moreover, despite not expressly barring the "same person" test, the general holding of *Delverde III* appears to stand in opposition to the thrust of the test's focus. As discussed, the "same person" test will deem the pre-sale entity to be equivalent to the post-sale entity, if the latter was "operated in substantially the same manner before and after the change in ownership." *Remand Determination* at 13. Although Commerce's logic is not inherently unreasonable, that "nothing material has changed since the original bestowal of the subsidy," *id.* at 7, its assumption ignores the fundamental logic of *Delverde III.* In particular, the Federal Circuit appears to have been concerned about *any per se* assumption regarding the presence of a contribution and a benefit following a change in ownership, stating:

> "Although Commerce characterizes a change in ownership as an issue of 'subsequent events' or 'effects' that it can disregard, we disagree. A change of ownership is neither. First, the fact that Congress added the Change of Ownership provision to the statute refutes such assertions of irrelevance. **As we stated earlier, that provision prohibits a *per se* rule for determining whether a subsidy continues to be countervailable to a new owner following a change of ownership.** As such the statute clearly contemplates its possible relevance and contemplates that under some circumstances the purchaser will not be deemed to have received a subsidy."

Delverde III at 1367 (emphasis added). Moreover, the Federal Circuit's discussion of Commerce's failure to make specific findings of a contribution and benefit does not suggest there are instances where such findings may be foregone under the statute:

> "As such, Commerce has adopted a *per se* rule that a person receives a subsidy in these circumstances and has failed to make the specific findings of financial contribution and a benefit to Delverde that are

> required by §§ 1677(5)(D) and (E). That conclusion is in direct conflict with the statute."

Id.

Nonetheless, Commerce contends the "same person" approach is consistent both with *Delverde III* and the World Trade Organization's Appellate body's holding in *UK Leaded Bar.* Commerce asserts that, although the court in *Delverde III* did not expressly discuss personhood in the context that Commerce now asserts is critical, the court was "under the impression that Delverde was a different person from the original subsidy recipient," *Remand Determination* at 5, and moreover that "[t]he *Delverde III* court was under this impression because the parties' presentations seemed to characterize the Delverde change-in-ownership transaction as simply one firm selling some of its assets to another firm, which would indicate that the assets now belonged to a different 'person.'" *Id.* at fn.2.

Plaintiffs refer to Commerce's internal regulations regarding the interpretation of the Act, which state that a "person" is "any interested party as well as any other individual, enterprise, or entity, as appropriate." 19 C.F.R. § 351.102(b). The regulation further clarifies that:

> The Act contains many technical terms applicable to antidumping and countervailing duty proceedings. In the case of terms that are not defined in this section or other sections of this part, readers should refer to the relevant provisions of the Act. This section:
>
> (1) Defines terms that appear in the Act but are not defined in the Act;
>
> (2) Defines terms that appear in this Part but do not appear in the Act; and
>
> (3) Elaborates on the meaning of certain terms that are defined in the Act.

Id. §351.102. The term "person" is not defined within the Act and thus falls under section 1. As such, this court is informed by the regulation's definition, which clearly supports the Plaintiffs' interpretation of the term as a generic and inclusive reference to various classes of business entities. Therefore, Commerce's interpretation of "person" to mean a post-sale entity that is a distinct person from the pre-sale entity appears to be in conflict with the regulation.

The legislative history of the URAA, unfortunately, does little to clarify the situation other than to reiterate the *Delverde III* disposition regarding the impermissibility of an absolute *per se* rule. Regarding the new Change of Ownership provision, the House Report states:

> Section [1677(5)(F)] is being added to the Act to clarify that the sale of a firm at arm's-length does not automatically, and in all cases, extinguish any prior subsidies conferred. Absent this clarification, some might argue that all that would be required to eliminate any countervailing duty liability would be to sell subsidized productive assets to an unrelated party. Consequently, it is imperative that the implementing bill correct and prevent such an extreme interpretation.

> The issue of the privatization of a state-owned firm can be extremely complex and multifaceted. While it is the Committee's intent that Commerce retain the discretion to determine whether, and to what extent, the privatization of a government-owned firm eliminates any previously conferred countervailable subsidies, Commerce must exercise this discretion carefully through its consideration of the facts of each case and its determination of the appropriate methodology to be applied.

H.R. Rep. No. 103–826(I) at 110 (1994), reprinted in 1994 *U.S.C.C.A.N.* 3773, 3882.

Against this backdrop, Commerce is asking this court to embrace a strained and highly conjectural reading of *Delverde III*. Although the *Delverde III* court was confronted with a change in ownership involving the purchase and sale of assets as opposed to a transfer of stock, Commerce is speculating as to whether the court would dispense with the contribution and benefit analysis in the latter scenario. While Commerce claims that the court in *Delverde III* impliedly laid groundwork for treatment of stock transfer scenarios, separate and apart from the treatment that was expressly discussed in that case, it does not allude to any language, statutory or otherwise, to support this proposition.

Although the "same person" test is not all encompassing like Commerce's original *per se* rule, it still operates in a *per se* fashion for this subset of possible change in ownership scenarios. It is conceivable that a change in ownership might very well be virtually in name only (i.e., it satisfies the "same person" test), without the benefit associated with the contribution traveling to the post-sale entity. However, Commerce's "same person" test, although not ensuring, as AST argues, "that subsidies automatically travel in full in every change of ownership", AST's Supplemental Brief at 14, can and will overlook those instances where a change in ownership satisfies the test, in the absence of a benefit to the post-sale entity. It is effectively another *per se* rule. Once again, where the post-sale entity is deemed the "same person" as the pre-sale entity, a benefit is *per se* ascribed to the former. Hence Commerce, as AST maintains, seeks to carve out an "exception" to the *Delverde III* holding. This fact is underscored by the all or nothing outcome of the test when compared to less severe outcomes.[5]

There is no indication that the *Delverde III* court considered the array of ramifications that accompany distinct personhood in the CVD context as Commerce maintains, let alone any indication that it advocated any separate analysis as a prelude to the benefit and contribution analysis that it did discuss in detail. Although the court did mention the term "person", it is not evident that it was doing anything more than simply reiterating the language of the statute without loading that term with

[5] For example, if Commerce were to compromise and dispense with the contribution analysis upon finding the post-sale entity is the "same person", but then still engage in the benefit analysis, the *per se* nature of the "same person" test would be mitigated. However this is not the case.

greater import.[6] As Plaintiffs state, "the question of whether the purchaser was a different 'person' is clearly without significance in the Court's analysis or the statutory scheme on which it relied." AST's Supplemental Brief at 7.

The "same person" test, while demonstrating that a privatization transaction may, in fact, change little other than corporate ownership, fails to address certain mitigating factors that are as significant as the unaltered nature of the entity's assets, labor force, debt structure, and general business operations. In this case, it appears that AST was largely preserved, by design, to ensure its purchasers the enjoyment of its relative strengths following acquisition. This is the hallmark of many corporate acquisitions, where the total business entity is more attractive than its individual components. Hence it is to be expected that certain material aspects of these business entities will survive privatization. As an intuitive matter, it follows that the "passing through" of certain non-physical assets of the pre-privatized entity to the privatized entity is more likely in these scenarios. Included in this category is the benefit associated with a countervailable subsidy. Intuition, however, is not necessarily reality. In automatically attributing the full value of the pre-privatization subsidy to KAI-AST, the "same person" test substitutes intuitive reality for empirical proof.

1

THE "SAME PERSON" TEST IGNORES MATERIAL FACTORS THAT MAY NEGATE OR MITIGATE THE BENEFIT CONFERRED UPON THE PRIVATIZED ENTITY

As discussed above, Commerce's "same person" test, when satisfied, without any consideration of factors that may offset or completely negate a benefit associated with a given subsidy, attributes the full extent of such benefit to the privatized entity. That nonconsideration makes the test summary and unfair and thus its determination is unsupported by substantial evidence.[7]

In this case, it strikes the court that the "same person" test completely ignores the Plaintiffs' assertion that KAI paid full value for AST's assets. As AST complains, "[u]nder the Department's remand deter-

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[6] The court merely said that "[t]he statute clearly states that Commerce must determine that a *person* received both a financial contribution and a benefit, either directly or indirectly, through one of the acts enumerated, and provides no presumption for any change of ownership situation * * *. Commerce's methodology is inconsistent with the plain language of the amended statute." *Delverde III* at 1368 (emphasis added).

[7] In situations such as the current one, Commerce has argued that it should be given the latitude to persuasively demonstrate that the post-sale entity must have benefitted from a contribution made to the pre-sale entity, without engaging in a full scale benefit and contribution analysis. *See Allegheny Ludlum, Corp., et al. v. Unites States,* 2001 Ct. Intl. Trade LEXIS 129 (CIT 2001). There are some parallels between *Allegheny Ludlum* and the current case. For instance, the court might embrace Commerce's "same person" test on the basis that it provides Commerce the flexibility to avoid costly and redundant benefit and contribution analyses by convincingly demonstrating that a post-sale entity is, by definition, a beneficiary of a contribution to the pre-sale entity. However, unlike *Allegheny Ludlum,* where Commerce declined to undertake a new and separate countervailing duty investigation during an already ongoing CVD investigation, here Commerce is attempting to avoid completing an ongoing CVD investigation. This critical distinction bars the complete application of the *Allegheny Ludlum* rationale. Since Commerce is already engaged in a CVD investigation it cannot, in the name of efficiency considerations, dispense with its obligation to render a fair and accurate determination. Therefore, to the extent that its "same person" test forgoes accuracy in favor of expedience, it cannot stand. As a result, while the test efficiently and compellingly demonstrates that a contribution likely passed through to the privatized entity where it is the "same person" as the government owned entity, the test's failure to more fully probe the nature and character of the potential benefit enjoyed by the privatized entity cannot be sustained by the discussed efficiency rationale.

mination methodology, the amount paid for AST is totally irrelevant." AST's Supplemental Brief at 29. Indeed it is possible that, as Plaintiffs argue, the value of any benefit received by a subsidized predecessor would be accounted for in full by a company's buyers. At the very least, the benefit stemming from a nonrecurring subsidy may be mitigated by a purchase price that reflects the value of such benefit, especially if AST, as Plaintiffs assert, had "literally paid in full for everything they received." AST's Brief in Support of Motion for Judgment on the Agency Record Under USCIT 56.2 ("AST's Brief") at 14. Logic dictates that a subsidy and the attendant benefit, which by definition is a valuable contribution bestowed without adequate remuneration,[8] cannot exist where that benefit is purchased for full consideration. Indeed, the *Delverde III* court itself stated with regard to Commerce's previous methodology:

> Had Commerce fully examined the facts, it might have found that Delverde paid full value for the assets and thus received no benefit from the prior owner's subsidies, or Commerce might have found that Delverde did not pay full value and thus did indirectly receive a "financial contribution" and a "benefit" from the government by purchasing its assets from a subsidized company "for less than adequate remuneration."

Delverde III at 1368 (citations omitted).

Although the court recognizes that the purchase of a public entity's assets at fair market value is not dispositive of a benefit determination under the statute, that fact must be fairly considered in arriving at that determination. Indeed, Defendant-Intervenors are correct in pointing out that:

> [T]he only facts AST deemed relevant to the agency's determination of whether a subsidy was eliminated by a change of ownership—whether the sale was made at fair market value and whether the price was arrived at through arm's length negotiations—are the very facts that the statute and the *Delverde* court held are *not* determinative of whether a subsidy has been eliminated."

Defendant-Intervenors' Brief In Opposition to Plaintiffs' Rule 56.2 Brief and AST's Supplemental Briefs Addressing Commerce's Redeter-

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[8] 19 U.S.C. §1677(5)(E) provides:

> Benefit conferred. A benefit shall normally be treated as conferred where there is a benefit to the recipient, including—
>
> (i) in the case of an equity infusion, if the investment decision is inconsistent with the usual investment practice of private investors, including the practice regarding the provision of risk capital, in the country in which the equity infusion is made,
>
> (ii) in the case of a loan, if there is a difference between the amount the recipient of the loan pays on the loan and the amount the recipient would pay on a comparable commercial loan that the recipient could actually obtain on the market,
>
> (iii) in the case of a loan guarantee, if there is a difference, after adjusting for any difference in guarantee fees, between the amount the recipient of the guarantee pays on the guaranteed loan and the amount the recipient would pay for a comparable commercial loan if there were no guarantee by the authority, and
>
> (iv) in the case where goods or services are provided, if such goods or services are provided for less than adequate remuneration, and in the case where goods are purchased, if such goods are purchased for more than adequate remuneration.
>
> For purposes of clause (iv), the adequacy of remuneration shall be determined in relation to prevailing market conditions for the good or service being provided or the goods being purchased in the country which is subject to the investigation or review. Prevailing market conditions include price, quality, availability, marketability, transportation, and other conditions of purchase or sale.

mination on Remand ("DI's Brief") at 11–12 (emphasis in original). However, because a given factor is not dispositive does not make it irrelevant.[9] As Plaintiffs contend, Commerce's test appears to miss the mark and "[r]ather the fundamental issue is whether any such alleged 'successor' *actually received a market benefit* during the period of review with regard to the products under investigation." AST's Supplemental Brief at 18 (emphasis in original).[10]

C

SINCE THE "SAME PERSON" TEST DOES NOT PASS MUSTER UNDER *DELVERDE III*, COMMERCE'S OBLIGATIONS UNDER INTERNATIONAL LAW AND THE CHARMING BETSY DOCTRINE ARE NOT RELEVANT

Since Commerce's "same person" test determines the presence and scope of a potential benefit in *per se* fashion, it fails under the rationale articulated in *Delverde III* and as such, the court need not deal with Commerce's obligations under international law and the *Charming Betsy* doctrine. It is sufficient to recognize that under the WTO's decisions in *UK Leaded Bars,* Commerce's focus on principles of successorship as the sole criteria for the imposition of countervailing duties in the absence of a benefit determination was also rejected. In *UK Leaded Bars,* with regard to Commerce's argument that the subject government owned and subsequently privatized company were the "same person", the WTO Panel and Appellate Body responded:

> We, however, are in no doubt that, for the purpose of determining "benefit", a clear distinction should be drawn between BSC, and UES and BSplc/BSES respectively. This is because the changes in ownership leading to the creation of UES and BSplc/BSES involved the payment of consideration for the productive assets etc. acquired by those entities from BSC. Since the finding of "benefit" to BSC was effectively based on BSC acquiring those productive assets etc.

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[9] However, the Defendant-Intervenors' companion argument that the fact the current subsidies are non-recurring and were allocated prior to the current privatization does not itself invalidate the "same person" test's outcome is accurate. As the Defendant-Intervenors state, "Commerce and the courts have long-recognized that nonrecurring subsides, such as the massive grants and equity infusions received by AST, may be allocated and countervailed over a period of years." *Id.* at 14 (citing *Saarstahl AG v. United States,* 78 F.3d 1539, 1543 (Fed Cir. 1996); *Countervailing Duties; Final Rule,* 63 Fed. Reg. 65,348, 65,415–17 (1998) (§§ 351.524 and 525); S. Rep. No. 249, 96th Cong., 1st Sess., at 85–86 (1979)). Moreover as a logical corollary, "[w]here nonrecurring subsidies are provided to a company, the subsidy benefit is allocated over time based on the average useful life of the company's assets * * *. [T]he Department recognizes that the bestowal of a nonrecurring subsidy to a company will provide a financial contribution and a benefit to that company's exports for many years." *Id.* (citations omitted). Moreover, if this approach were rejected, then all non-recurring subsidies, whose impact and benefit are enjoyed subsequently in the form of enhanced productivity, cost-advantage, etc. would always escape the imposition of countervailing duties.

Nonetheless, since the "same person" test focuses almost exclusively on the dynamics of successorship as a proxy for a more focused benefit investigation, the imposition of countervailing duties based thereon is not supported by substantial evidence.

[10] The "same person" test and its faults in relation to *Delverde III* are comprehensively analyzed in two recent decisions *Allegheny Ludlum Corp. et al. v. United States,* 26 CIT ____, 2002 Ct. Intl. Trade Lexis 1, Slip-Op. 02–01 (January 4, 2002) and *GTS Industries S.A. v. United States,* 26 CIT ____, 2002 Ct. Intl. Trade Lexis 2, Slip-Op. 02–02 (January 4, 2002). The court notes that the same person test was rejected in the above decisions under a similar rationale.

> Although Commerce's "person" analysis is not an explicit *per se* rule, it still fails to meet the requirements of the statute because it concludes that a purchaser received a subsidy without making "specific findings of financial contribution and benefit * * * that are required by §§1677(5)(D) and (E)." *Delverde III*, 202 F.3d at 1367. An initial public offering of a formerly government controlled corporation will often involve the same entity pre- and post-sale using Commerce's criteria. Indeed, in nearly every circumstance that a state-run enterprise is privatized as a whole entity, Commerce would be able to find that the same "person" exists. Commerce's use of a methodology that eliminated the need to determine if the subsidies passed through to the privatized entity in this situation was specifically rejected by the Federal Circuit in *Delverde III*.

Allegheny Ludlum Corp., 26 CIT ____, Slip-Op. 02–01 at 18.

> for free, the fact that consideration is provided for those productive assets etc. by UES and BSplc/BSES, or the owners thereof, must raise the possibility that the original "benefit" determination in respect of BSC is no longer valid for UES and BSplc/BSES respectively. For this reason, we consider that the changes in ownership leading to the creation of UES and BSplc/BSES should have caused the USDOC to examine whether the production of leaded bars by UES and BSplc/BSES respectively, and not BSC, was subsidized. In particular, [Commerce] should have examined the continued existence of "benefit" already deemed to have been conferred by the pre-1985/86 "financial contribution" to BSC, and it should have done so from the perspective of UES and BSplc/BSES respectively, and not BSC.
>
> The United States has argued that there is no need to determine "benefit" in respect of successor companies * * *. We consider that the presumption of "benefit" flowing from united, non-recurring "financial contributions" is rebutted in the circumstances surrounding the changes in ownership leading to the creation of UES and BSplc/BSES respectively. In such circumstances, the continued existence of benefit to UES and BSplc/BSES respectively must be demonstrated.

UK Leaded Bars Panel Report at para 6.70–71 (footnotes omitted). Although the WTO Panel reaches a conclusion similar to the one herein, the court merely takes note of the holding's thrust without opining on Commerce's obligations thereunder.

D

COMMERCE PROPERLY RELIED UPON ADVERSE FACTS AVAILABLE

Commerce's resort to other facts available and adverse facts available in devising its new privatization methodology was the result of AST's and the GOI's willful non-compliance with Commerce's questionnaires and, as such, Commerce proceeded appropriately. Plaintiffs complain that as a result, the extent of the current subsidies were unfairly overstated. AST's Supplemental Brief at 30. However, Commerce, in arriving at its new privatization methodology, provided the respondents with an array of questions seeking pertinent information. Indeed, an explanation as to the questions' significance was provided to the respondents. The respondents thought such questions irrelevant to Commerce's investigation and refused to provide answers. As such, they cannot be heard to complain about Commerce's decision to employ adverse facts available to fill this void.

In particular, Commerce averred that "with regard to the pre-privatization asset spin-offs as well as the post-privatization sales of shares * * * [a]lthough there is some information regarding these transactions on the record from the investigation, we find that this information does not provide an adequate basis on which to determine whether these sales represented new entities that were sold from ILVA (the pre-1993 asset spin-offs) or AST (the post-privatization sales of shares). Consequently we determine that the information on the record is too incom-

plete to serve as a reliable basis for the determination with respect to these transactions." *Remand Determination* at 23–24. As a result, Commerce forwarded questionnaires aimed at acquiring this information to the respondents.

In fact, Commerce provided the respondents two independent opportunities to respond to these questionnaires, both of which were declined. *See Remand Determination* at 23–25. Moreover, the respondents' decision not to comply was not motivated by any inadvertent roadblock, such as a clerical error. Rather, AST explained its failure to respond on the basis that "these transactions are not relevant to the terms of AST's privatization, the Department's treatment of which is the subject of this remand * * * If the Department believes it needs additional information regarding any of these transactions, AST, the GOI and the EC respectfully request that the Department explain how such information is pertinent to the proper scope of this remand." AST Remand Questionnaire Response at 28–29. That situation does not come close to situations where a respondent acted to the best of its ability under the circumstances. *See e.g., Acciai Speciali Terni v. United States,* Slip-Op 01–36, 38–41 (March 31, 2001). Nonetheless, Commerce complied with the above request and stated:

> [t]he purpose of this remand is to re-examine our change-in-ownership methodology, in light of, *inter alia, Delverde.* We therefore reiterate our request for complete remand questionnaire responses with regard to all of the changes in ownership. If we determine that this information is necessary to our remand determination and it is not provided, we may resort to facts otherwise available, including assumptions that are adverse to the respondents' interests.

Remand Determination at 24 (quoting Commerce's Remand Supplemental Questionnaire at Question 15).

This statement is direct and its thrust patently obvious; the dynamics of the subject change-in-ownership is most certainly relevant in compiling a definitive change-in-ownership methodology, especially given the court's directions in *Delverde III.* Therefore, the respondents' second refusal to answer these questions strikes the court as providing a reasonable basis for Commerce to conclude that cooperation was lacking. Furthermore, as Defendant-Intervenors state, "[I]n making this choice, the parties were well aware of the possible consequence of their noncompliance, as the Department explicitly advised them at each stage of the remand that failure to provide requested information could result in a finding using adverse facts available, or adverse facts available." DI's Brief at 40 (citing *Remand Determination* at 18).

Commerce correctly proceeded under the statutes governing the use of adverse facts available, 19 U.S.C. § 1677e[11] and 19 U.S.C. § 1677m.[12] As "the necessary information [was] not available on the record," § 1677e was triggered. Secondly, the Department conducted itself according to § 1677m, by first finding that the original set of responses were deficient and then offering an opportunity to correct the deficiency. Also, consistent with § 1677m(d), Commerce informed the respondents of the nature of the deficiency. In response to the respondents' rationale for withholding the requested information, Commerce correctly concluded that the parties had not "acted to the best of their ability to comply with [the Department's] requests for information," *Remand Determination* at 25 and 36–37, thereby warranting the use of adverse facts available under § 1677e.

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[11] § 1677e. Determinations on the basis of the facts available

(a) In general. If—

(1) necessary information is not available on the record, or

(2) an interested party or any other person—

(A) withholds information that has been requested by the administering authority or the Commission under this title,

(B) fails to provide such information by the deadlines for submission of the information or in the form and manner requested, subject to subsections (c)(1) and (e) of section 782 [19 USCS § 1677m(c)(1) and (e)],

(C) significantly impedes a proceeding under this title, or

(D) provides such information but the information cannot be verified as provided in section 782(i) [19 USCS § 1677m(i)], the administering authority and the Commission shall, subject to section 782(d) [19 USCS § 1677m(d)], use the facts otherwise available in reaching the applicable determination under this title.

[12] § 1677m provides, in relevant part:

Conduct of investigations and administrative reviews.

c) Difficulties in meeting requirements.

(1) Notification by interested party. If an interested party, promptly after receiving a request from the administering authority or the Commission for information, notifies the administering authority or the Commission (as the case may be) that such party is unable to submit the information requested in the requested form and manner, together with a full explanation and suggested alternative forms in which such party is able to submit the information, the administering authority or the Commission (as the case may be) shall consider the ability of the interested party to submit the information in the requested form and manner and may modify such requirements to the extent necessary to avoid imposing an unreasonable burden on that party.

(2) Assistance to interested parties. The administering authority and the Commission shall take into account any difficulties experienced by interested parties, particularly small companies, in supplying information requested by the administering authority or the Commission in connection with investigations and reviews under this title, and shall provide to such interested parties any assistance that is practicable in supplying such information.

(d) Deficient submissions. If the administering authority or the Commission determines that a response to a request for information under this title does not comply with the request, the administering authority or the Commission (as the case may be) shall promptly inform the person submitting the response of the nature of the deficiency and shall, to the extent practicable, provide that person with an opportunity to remedy or explain the deficiency in light of the time limits established for the completion of investigations or reviews under this title. If that person submits further information in response to such deficiency and either—

(1) the administering authority or the Commission (as the case may be) finds that such response is not satisfactory, or

(2) such response is not submitted within the applicable time limits, then the administering authority or the Commission (as the case may be) may, subject to subsection (e), disregard all or part of the original and subsequent responses.

(e) Use of certain information. In reaching a determination under section 703, 705, 733, 735, 751, or 753 [19 USCS § 1671b, 1671d, 1673b, 1673d, 1675, or 1675b] the administering authority and the Commission shall not decline to consider information that is submitted by an interested party and is necessary to the determination but does not meet all the applicable requirements established by the administering authority or the Commission, if—

(1) the information is submitted by the deadline established for its submission,

(2) the information can be verified,

(3) the information is not so incomplete that it cannot serve as a reliable basis for reaching the applicable determination,

(4) the interested party has demonstrated that it acted to the best of its ability in providing the information and meeting the requirements established by the administering authority or the Commission with respect to the information, and

(5) the information can be used without undue difficulties.

VI

CONCLUSION

Commerce has failed to devise a new privatization methodology that effectuates the underlying statute or the instructions of the Federal Circuit. Therefore, since the majority of the findings in the *Remand Determination* are invariably linked to the outcome of "same person" test, they cannot be sustained. On the basis of this test alone, Commerce has not articulated "a 'rational connection between the facts found and the choice made.'" *Bando Chem. Indus. v. United States,* 16 CIT 133, 136, 787 F. Supp. 224, 227 (1992) (quoting *Bowman Transportation, Inc. v. Arkansas-Best Freight System, Inc.,* 419 U.S. 281, 285 (1974)). In particular, Commerce assessed a subsidy rate of 17.25%, an upward assessment from 15.16%, which was almost entirely founded on the determination that the KAI-AST is the "same person" as GOI-AST. *See* AST's Supplemental Brief at 28. As discussed, although the determination that the two entities are the "same person" is supported by substantial evidence, Commerce's further conclusion that a benefit was enjoyed by KAI-AST as a result of a subsidy bestowed upon GOI-AST is not.

Commerce, in order to properly effectuate the statute, must demonstrate that such a benefit exists and it must prove its extent. Commerce's current assertion that simply because that GOI-AST and KAI-AST are the "same person" the *full* extent of the subject subsidy's benefit was enjoyed by the latter is unsupported. Therefore Plaintiffs' arguments that Commerce has overstated the current subsidy rate based on Commerce's revised privatization methodology is persuasive only to the extent that Commerce has not demonstrated a benefit at all. The court therefore refrains from further examination or breakdown of the assessed subsidy rate, as it is conceivable that Commerce may upon further remand demonstrate that this rate is justified. However, Commerce must examine and consider certain material facts as part of its analysis, including but not limited to the impact that the purchase price paid by KAI for AST's assets has upon whatever benefit KAI-AST may have enjoyed.

For the foregoing reasons, the court finds that Commerce's *Remand Determination* is not supported by substantial evidence and is not in accordance with the law.

(Slip Op. 02–26)

GEUM POONG CORP. AND SAM YOUNG SYNTHETICS CO., LTD., PLAINTIFFS *v.* UNITED STATES, DEFENDANT *v.* E.I. DUPONT DE NEMOURS, INC., ARTEVA SPECIALTIES S.A.R.L., D/B/A KOSA; AND WELLMAN, INC., DEFENDANT-INTERVENORS

Consolidated Court No. 00–06–00298

[ITA's antidumping duty remand determination remanded.]

(Dated March 8, 2002)

Sandler, Travis & Rosenberg, P.A. (Philip S. Gallas, Gregory S. Menegaz and *Mark R. Ludwikowski)* for plaintiffs.

Stuart E. Schiffer, Acting Assistant Attorney General, *David M. Cohen,* Director, Commercial Litigation Branch, Civil Division, United States Department of Justice *(Erin E. Powell), Scott D. McBride,* Office of the General Counsel, United States Department of Commerce, of counsel, for defendant.

Collier Shannon Scott, PLLC (Paul C. Rosenthal, Kathleen W. Cannon, David C. Smith, Jr., and *Grace W. Kim)* for defendant-intervenors.

OPINION

RESTANI, *Judge:* This matter comes before the court as a result of the court's decision in *Geum Poong Corp. v. United States,* 163 F. Supp. 2d 669 (Ct. Int'l Trade 2001) [hereinafter, *"Geum Poong I"],* in which *Certain Polyester Staple Fiber from the Republic of Korea and Taiwan,* 65 Fed. Reg. 16,880 (2000), *amd'd,* 65 Fed. Reg. 33,807 (Dep't Comm. 2000) (final determ.) [hereinafter, "Final Determination"], was remanded for Commerce to reconsider Geum Poong's CV profit calculation. The court now reviews Commerce's *Final Results of Redetermination Pursuant to Court Remand* (2001) [hereinafter, "Remand Determination"].

JURISDICTION

The court exercises jurisdiction pursuant to 28 U.S.C. § 1581(c) (1994), which provides for judicial review of a final determination by the Department of Commerce in accordance with the provisions of 19 U.S.C. § 1516a(a)(2)(B)(i) (1994).

DISCUSSION

In the Final Determination, Commerce calculated Geum Poong's CV profit under 19 U.S.C. § 1677b(e)(B)(iii) ("Alternative Three")[1] by taking a simple average of (A) profit data on the Korean man-made fiber industry from the Bank of Korea (the "BOK data") with (B) the figure for the weighted-average profit rates of Samyang and Sam Young, the other respondents in the investigation. In *Geum Poong I,* the court held

[1] Under Alternative Three, Commerce may calculate CV profit by "any * * * reasonable method, *except that the amount allowed for profit may not exceed the amount normally realized by exporters or producers (other than the exporter or producer described in clause (i)) in connection with the sale, for consumption in the foreign country, of merchandise that is in the same general category of products as the subject merchandise*[.]" 19 U.S.C. § 1677b(e)(2)(B)(iii) (emphasis added). The emphasized portion of Alternative Three is referred to as the "profit cap." *See Floral Trade Council v. United States,* 41 F. Supp. 2d 319, 326–27 (Ct. Int'l Trade 1999).

that Commerce did not err in choosing to calculate CV profit under Alternative Three on the grounds that: (1) the Alternatives in 19 U.S.C. § 1677b(e)(B) are not hierarchical; and (2) Commerce could not use Alternative Two without violating limitations on use of proprietary business information. The court nevertheless found that Commerce failed to meet its burden of explaining its reasoning with respect to: (1) resorting to facts available, or (2) its facts available selections.[2] On remand, Commerce did not address the court's concerns, but rather adhered to its prior methodology and provided no rational explanation for its choices.[3]

I. The Availability of Data for Calculating a Facts Available Profit Cap

In *Geum Poong I,* the court held that in calculating CV profit under a facts available methodology, i.e., one that employs Alternative Three without the profit cap, Commerce may rely on any data available to it, which may include some non-home market sales data, provided its method is reasonable and it provides an adequate explanation thereof. " *Geum Poong I* at 676. The court found, however, that Commerce did not explain whether any data were available to calculate the profit cap, and noted that Commerce failed to address the adequacy of the financial statements for Samyang, Saehan Industries, Inc., and SK Chemicals that had been submitted by Geum Poong in response to Commerce's January 11, 2000 request for additional information. *Id*. at 678 & nn. 12, 14. The court also found that Commerce failed to explain why the BOK data do not serve as a basis for calculating a "facts available profit cap." *Id.* at 678–79. Accordingly, in *Geum Poong I,* the court instructed Commerce to calculate a "facts available profit cap," or to explain why such a calculation could not be made in this case.

In the Remand Determination, Commerce explained that it could not calculate an appropriate "profit cap" because the four possible sources of data included or were likely to include non-home market sales.[4] Commerce stated:

> With the exception of the Samyang CV profit data developed * * * in the underlying investigation * * * all of the profit data on the record of this proceeding is flawed for purposes of calculating a profit cap because it includes, or is likely to include, profits earned on sales outside of Korea. Consequently, as a matter of law and regulation, these sources could not be used as a profit cap and, lacking a profit cap, the Department was forced to use the methodology contem-

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[2] The *Statement of Administrative Action,* accompanying H.R. Rep. No. 103–826(I), at 840 (1994), *reprinted in* 1994 U.S.C.C.A.N. 4040, 4176 (1994) [hereinafter "SAA"], specifies that "[i]f [Alternative Three] is selected, Commerce will provide to interested parties a description of the method chosen and an explanation of why it was selected."

[3] In its previous decision, the court upheld two other aspects of Commerce's determination which are unrelated to the profit calculation. Defendant did not respond to Plaintiffs' objections to the remand redetermination.

[4] Commerce explains why the following sources were inappropriate for a profit cap under 1677b(e)(2)(B)(iii): (1) Geum Poong's reported profit reflected profits from several of Geum Poong's third country markets; (2) Sam Young's profit was not based on home market sales, and although Samyang's profit reflected profits exclusively on sales in the Korean market, the use of Samyang's profit would have impermissibly revealed its proprietary profit ratio; (3) information regarding the public audited financial statements of certain PSF producers (Samyang, Saehan and SK Chemicals) indicated that these producers also had sales outside the Korean market; and (4) BOK data likely included companies that sell outside of the Korean market. Remand Determination at 2–3.

> plated in the SAA, i.e., to apply alternative (iii) on the basis of the facts available (SAA at 841).

Remand Determination at 4.

Commerce ignores the court's specific instruction to apply a "facts available profit cap" if a reasonable means of calculating one could be devised. Rather than assess the reasonableness of using any of the four available sources in light of perceived deficiencies, Commerce merely reiterates its previous argument that it cannot apply a profit cap because the statute limits it to considering profit rates earned on sales in Korea. Commerce essentially considers itself compelled to reject any data that may include *any* non-home market sales, even when calculating a "facts available profit cap."

By its nature, however, a "facts available profit cap" contemplates that there may be some deficiencies in the data, e.g., the data include some non-home market sales.[5] As the court stated in *Geum Poong I,* "the SAA, while approving Commerce's 'no profit cap' methodology for cases where no cap data is available at all, provides no guidance in the case of a technically deficient cap. * * * Because the statute mandates the application of a profit cap, Commerce cannot sidestep the requirement without giving adequate explanation even in a facts available scenario." *Geum Poong I* at 679. The court also noted that "in applying facts available, Commerce complies with statutory provisions to the extent possible." *Geum Poong I* at 675 n.8. In calculating a "facts available profit cap," therefore, Commerce must determine whether the sales outside of Korea, or any other identified deficiency in the data, are of such extent that using the data would render the profit cap calculated therefrom unreasonable or inaccurate. In this case, Commerce did not determine that any of the data sources were predominantly or exclusively non-home market sales. Nor did Commerce assess the relative validity among the sources in light of their deficiencies. Therefore, Commerce did not fulfil its obligation to determine whether a reasonable "facts available profit cap" could be applied, and has not presented sufficient grounds for dispensing with the profit cap altogether.

II. Reasonableness of Commerce's Selected Methodology

In *Geum Poong I,* the court found that even if Commerce's decision to calculate CV profit under Alternative Three without the profit cap were justified, Commerce failed to explain adequately the reasonableness of the methodology it actually employed. Specifically, the court found that Commerce failed to account for: (1) its rejection of the financial statements of three Korean PSF producers, and (2) potential sources of dis-

[5] According to the SAA, Commerce may calculate CV profit under Alternative Three without applying the profit cap, that is, under "facts available" under certain circumstances. The SAA explains that:

> The Administration * * * recognizes that where, due to the absence of data, Commerce cannot determine amounts for profit under alternatives (1) and (2) or a "profit cap" under alternative (3), it might have to apply alternative (3) on the basis of "the facts available." This ensures that Commerce can use alternative (3) *when it cannot calculate the profit normally realized by other companies on sales of the same general category of products*.

SAA at 841, *reprinted in* 1994 U.S.C.C.A.N. at 4177. Although the statute indicates that the profit cap is to be based on home-market sales, the SAA contemplates only that Commerce will dispense with the profit cap when profit data are unavailable with respect to other companies on sales of the same general category of products. The SAA says nothing about dispensing with the profit cap when segregated data on solely home market sales are unavailable.

tortion including (a) the likelihood of double-counting Samyang and/or Sam Young data; (b) the use of a simple average of company-specific data with industry wide data, each comprising a different scope of merchandise; and (c) the apparent inconsistency in its statements as to which companies were included in the BOK data.

1. Rejection of Audited Financial Statements

On remand, Commerce explains that it did not use the audited financial statements of three PSF producers (Samyang, Saehan, and SK Chemicals) because it "is cautious about using company specific data submitted by parties * * * because parties can be expected to submit only data that is favorable to them." Remand Redetermination at 5. Commerce also expresses concern with the "low" profits for these three companies, claiming that "[o]ther Korean producers and exporters, whose financial results were not submitted, might have had higher rates." *Id.* Commerce also questions the usefulness of the financial statements on the ground that they reflected the financial results for the entire operations of these companies and likely included non-subject merchandise and sales to the United States.

The court rejects Commerce's explanations for three reasons. First, the financial statements were submitted by Geum Poong in response to Commerce's January 11, 2000 request for additional information. *See Letter from Susan H. Kuhbach* (Jan 11, 2000), P. R. Doc. 247. In this request, Commerce indicated that "any information submitted must be credible and self-verifying, e.g., audited financial statements of Korean firms that produce merchandise in the same general category as subject merchandise." *Id.* Commerce does not state that the statements submitted did not meet its description, and it could have requested still more information if it considered the submission somehow incomplete. Second, Commerce deems the profits "low" without indicating any basis for comparison. If Commerce suspected that other PSF producers may have higher profit levels, it could have sought additional information from Geum Poong or a third source. Commerce has not presented any reason other than speculation why the profits for these three companies are unrepresentative of the profit experience of PSF producers in Korea.

Third, Commerce's refusal to use this data is inconsistent with its past practice of accepting profit data from financial statements of exporters to calculate CV profits as "facts available" under Alternative Three. For example, in *Shop Towels from Bangladesh,* 61 Fed. Reg. 55,957, 55,961 (Dep't Comm. 1996) (final admin. rev.), Commerce calculated CV profit by relying on actual profit data from the financial statements of three Bangladesh-based producers of products in the same general category as those under investigation. Commerce accepted the financial statements in that case notwithstanding petitioner's claims that two of the companies' annual reports do not indicate whether they export merchandise, and that there was reason to believe the third in fact included export sales. Commerce indicated that it was sufficient that there was evidence of sales in Bangladesh. In contrast, Commerce

rejected the use of financial statements for a Bangladesh textile company that made only export sales. *Id.* at 55,960 cmt. 3. In this case, Commerce states that "information indicates that [the three producers] also had sales outside the Korean market," but does not maintain that any of the three Korean PSF producers sold exclusively or even primarily for export, either to the U.S. or to third country markets.[6] Remand Determination at 3.

In sum, Commerce has not provided a valid reason why the profit experience of the three companies would be unrepresentative of home market sales experience, nor is its determination in accordance with past practice. This is not to say, however, that Commerce was bound to use the financial statements. If Commerce had alternative sources of data that would be equally or more reliable and/or representative of home market profit experience, it is within Commerce's discretion to use either set of data. The court finds, however, that to date Commerce's selection of an alternate methodology is unsupported.

2. Simple Average of Sam Young's and Samyang's Profit Rates with the BOK Data

a. Double Counting

In *Geum Poong I,* the court instructed Commerce to reevaluate its method of combining company-specific data with industry-wide data to determine CV profit in light of the possibility that Samyang's and Sam Young's data already may have been included in the BOK data. On remand, Commerce acknowledges that Samyang and Sam Young's data were likely included in the BOK average. Commerce asserts that its combination was the best alternative under the following reasoning: (1) Samyang's calculated profit rate should be given weight because it was based on sales in Korea; (2) because that rate is proprietary, Samyang's profit could not be used by itself; (3) Sam Young's profit rate could not be used alone because it reflects profits earned on third country sales, not home market sales; and (4) the BOK data could not be used

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[6] The court notes that, since the Final Determination, Commerce recognized that circumstances may warrant the use of other companies' financial statements to calculate CV profit under Alternative Three notwithstanding the possible inclusion of some U.S. sales. In *Pure Magnesium from Israel,* 66 Fed. Reg. 49,349, (Dep't Comm. Sept. 27, 2001) (final determ.), Commerce calculated CV profit under Alternative Three using as a profit source the financial statements of a producer of goods in the same general category despite the fact that these statements included export sales, which may or may not have included U.S. sales. In that case, Commerce indicated that it weighed several factors, including: (1) the similarity of three potential surrogate companies' business operations and products to the respondent's; (2) the extent to which the financial data of the surrogate company reflects sales in the United States as well as the home market; and (3) the contemporaneity of the surrogate data to the POI. *Id.* at cmt. 8. Commerce explained the factors as follows:

> [1] The greater the similarity in business operations and products, the more likely that there is a greater correlation in the profit experience of the two companies.
> [2] Concerning the extent that U.S. sales are reflected in the surrogate's financial statements, because the Department is typically comparing U.S. sales to a normal value from the home market or third country, it does not want to construct a normal value based on financial data that contains exclusively or predominantly U.S. sales. Further, in accordance with § 1677b(e)(2)(b) generally, we seek to the extent possible home market profit experience. [3] Finally contemporaneity is a concern because markets change over time and the more current the data the more reflective it would be of the market in which the respondent is operating.

Id. Commerce then analyzed each factor with respect to each potential surrogate. Thus, although Commerce seeks "to the extent possible" to determine "home market profit experience," it need not reject financial statements of a potential surrogate simply because that company made some non-home market sales. In this case, Commerce has not identified or weighed any factors, but instead categorically disqualified a potential source of data based on the mere possibility of some non-home market sales. Commerce has not stated that the sales of these companies are "predominately or exclusively" to the United States or to third country markets.

alone on the ground that, as the data likely reflect a wide range of products and the experience of much of the Korean industry, they reflects profits earned in all markets. Commerce indicates that under these circumstances, it chose to combine the BOK data with the Samyang and Sam Young profit data in order to give "greater weight" to the latter. Commerce stated its reasoning as follows:

> Given the options available for using these sources singly or in combination, the Department decided to combine the Samyang, Sam Young, and BOK data. In doing so, the Department was able to incorporate Samyang's home market profit experience with other useable data from Sam Young and the BOK. The two investigated companies, Samyang and Sam Young were effectively given greater weight because their data conformed to the subject merchandise and did not include profits earned in the United States. However, weight was also given to the BOK data because it reflected the experience of the broader Korean industry and it included home market profits.

Remand Determination at 5–6. Commerce admits that this method likely caused Samyang and Sam Young to be double-counted, but explained that the likelihood of skewed results is very small for two reasons: (1) Commerce states that it was aware of at least 25 producers of PSF in Korea, and therefore the profit rates for Sam Young and Samyang as reflected in the BOK data were diluted; and (2) the Samyang and Sam Young profit rates reflected in the BOK data likely differed from the profit rates calculated by the Department for these companies.[7]

Commerce's justification for its decision to combine the data is not rational, and skirts the court's concerns regarding skewed results. First, Commerce's explanation that Sam Young's data should be given "greater weight" because it did not have U.S. sales is disingenuous. Commerce admitted that Sam Young's profit is not based on any home market sales whatsoever. If anything, double-counting Sam Young's data would result in a *less* accurate measure of the CV profit rate than if it were excluded entirely because the goal in calculating CV profit is to approximate the home market profit experience.[8] Furthermore, double-counting is ordinarily a problem that the agency seeks to correct if possible, rather than a methodology adopted to assign more weight to a

[7] Commerce indicates that its Samyang and Sam Young calculations were obtained from comparison market sales made in the ordinary course of trade.

[8] Commerce further explained that:

> Under this logic, it would not have been correct for the Department to include the profit rates for the companies, other than Samyang, whose public audited financial statements were submitted by Geum Poong. In particular, because these financial statements reflected the financial results for the entire operations of these companies, they likely included non-subject merchandise and sales to the United States. Thus, they did not likely present information that was as useful as the profit rates calculated by the Department for Sam Young and Samyang, nor did they have the advantage of presenting a broad picture of the Korean industry.

Commerce's explanation misses the mark, since the financial statements apparently reflect sales in the same general category, and include home market sales. *See* discussion under II.1, *supra*.

particular set of data.[9] There is no support for the proposition that Commerce's discretion to give particular data more weight includes the discretion to distort reality intentionally by factoring into its calculations a preferred set of data more than once, if such double-counting can be avoided. *Cf. Pohang Iron & Steel Co. v. United States,* 118 F. Supp. 2d 1328, 1328–29 (2001) (upholding calculations unavoidably incorporating known double-counting where a respondent failed to submit all information necessary to enable Commerce to resolve the double-counting issue definitively).

Second, Commerce has not given a rational or factually-supported basis for its assertion that the potential for skewed results is minimal. The absolute number of producers overall in some cases may be relevant to whether double-counting substantially distorts an agency's calculations. In this case, however, Commerce had indicated in the Final Determination that Samyang and Sam Young "comprise a substantial portion of the industry." Final Determination at cmt. 15. Logically, if either of these companies represent a dominant share of the Korean market, its profit rate may be substantially higher than the other companies figuring in the BOK data, or for some other reason be unrepresentative of profits "normally realized" by other companies producing goods in the same general category as the subject merchandise. This potential source of distortion would be the case irrespective of the number of Korean man-made fiber producers overall. Counting potentially anomalous profit rates twice, therefore, would give a misleading picture of the profit experience of other Korean producers of goods in the same general category as the subject merchandise.

On remand, Commerce has not addressed the concerns regarding the potential for double-counting expressed in *Geum Poong I,* or made any other findings to aid the court in assessing the reasonableness of its new combination methodology.

b. Mixed Data Sets

The court charged Commerce with reassessing on remand the reasonableness of its method of taking a simple average of company-specific

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[9] The facts of this case stand in contrast to those in *Asociacion de Productores de Salmon y Trucha de Chile,* 180 F. Supp. 2d 1360, 1365–68 (Ct. Int'l Trade 2002). There, the Commission had access to two sets of data for the period 1994–1998. The first set was "consolidated subject producer data" submitted by a salmon producers association that incorporated estimated production and capacity information for a number of smaller Chilean salmon producers. Larger producers individually submitted data, which included production and capacity data from a producer already included in the association's submission, Fiordo Blanco. Because the two sets of data were added together to arrive at a total figure for production and capacity, the data for this producer would be included twice. The Commission was able to correct for the double-counting of data for the period 1994–1997 by deducting from the consolidated producer data the amounts for the individual producer indicated in the larger producers' submitted data. The Commission did not do so for the 1998 data, however, because the actual production and capacity levels for Fiordo Blanco in 1998 were much higher than the association's estimate for that year. As a result, exclusion of the actual individual producer's data from the estimated amounts would further underestimate the subject producers' production and capacity levels for that year. In addition, the association admitted to unidentified "clerical errors" and was unable to provide the Commission with "deconsolidated production data" that would indicate how its estimates for Fiordo Blanco were calculated. Thus, the Commission determined that excluding the individual producer's actual data would give less accurate results, and declined to make the adjustment. The court held that the Commission's decision was reasonable because, faced with a choice between imperfect alternatives, the Commission opted for the one that it considered less inaccurate.

In this case, Commerce states that the figures for Samyang and Sam Young "likely differ" from those already included in the BOK data, but does not indicate that its figures are more accurate, or that the BOK data itself is inaccurate, as in *Asociacion Productores de Salmon y Trucha de Chile.* Commerce was not forced to choose between imperfect alternatives, but made a methodological choice to assign greater weight to a particular set of data by double-counting it.

data (i.e., the Samyang and Sam Young data) with industry wide data (i.e., the BOK data), when the former is limited to one product-type and the latter includes all man-made fibers. On remand, Commerce admits that the combination of company-specific data with industry-wide data for calculating CV profit is unprecedented.[10] Commerce asserts, however, that this combination allows it to include "as much information as possible" to determine Geum Poong's CV profit "as accurately as possible." Remand Redetermination at 6. It is not clear to the court how *more* information necessarily equates to *more accurate* information. Performing calculations with data simply because they are available may give the illusion of accuracy, but this hardly constitutes a "reasonable methodology." In the absence of any precedent or valid explanation of why mixing two data sets with the product group of one fully encompassed in that of the other, the court finds that Commerce has not established that its methodology is reasonable or supported by the evidence of record.

c. Inconsistency

In *Geum Poong I,* the court directed Commerce's attention to an apparent inconsistency in its justification for combining the Samyang and Sam Young profit rates with the BOK data (i.e., that the latter includes data for Saehan Industries and SK Chemicals), with its claim that it used a simple average as "facts available" in part because Commerce was unaware of which companies were included in the BOK data. On remand, Commerce fails to appreciate the court's concern, stating only that it "made a single assumption about which companies are likely reflected in the BOK data," and that "it is best to treat the BOK data as including most, if not all of Korean producers of manmade fibers." Remand Determination at 7. In its explanation of why it did not use the audited financial statements for three Korean PSF producers submitted by Geum Poong, Commerce states that "the financial results of two of these companies, Saehan Industries, and SK Chemicals, were included in the BOK data. The third company's data, i.e., Samyang's data, were used, albeit in a different form." Remand Determination at 6. Commerce also indicated in its explanation of the effect of double-counting that a total of 25 PSF producers are included in the data, yet it does not indicate the source of this information. Either Commerce knew which companies were included in the BOK data or it did not. It is not clear to the court how Commerce could know that the financial statements of the companies were included in the BOK data—much less that those of one company appeared "in a different form"—if it considered itself forced to reject the BOK data, for the purpose of calculating a profit cap

[10] In other cases, Commerce has calculated CV profit based on either company/product-specific information or on industry-wide profit information. *See, e.g., Honey from Argentina,* 66 Fed. Reg. 50,611, at cmt. 2 (Dep't Comm. 2001) (final determination) (Commerce calculated CV profit based on cost of production figures from studies published in a publicly available trade publication for the Argentine honey industry provided by the petitioners); *Fresh Kiwifruit from New Zealand,* 62 Fed. Reg. 47,440, 47,441 (Dep't Comm. 1997) (final determination) (in the absence of data on exporters' home market sales profits, Commerce used the average profit of twenty sampled growers to calculate CV profit); *Fresh Atlantic Salmon from Chile,* 63 Fed. Reg. 31,411, 31,435 (Dep't Comm. 1998) (final determination) (Commerce based CV profit on a weighted average of company-specific profit rates of four other Chilean producers).

based on an "assumption" as to which companies were included in the BOK data and the likelihood that these companies sell outside Korea. Thus, in the Remand Determination, Commerce leaves unaddressed the inconsistency about which the court had expressed concerns.

CONCLUSION

Accordingly, the court rejects as unreasonable and unsupported Commerce's determination to dispense with the profit cap and its methodology in calculating CV profit. Commerce must determine Geum Poong's CV profit rate by (1) applying a facts available profit cap, which may or may not include non-home market sales;[11] and (2) calculating a profit rate derived from the financial statements for Samyang, Saehan, and SK Chemicals, or from the industry-wide BOK profit data, or some other method that will avoid the deficiencies described herein.

(Slip Op. 02–27)

ALLOY PIPING PRODUCTS, INC., FLOWLINE DIVISION., MARKOVITZ ENTERPRISES, INC., GERLIN, INC., AND TAYLOR GORGE STAINLESS, INC., PLAINTIFFS *v.* UNITED STATES OF AMERICA, DEFENDANT, AND KANZEN TETSU SDN. BHD., SCHULZ (MFG) SDN. BHD., AND SCHULZ U.S.A., INC., DEFENDANT-INTERVENORS

Consolidated Court No. 01–00099

[Defendant-Intervenors' renewed motion to supplement the administrative record is denied. Plaintiffs' and Defendant-Intervenors' respective motions for judgment upon the agency record are denied. The Department of Commerce's *Final Determination* is sustained. Defendant-Intervenors' application for oral argument is denied.]

(Dated March 11, 2002)

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White & Case, LLP (Walter J. Spak, Robert G. Gosselink, and *Frank H. Morgan),* Washington, D.C., for Defendant-Intervenors.

OPINION

CARMAN, *Chief Judge:* This consolidated action comes before the Court on Plaintiffs' and Defendant-Intervenors' respective motions for

[11] Commerce may dispense with the profit cap only if available data are significantly undermined by non-home market data.

judgment upon the agency record pursuant to USCIT R. 56.2. At issue are several elements of the Department of Commerce's ("Commerce") final affirmative antidumping duty ("AD") determination in *Notice of Final Determination of Sales at Less Than Fair Value: Stainless Steel Butt-Weld Pipe Fittings From Malaysia,* 65 Fed. Reg. 81,825 (Dec. 27, 2000) *("Final Determination").*

Plaintiffs Alloy Piping Products, Inc., Flowline Division., Markovitz Enterprises, Inc., Gerlin, Inc., and Taylor Gorge Stainless, Inc. ("Alloy" or "Domestic Industry") contest Commerce's use of third country sales as the basis for normal value ("NV"). Defendant-Intervenors Kanzen Tetsu Sdn. Bhd., Schulz (Mfg) Sdn. Bhd., and Schulz U.S.A., Inc. ("Kanzen") claim the *Final Determination* is subject to a ministerial error that Commerce has failed to correct. Kanzen also renews its motion, pursuant to USCIT Rules 7(f) and 71(a), for an order requiring Commerce to supplement the administrative record. Defendant, United States, opposes all three motions. On the basis of the papers submitted, the relevant statutes and regulations, and for the reasons set forth herein, the Court denies Alloy's motion for judgment upon the agency record. The Court also denies Kanzen's motion to supplement the administrative record and its motion for judgment upon the agency record. Commerce's *Final Determination* is sustained. Kanzen's application for oral argument is denied. The Court has jurisdiction over this matter pursuant to 28 U.S.C. § 1581(c) (1994).

BACKGROUND

On January 18, 2000, Commerce initiated an AD investigation into whether stainless steel butt-weld pipe fittings from Malaysia were being sold, or were likely to be sold in the United States at less than fair value.[1] *See Initiation of Antidumping Duty Investigation: Stainless Steel Butt-Weld Pipe Fittings from Germany, Italy, Malaysia and the Philippines,* 65 Fed. Reg. 4,595 (Jan. 31, 2000). On February 10, 2000, Kanzen submitted a questionnaire response, alleging that its Malaysian home market sales were not "viable" for purposes of calculating normal value because their volume was less than five percent of the volume of Kanzen's U.S. sales. (Alloy Confidential Appendix (Alloy Conf. App.) Tab 3.) Kanzen, therefore, submitted third country market information to serve as the basis for NV. (Id.) On February 24, 2000, the ITC published its preliminary determination that there was a reasonable indication that an industry in the United States was being materially injured by reason of imports of the subject merchandise from Malaysia. *See Certain Stainless Steel Butt-Weld Pipe Fittings From Germany, Italy, Malaysia, and the Philippines,* Investigations Nos. 731–TA–864–867 (Preliminary), 65 Fed. Reg. 9,298 (Feb. 24, 2000).

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[1] Commerce determined that it would not be practicable to investigate all four Malaysian producers/exporters listed in the AD Petition and therefore limited its investigation to the largest producer/exporter, Kanzen Tetsu Sdn. Bhd., pursuant to 19 U.S.C. § 1677f–1(c)(2). *See Notice of Preliminary Determination of Sales at Not Less Than Fair Value and Postponement of Final Determination: Stainless Steel Butt-Weld Pipe Fittings from Malaysia,* 65 Fed. Reg. 47,398, 47,399 (Aug. 2, 2000) *("Preliminary Determination").*

On August 2, 2000, after reviewing the questionnaire responses submitted by Kanzen, Commerce published its preliminary determination. *See Notice of Preliminary Determination of Sales at Not Less Than Fair Value and Postponement of Final Determination: Stainless Steel Butt-Weld Pipe Fittings from Malaysia,* 65 Fed. Reg. 47,398 (Aug. 2, 2000) *("Preliminary Determination").* Commerce estimated a *de minimis* weighted-average dumping margin of 0.59 percent and thus preliminarily determined that stainless steel butt-weld pipe fittings from Malaysia were not being sold, nor were they likely to be sold, in the United States at less than fair value. *Id*. Important to the instant review, Commerce determined that Kanzen's "aggregate volume of home market sales of the foreign like product was less than five percent of its aggregate volume of U.S. sales for the subject merchandise, * * * [and thus] not viable." *Id*. at 47,399. Therefore, Commerce based NV on Kanzen's sales to the United Kingdom because Kanzen's aggregate volume of sales of the foreign like product in the U.K. was more than five percent of its aggregate volume of U.S. sales of the subject merchandise and therefore viable. *See id.*

Commerce then conducted a sales verification of Kanzen between September 25 and September 29, 2000. *See Sales Verification Report for the Anti-Dumping Duty Investigation Covering Stainless Steel Butt-Weld Pipe Fittings from Malaysia for the period October 1, 1998 through September 30, 1999* (Oct. 11, 2000) *("Sales Verification Report"), reproduced at* Kanzen's Conf. App. Tab 3. During its verification, Commerce conducted full quantity and value reconciliation of Kanzen's U.K., U.S., and home market sales. *See* December 15, 2000 Issues and Decision Memorandum ("Decision Memo") from Joseph A. Spetrini, Deputy Assistant Secretary, Import Administration, to Troy H. Cribb, Assistant Secretary for Import Administration at Comment 2, *reproduced at* U.S. App. at 7. Commerce found nothing to contradict Kanzen's assertion that its Malaysian home market was not viable for purposes of determining NV but that its third country sales to the United Kingdom did constitute a viable market for such purposes. *Id*.

In its comments on the *Preliminary Determination* Alloy objected to Commerce's reliance on Kanzen's third country sales to the United Kingdom as the basis for NV. (Petitioners' Case Brief at 3, *reproduced at* Alloy Conf. App. Tab 6.) Kanzen countered that the U.K. market was a proper, viable market for calculating NV. Decision Memo at Comment 2. After Commerce held a public hearing on November 22, 2000, it addressed all issues raised by the parties in its Decision Memo. *See Final Determination*, 65 Fed. Reg. at 81,826. There, Commerce agreed with Kanzen that the U.K. market was viable and proper to use as the comparison market. *Id.*

Commerce expressly adopted its resolution of the issues raised in its Decision Memo when it published its affirmative final determination of sales at less than fair value on December 27, 2000. *See Final Determination*, 65 Fed. Reg. at 81,826. Commerce calculated a final weighted-

average dumping margin of 7.51 percent for all Malaysian producers/exporters. *See id.* at 81,827.

On December 28, 2000 Kanzen filed its first request with Commerce for correction of certain alleged ministerial errors that Commerce denied because it claimed the alleged errors did not fall within the definition of ministerial errors as provided for in the applicable statute and regulation.[2] Kanzen filed a second request for correction of alleged ministerial errors on February 1, 2001, which Commerce again rejected, this time because it was untimely filed factual information.

On July 6, 2001 Kanzen made a motion before the Court to supplement the administrative record. Kanzen sought to include the submissions made by all parties related to its request for correction of ministerial errors. Both the United States and Alloy opposed this motion on July 20, 2001. On August 15, 2001 the Court denied Kanzen's motion with leave to renew at the time of filing its motion for judgment upon the agency record.

STANDARD OF REVIEW

This Court will sustain a final determination by Commerce unless it is "unsupported by substantial evidence on the record, or otherwise not in accordance with law." 19 U.S.C. § 1516a(b)(1)(B)(i) (1994). The substantial evidence standard applies to Commerce's factual findings. This standard requires more than a "mere scintilla" of evidence, *Primary Steel, Inc. v. United States,* 834 F. Supp. 1374, 1380 (Ct. Int'l Trade 1993), and consists of "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Consolidated Edison Co. v. NLRB,* 305 U.S. 197, 229 (1938); *Matsushita Elec. Indus. Co., Ltd. v. United States,* 750 F.2d 927, 933 (Fed. Cir. 1984). Under this standard, the Court will not disturb an agency determination if its factual findings are reasonable and supported by the record as a whole, even if there is some evidence that detracts from the agency's conclusion. *See Heveafil Sdn. Bhd. & Filati Lastex Sdn. Bhd. v. United States,* No. 98–04–00908, 2001 WL 194986, at *2 (Ct. Int'l Trade Feb. 27, 2001) (citing *Atlantic Sugar, Ltd. v. United States*, 744 F.2d 1556, 1563 (Fed. Cir. 1984)).

"Otherwise in accordance with law" governs Commerce's legal interpretations of the statutes it administers. To determine whether Commerce's legal interpretation and application of the antidumping statutes are in accordance with law, the Court applies the two-step test set forth by the Supreme Court in *Chevron U.S.A., Inc. v. Natural Resource Defense Counsel, Inc*., 467 U.S. 837, 842 (1984). Under this test, the Court examines whether the relevant statute addresses the specific question at issue, and if not, whether the agency's statutory interpretation is reasonable in light of the overall statutory scheme. *See id*. at 842–43.

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[2] The nature of the ministerial errors will be discussed in more detail in the Court's discussion of Kanzen's renewed motion to supplement the administrative record and motion for judgment upon the agency record.

DISCUSSION

There are three questions presented in this case. The first, posed by Alloy's 56.2 Motion, is whether Commerce's determination to rely on Kanzen's third country sales to the United Kingdom as the basis for NV is supported by substantial evidence on the record and is otherwise in accordance with law. The second, posed by Kanzen's 56.2 Motion, is whether Commerce's decision not to correct certain alleged ministerial errors is supported by substantial evidence on the record and is otherwise in accordance with law. The third, posed by Kanzen's renewed motion, is whether there is any basis upon which to supplement the administrative record in this case.

I. Alloy's Motion for Judgment Upon the Agency Record

A. Contentions of the Parties:

1. Plaintiffs/Alloy

Alloy contends Commerce's decision to rely upon Kanzen's third country sales as the basis for NV is not supported by substantial evidence on the record and is not otherwise in accordance with law. (Memorandum in Support of 56.2 Motion for Judgment Upon the Agency Record Submitted by Plaintiffs Alloy Piping Products, Inc., et al. ("Alloy 56.2 Br.") at 1.) Alloy makes two primary arguments in support of this contention: (1) Commerce erred in relying upon Kanzen's third country sales to the United Kingdom as the basis for NV because those prices were not "representative" as required by 19 U.S.C. § 1677b(a)(1)(B)(ii)(I); and (2) Commerce should have used its discretion to use home market sales as the basis for NV even though Kanzen's home market sales fell below the five percent viability threshold required by 19 U.S.C. § 1677b(a)(1)(C). (Id. at 10–13.)

Alloy notes, at the outset, that the term "representative" is not defined in the statute, corresponding regulation, legislative history, or case law. (Id.) Therefore, Alloy proposes that the Court apply, by analogy, the methodology used in Commerce's decision underlying *Thai Pineapple Pub. Co. v. United States,* 946 F. Supp. 11, 16 (Ct. Int'l Trade 1996). In *Thai Pineapple,* Commerce considered eight factors to determine whether third country sales were made in the ordinary course of trade: customers, terms of sale, volume of sales, frequency of sales, sales quantity, sales price, profitability, and market demand. Alloy believes these eight factors could be applied to determine if Kanzen's third country sales were "representative" within the meaning of the statute. (Id. at 17–18.)

Alloy bases its conclusion that Kanzen's third country sales are not representative on four factors. First, Alloy contends Kanzen's sales to the U.K were not representative because they were made at dumped prices. (Id. at 19.) Alloy argues Commerce must avoid using prices that it has "reason to believe or suspect" are being dumped. (Id. at 18–19.) Alloy asserts that Commerce did not, but should have, conducted a comparative analysis of sales price between third country and home market, as Commerce did in *Thai Pineapple*. (Id. at 22.) This analysis would have

demonstrated to Commerce that there was a significant disparity between the respective sales prices. (Id at 23.) Alloy asserts reliance on dumped sales in a third country will understate the degree to which a foreign producer is dumping in the United States. (Id. at 19.)

Second, Alloy contends Kanzen's U.K. sales were not representative because they were made to only one customer. (Id. at 25.) In *Thai Pineapple*, Commerce found that sales were made outside the ordinary course of trade, noting only one customer existed. *Thai Pineapple*, 946 F. Supp. at 16. In the case at hand, Alloy asserts that because Kanzen received only a small number of orders by a single U.K. customer during the POI, the potential for price manipulation precluded a finding that the U.K. sales were representative. (Alloy 56.2 Br. at 26, citing *Koenig & Bauer-Albert AG v. United States,* 15 F. Supp. 2d 834, 840 (Ct. Int'l Trade 1998), *aff'd in part, rev'd in part* (on other grounds), 2001 WL 893900 (Fed. Cir. Aug. 9, 2001).)

Third, Alloy contends Kanzen's U.K. sales should not have been used because the terms of sale were not representative of Kanzen's sales to the United States. (Alloy 56.2 Br. at 27.) Citing the "terms of sale" factor of *Thai Pineapple*, Alloy argues that the terms of sale between Kanzen and its U.K. customer were aberrational and considerably more favorable to its U.K. customer than those offered to Kanzen's U.S. customers. (Alloy 56.2 Br. at 27.)

Fourth, Alloy contends Kanzen's third country sales should not be considered representative because their volume differed only slightly from that of the home market. (Id. at 24.)

Finally, Alloy concludes that Commerce should reconsider using Kanzen's home market sales as the basis for NV. (Id. at 24–25.) Alloy argues both the statute and the regulation express a preference for home market sales as the basis for NV. (Id., citing 19 U.S.C. § 1677b(a)(1)(B) and 19 C.F.R. § 351.404(a).) In this case, adherence to the five percent test subverts the purpose of the law. (Alloy Conf. Br. at 23.)

Alloy asks the Court to remand this case to Commerce with instructions to reconsider all possible choices, including the use of home market sales, as the basis for NV. (Id. at 30.)

2. Defendant/United States & Defendant-Intervenors/Kanzen

The United States and Kanzen (collectively "Defendants") contend Commerce's decision to use Kanzen's third country sales to the United Kingdom as the basis for NV is supported by substantial evidence on the record and is otherwise in accordance with law. (Defendant's Memorandum in Opposition to Plaintiffs' and Defendant-Intervenors' Rule 56.2 Motions for Judgment Upon the Agency's Record and Appendix ("U.S. Br." and "U.S. App.") at 12.) Defendant makes two arguments in support of its contention: (1) Commerce properly decided to use Kanzen's third country sales as the basis for NV; and (2) Kanzen's third country prices were representative.

Defendants assert Kanzen's home market sales fell below the five percent threshold required by the so-called viability test, rendering them

insufficient for purposes of determining NV. (Id. at 13–15.) Thus, as Defendant explains, the statute, 19 U.S.C. § 1677b(a)(1)(C), and the corresponding regulation, 19 C.F.R. § 351.404(b)(1), direct Commerce to use third country sales for such purpose. (Id. at 14–15.) Although Defendants agree with Alloy that inclusion of the word "normally" in the statute provides Commerce with some flexibility in applying the five percent test, Defendants contend Alloy has failed to make any convincing argument justifying a departure from the test. (Id. at 24–25.)

Defendants next assert that Kanzen's third country prices were representative. Defendants argue that by simply using the term "representative," without further elaboration, Congress intended to give Commerce the discretion to determine representative prices on a case-by-case basis. (Id. at 18.) Defendants argue Alloy's reliance on the eight-factor approach of *Thai Pineapple* is misguided. (Id. at 23.) Defendants contend the issue in *Thai Pineapple,* which was whether a sale was made outside the ordinary course of trade, is distinguishable from the issue in this case, which is whether Kanzen's third country sales are representative. (Id.)

Defendants refute Alloy's assertion that Kanzen's third country sales to the U.K. were sold at dumped prices and, therefore, not representative. (Id. at 22.) The United States contends (1) Alloy incorrectly applies the "reason to believe or suspect" standard and (2) there is no evidence to support Alloy's contention that Kanzen's third country sales were dumped. (Id. at 19–24.)

Defendants next refute Alloy's claims that Kanzen's U.K. sales are not representative because they were made to only a single customer. (Id. at 25.) As discussed previously, Defendants reject Alloy's reliance on the eight factors laid out in *Thai Pineapple*, distinguishing it from the instant case. (Id. at 26.) Even if the Court were to find the eight factors applicable, Defendants argue the various factors were evaluated in the aggregate; no one factor was deemed to be dispositive, as Alloy urges in this case. (Id.) Defendants also reject Alloy's claim that the "potential for manipulation" of prices existed because Alloy made no attempt to support its argument with any record evidence. (Id. at 27.)

Third, Defendants refute Alloy's claims that Kanzen's U.K. sales are not representative because Kanzen's terms of sale for its U.K. sales differed significantly from the terms of sale offered on its U.S. sales. (Id.) Defendants point out that Commerce conducted a thorough verification and found no discrepancies. (Id. at 27–28.) Accordingly, Defendants argue, this argument lacks merit. Defendants conclude Kanzen's U.K. sales are representative and urge the Court to deny Alloy's motion for judgment upon the agency record.

B. Analysis:

1. The Statutory Scheme

Under U.S. antidumping law, Commerce determines dumping margins by comparing "the weighted average of the normal values to the weighted average of the export prices (and constructed export prices) for

comparable merchandise." 19 U.S.C. § 1677f–1(d)(1)(A)(i). The question presented in this case is whether Commerce's reliance upon Kanzen's third country sales to the United Kingdom as the basis for normal value ("NV") is supported by substantial evidence on the record and is otherwise in accordance with law. Thus, the Court's analysis begins with an examination of the statute, 19 U.S.C. § 1677b, governing the calculation of NV. The statute first directs Commerce to use the exporter's home market sales as the basis for NV:

> (a)(1)(A) In general
>
> The normal value of the subject merchandise shall be the price described in subparagraph (B), * * *
>
> (B) Price
>
> The price referred to in subparagraph (A) is—
>
> (i) the price at which the foreign like product is first sold (or, in the absence of a sale, offered for sale) for consumption in the exporting country, in the usual commercial quantities and in the ordinary course of trade and, to the extent practicable, at the same level of trade as the export price or constructed export price * * *.

§ 1677b(a)(1)(A) & (B)(i).

Commerce must use the home market so long as it is viable. The home market will be deemed non-viable if:

> (ii) the administering authority determines that the aggregate quantity (or, if quantity is not appropriate, value) of the foreign like product sold in the exporting country is *insufficient* to permit a proper comparison with the sales of the subject merchandise to the United States, or

§ 1677b(a)(1)(C)(ii) (emphasis added).[3] For purposes of subparagraph (ii), *supra*, the statute specifies that home market sales "shall normally be considered to be *insufficient* if such quantity (or value) is less than 5 percent of the aggregate quantity (or value) of sales of the subject merchandise to the United States." § 1677b(a)(1)(C) (emphasis added).

If Commerce determines that the home market is non-viable, the statute directs Commerce to use third country sales as the basis for NV. § 1677b(a)(1)(C). The statute imposes a viability requirement upon third country sales as well. The statutory requirements for Commerce's selection of a third country NV are that:

> (I) such price is representative,
>
> (II) the aggregate quantity (or, if quantity is not appropriate, value) of the foreign like product sold by the exporter or producer in such other country is 5 percent or more of the aggregate quantity (or value) of the subject merchandise sold in the United States or for export to the United States, and

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[3] The statute provides two other scenarios that will cause the home market to be non-viable, however, they are not at issue in this case. *See* 19 U.S.C. § 1677b(a)(1)(C)(i) & (iii).

> (III) the administering authority does not determine that the particular market situation in such other country prevents a proper comparison with the export price or constructed export price.

§ 1677b(a)(1)(B)(ii). Finally, if Commerce determines that neither the home market nor a third country furnish a viable measure of normal value, the statute directs Commerce to use a constructed value to calculate NV. *See* § 1677b(a)(4).[4]

2. Commerce's Determination That the Home Market Was Not Viable Is Supported by Substantial Evidence on the Record and Is Otherwise In Accordance With Law

The Court finds Commerce's determination that Kanzen's home market was not viable for comparison purposes is supported by substantial evidence on the record and is otherwise in accordance with law because the aggregate quantity of home market sales was less than five percent of the aggregate quantity of sales of the subject merchandise to the United States. *See Preliminary Determination,* 65 Fed. Reg. at 47,399. On the other hand, the aggregate volume of Kanzen's U.K. sales was more than five percent of its aggregate volume of U.S. sales. *Id*. Therefore, after conducting full sales verifications of Kanzen's U.K., U.S., and home market sales, Commerce properly determined the home market was not viable.

The Court rejects Alloy's argument that Commerce's strict adherence to the five percent test in this case is subversive and contradicts the intent of the statute. The Court agrees the statute provides Commerce with flexibility to consider home market sales even if the aggregate volume of sales is less than five percent by stating such sales "shall *normally* be considered to be insufficient * * *." 19 U.S.C. § 1677b(a)(1)(C) (emphasis added).[5] The Statement of Administrative Action ("SAA") supports this interpretation by explicitly providing an exception to this general rule: "In *unusual situations* * * * home market sales constituting less than five percent of sales to the United States could be considered viable * * *." H.R. REP. NO. 103–826, at 821, *reprinted in* 1994 U.S.C.C.A.N. 4040, at 4162 (emphasis added).[6]

However, Alloy fails to demonstrate how this is an "unusual situation" that renders the five percent threshold inappropriate, and it points to no supporting evidence in the record. The Court finds Commerce properly chose to proceed to an examination of the viability of

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[4] While the statute grants Commerce discretion to choose third country sales or constructed value, Commerce's regulation expresses a preference for third country sales as the basis for NV. The regulation provides:

> (f) *Third country sales and constructed value*. The Secretary normally will calculate normal value based on sales to a third country rather than on constructed value if adequate information is available and verifiable * * * 19 C.F.R. § 351.404(f) (1994). Commerce followed this sequence in its investigation, first examining home market viability and then proceeding to third country market viability.

[5] Commerce notes in the preamble to the final regulations that it "retained the word 'normally' in order to provide the Department with the flexibility to deal with unusual situations." *Antidumping Duties; Countervailing Duties: Final Rule,* 62 Fed. Reg. 27,296, 27,358 (May 19, 1997) *("Preamble").*

[6] The Court notes the questionnaire Commerce issued to Kanzen states that "[i]f the volume of your home market sales * * * is less than five percent of the volume of your sales to the United States of the subject merchandise * * * contact the official in charge because the Department, *except in unusual situations, will not use your home market as the basis for calculating normal value."* (Alloy Conf. App. Tab 3, at 3 (emphasis added).) This demonstrates to the Court that this is an established practice for Commerce.

Kanzen's third country sales to the United Kingdom as the basis for NV because Commerce followed its consistent practice of strictly abiding by the five percent test as a threshold for viability. *See, e.g., Notice of Final Determination of Sales at Less Than Fair Value: Stainless Steel Wire Rod from Japan,* 63 Fed. Reg. 40,434, 40,441–42 (July 29, 1998). Additionally, this Court has affirmed Commerce's reliance on the five percent threshold absent a showing of some unusual situation that would render its application inappropriate. *See, e.g., Chemetals, Incorporated v. United States,* 138 F. Supp.2d 1338, 1349 (Ct. Int'l Trade 2001) (holding plaintiffs failed to demonstrate an unusual situation invalidating use of five percent test).

3. Commerce's Determination to Use Kanzen's Third Country Sales to the United Kingdom as the Basis for Normal Value is Supported By Substantial Evidence on the Record and is Otherwise in Accordance With Law

The Court finds Commerce's selection of the United Kingdom as Kanzen's third country comparison market and its determination that Kanzen's third country sales to the U.K. are viable is supported by substantial evidence on the record and is otherwise in accordance with law.

Neither the statute, legislative history, nor regulations define "representative," but the regulation does limit the inquiry of market viability to one criterion: the sufficiency of sales in the third country. *See* 19 C.F.R. § 351.404. The third country market will be deemed viable if Commerce is "satisfied that sales of the foreign like product * * * are of sufficient quantity [i.e. 5 percent or more of the aggregate quantity of the subject merchandise to the United States] to form the basis of normal value." 19 C.F.R. § 351.404(b)(1) & (2). Once Commerce is satisfied that the third country market is viable, the party alleging that the prices are not "representative" bears the burden of "establish[ing] to the satisfaction of [Commerce] that" the criterion is not met.[7] *See* § 351.404(c)(2); *Preamble*, 62 Fed. Reg. at 27,357. In the *Preamble* Commerce explains its rationale for focusing only on the sufficiency of the sales for the purpose of establishing viability:

> [T]he criteria of a "particular market situation" and the "representativeness" of prices fall into the category of issues that the Department need not, and should not, routinely consider. * * * [T]he SAA at 821 recognizes that the Department must inform exporters at an early stage of a proceeding as to which sales they must report. This objective would be frustrated if the Department routinely analyzed

[7] Commerce also commented on the burden of proof in this scenario in its preamble to the final rules:

> [B]y using the phrase "if it is established to the satisfaction of the Secretary" in paragraph (c)(2), we merely were attempting to provide that the party alleging * * * that sales are not "representative" has the burden of demonstrating that there is a reasonable basis for believing * * * that sales are not "representative." Preamble, 62 Fed. Reg. at 27,357.

> the existence of a "particular market situation" or the "representativeness" of third country sales.

Preamble, 62 Fed. Reg. at 27,357. The Court finds this approach to be a reasonable application of the statute. The time frame within which Commerce must conduct its investigation is necessarily very short. Therefore, it is sensible to establish a bright line rule for determining viability. Indeed, the SAA states that "[a] clear standard governing most cases is necessary because Commerce must determine whether the * * * market is viable at an early stage in each proceeding to inform exporters which sales to report." SAA at 821. If a party wishes to challenge the use of third country sales because it believes those sales are not representative, there is a procedure for that party to do so.

In this case, Alloy does not dispute Commerce's determination that the aggregate quantity of the foreign like product sold by Kanzen in the U.K. was 5 percent or more of the aggregate quantity of the sales of the subject merchandise to the United States. *See Preliminary Determination,* 65 Fed. Reg. at 47,399. Thus, Kanzen's third country sales to the U.K. are presumptively representative, and the burden is on Alloy to "establish[] to the satisfaction of [Commerce] that * * * the price is not representative * * *." 19 C.F.R. § 351.404(c)(2)(ii). Alloy contends Commerce erred in basing NV on Kanzen's third country sales to the U.K. because those sales were not "representative" as required by 19 U.S.C. § 1677b(a)(1)(B)(ii)(I). Alloy bases this contention on four factors. For the reasons that follow, the Court finds Alloy has failed to satisfy its burden in this case.

a. There is No Evidence Kanzen's Third Country Sales Were Dumped

Alloy argues that Commerce must avoid using any prices that it has "reason to believe or suspect" may be dumped. However, the Court is not persuaded that the standard from non-market economy proceedings should be applied to the determination of a suitable comparison market. Even if it were, Alloy's application of the standard would still be incorrect because the "reason to believe or suspect" standard requires some *formal* finding of dumping. *See, e.g., Issues and Decisions Memo for the 1998–99 Administrative Review of Tapered Roller Bearings and Parts Thereof, Finished and Unfinished, from the People's Republic of China, Final Results, reprinted at* 2001 WL 118968 (Jan. 10, 2001) (Comment 1). There was no formal finding of dumping in this case. Thus, the Court finds without merit Alloy's contention that Commerce "could have evaluated for itself (as the domestic industry did) whether Kanzen's U.K. prices were dumped and were therefore unsuitable for use as normal value." (Alloy 56.2 Br. at 21–22.)

Second, while the Court agrees that the goal of accuracy cannot be achieved if Commerce relies upon dumped third country prices to calculate NV, there is simply no record evidence to support Alloy's conjecture here. Alloy provided none of the information normally required in a dumping investigation to perform the necessary margin calculations.

Simply having a lower price in the U.K is insufficient for the purpose of demonstrating dumping.

b. Kanzen's Sales to a Single U.K. Customer Do Not Make Them Unrepresentative

The Court rejects Alloy's argument that Kanzen's U.K. sales are not representative because they were made to a single customer. First, Alloy's reliance on *Thai Pineapple* is misguided. *Thai Pineapple* is distinguishable from the present case for two reasons. The question presented in *Thai Pineapple* was whether the respondent's sale was outside the ordinary course of trade, not whether the respondent's third country sales were "representative." Furthermore, in that case this Court was applying pre-Uruguay Round law. The applicable statute, 19 U.S.C. § 1677b, changed significantly after enactment of the Uruguay Round Agreements Act. Indeed, the requirement that a respondent's third country sales be "representative" was added by the Uruguay Round Agreements Act.

Second, Alloy's argument that the existence of only one customer provides the potential for manipulation of prices is flawed for two reasons. First, *Koenig & Brauer-Albert AG* is inapposite. There one of the respondents amended its contracts by increasing the sales price several months after petitioner filed its AD petition. *See Koenig*, 15 F. Supp.2d at 840. The respondent challenged Commerce's refusal to accept the amendments in its margin calculation. This Court upheld Commerce's rejection of the price amendments to the contract based upon the potential for manipulation. To support its conclusion, this Court pointed to Commerce's standard practice "not to accept price adjustments instituted *after* the filing of a petition * * * so as to discourage potential manipulation of potential dumping margins * * *." *Id*. (internal citations and quotations omitted) (emphasis added). That is simply not the scenario in this case. Here, there was no action taken by Kanzen that would cause Commerce to believe the potential for manipulation existed. Second, and perhaps more significant, Alloy cites no record evidence to support its assertion. Indeed, in rejecting petitioner's claim in *Koenig* this Court noted that the "price amendments themselves, made after the initiation of the investigation, constitute evidence that manipulation may occur." *Id*. There were no adjustments or amendments in this case indicating Kanzen was attempting to manipulate the margin. The Court therefore rejects this argument.

c. The Difference in U.K.'s Terms of Sale Do Not Make Them Unrepresentative

The Court also rejects Alloy's final argument that Kanzen's U.K. sales are not representative because Kanzen's U.K. terms of sale differed significantly from its U.S. terms of sale. Differences in the terms of sales do not automatically lead to the conclusion that Kanzen's U.K. sales are not "representative." Alloy does not demonstrate *how* the differences cause them to be unrepresentative. Commerce specifically addressed Alloy's concerns over these differences in the terms of sale in its Deci-

sion Memo after conducting a thorough sales verification. For example, with respect to the early payment discount offered by Kanzen to its U.K. customer but not its U.S. customers, Commerce noted that:

> The record is clearly developed from the sales verification as to establish that the early payment discount was applied only to a specific invoice for a U.K. sale, and was specifically calculated according to the details and circumstances of that sale. Furthermore, we * * * found no other early payment discounts during the POI. * * * We are properly treating the discount as a post-sale price adjustment * * * addressed in our normal value calculation.

Decision Memo at Comment 7 (internal citations omitted). Additionally, Commerce addressed petitioners concerns over the change in terms of payment from FOB to CIF, stating:

> This further supports our basis for using invoice date as the date of sale in the comment section on "Market viability," * * * and our determination that the material terms of sale for the U.K. market during the POI were not necessarily established at confirmation/contract date, but rather remained alterable by the parties after that time.

Id. at Comment 6. Commerce concluded that the differences in the terms of sale did not affect market viability:

> As for the substantial changes which petitioners claim render the U.K. market an improper comparison market, while such changes serve to justify the choice of invoice date as the date of sale, they are not so problematical or anomalous as to place the viability of the U.K. market in question. In fact, Kanzen provided at verification full documentation regarding these changes. This documentation supports a conclusion that these circumstantial changes were made in the ordinary course of business, and do not support petitioners' assertion that these constituted "unique" post-sale adjustments specifically designed "to lower the selling price for it's {sic} U.K. market." See Petitioner's Brief at 12.

Decision Memo at Comment 2. The Court finds Commerce thoroughly considered these discrepancies during the investigation. The Court therefore holds Commerce's decision to use Kanzen's third country sales to the U.K. as the basis for NV is supported by substantial evidence on the record and is otherwise in accordance with law.

II. Kanzen's Renewed Motion to Supplement the Administrative Record and Motion for Judgment Upon the Agency Record

A. Background

Kanzen brings two motions before the Court. First, Kanzen renews its motion to supplement the administrative record. Second, Kanzen alleges in its motion for judgment upon the agency record that Commerce failed to correct certain alleged ministerial errors.

Kanzen alleges that its August 15, 2000 Section C supplemental questionnaire response contained ministerial errors in the reporting of payment dates and credit expenses for 64 of its listing of 10,028 U.S. sales.

(Memorandum of Points and Authorities in Support of Plaintiff, Kanzen Tetsu's CIT Rule 56.2 Motion for Judgment Upon the Agency Record (Confidential Version) ("Kanzen 56.2 Br.") at 4.) Kanzen alleges that an incorrect high value of $42.00 was reported as the credit expense for these 64 sales. (Id. at 5; Kanzen Conf. App. Tab 4) Kanzen claims it prepared its Section C U.S. sales listing using Microsoft Excel, and originally reported "#N/A" in those fields that required calculated values (e.g. credit expenses) for which the number was not available since payment had not been received at the time of filing. (Kanzen 56.2 Br. at 8.) Kanzen asserts the credit expense errors resulted from a technical problem in the SAS software when "#N/A" in the Excel spreadsheet was converted into SAS format. (Id.) Kanzen alleges that the program incorrectly converted the symbol "#N/A" into the numeric value "42.00." Kanzen claims the $42.00 amount was hundreds of times higher than most of the credit expenses reported for Kanzen's 9,964 other U.S. sales. (Id. at 6.) Kanzen asserts that, but for the computer conversion error, the *de minimis* margin calculated in the *Preliminary Determination* would have remained in effect for the *Final Determination*. As noted earlier, Commerce declined to correct the alleged errors.

B. Kanzen's Renewed Motion to Supplement the Administrative Record

The Court notes the standard of review governing the merits of the underlying action, is whether it is unsupported by substantial evidence *on the record*, or otherwise not in accordance with law." 19 U.S.C. 1516a(b)(1)(B)(i) (emphasis added). Judicial review is therefore limited to the evidence contained in the administrative record. *See Kerr-McGee Chem. Corp. v. United States,* 955 F. Supp. 1466, 1471 (Ct. Int'l Trade 1997) (citing *Neuweg Fertigung GmbH v. United States,* 797 F. Supp. 1020, 1022 (Ct. Int'l Trade 1992)). The administrative record for review shall consist of:

> (i) a copy of all information presented to or obtained by the Secretary, the administering authority, or the Commission *during the course of the administrative proceeding*, including all governmental memoranda pertaining to the case and the record of ex parte meetings required to be kept by section 1677f(a)(3) of this title; and
>
> (ii) a copy of the determination, all transcripts or records of conferences or hearings, and all notices published in the Federal Register.

19 U.S.C. § 1516a(b)(2)(A) (emphasis added). The statute and case law of this Court are clear that the administrative record is limited to "the information that was presented to or obtained by the agency making the determination during the particular review proceeding for which sec-

tion 1516 authorizes judicial review."[8] *Beker Indus. Corp. v. United States*, 7 CIT 313, 316 (1984); *see also Kerr-McGee,* 955 F. Supp. at 1472; *Win-Tex Prods., Inc. v. United States,* 797 F. Supp. 1025, 1026 (Ct. Int'l Trade 1992). The Court has also held that "[a]ny information received by Commerce after the particular determination at issue is not part of the reviewable record." *Intrepid v. Pollock,* 15 CIT 84, 85 (1991) (citing *Ipsco, Inc. v. United States,* 715 F. Supp. 1104, 1109 (Ct. Int'l Trade 1989). The "particular determination at issue" in this case is the ITA's *Final Determination* published on December 27, 2000. Therefore, the administrative record in this case consists of all materials submitted to or obtained by the ITA between the initiation of the AD investigation on January 18, 2000 and the publication of the *Final Determination* on December 27, 2000.

This Court has consistently held that "[i]f ministerial errors exist in the Final Determination, they will be manifest in the administrative record as submitted and plaintiff can ask this Court for a remand to correct any such errors based on the record as submitted." *NSK Ltd. v. United States,* 788 F. Supp. 1228, 1229 (Ct. Int'l Trade 1992); *see also Brother Indus., Ltd. v. United States,* 771 F. Supp. 374, 384, 388 (Ct. Int'l Trade 1991); *Koyo Seiko,* 746 F. Supp. at 1110; *Serampore*, 696 F. Supp. at 673. Kanzen contends *NSK Ltd*. is distinguishable from the present case. There Commerce neither retained the parties' submissions nor made a ruling on the request for correction. Kanzen claims the instant case is different because Commerce accepted and retained the parties' submissions and issued a decision memorandum denying the request for correction. Thus, those documents should be considered part of the administrative record. (Kanzen 56.2 Br. at 9–10.) The Court finds this is a distinction without a difference. The materials are not properly part of the record because they had no bearing on Commerce's findings and decisions in its *Final Determination*. If an error was committed, it will be "manifest from the record as submitted." The Court, therefore, denies Kanzen's renewed motion to supplement the administrative record.

C. Kanzen's Motion for Judgment Upon the Agency Record

1. Contentions of the Parties

a. Defendant-Intervenors/Kanzen

Kanzen contends that Commerce's decision not to correct certain alleged ministerial errors ("ME") in its *Final Determination* is unsupported by substantial evidence on the record and not otherwise in accordance with law. (Id. at 2.) Kanzen supports this contention with three main arguments: (1) Commerce's decision is inconsistent with the case law of both this Court and the Court of Appeals for the Federal Cir-

[8] The legislative history of the Trade Agreements Act of 1979 is also clear on this point. The Senate Committee on Finance specifically stated:

> Judicial review of determinations subject to the provisions of subsection (a)(1) would proceed upon the basis of information before the relevant decision-maker *at the time the decision was rendered* including any information that has been compiled as part of the formal record. The court is not to conduct a trial *de novo* in reviewing such determinations.

S. REP. NO. 96–249 at 247–48 (1979), *reprinted in* 1979 U.S.C.C.A.N. 381, 633 (emphasis added).

cuit ("CAFC" or "Federal Circuit"); (2) statutory authority does not prohibit Commerce from correcting a respondent's clerical errors; (3) Commerce's *Final Determination* cannot be supported by substantial evidence if an error exists in the record.

First, Kanzen argues that Commerce's failure to correct certain ME's was an abuse of discretion and not consistent with this Court's precedent. (Id. at 13–17, citing *Koyo Seiko Co. v. United States,* 746 F. Supp. 1108 (Ct. Int'l Trade 1996); *Technoimportexport v. United States,* 766 F. Supp. 1169, 1179 (Ct. In'tl Trade 1991); *Serampore v. United States*, 696 F. Supp. 665, 673 (Ct. Int'l Trade 1988)). Kanzen notes that both this Court and the CAFC have stated that the statutory goal of calculating accurate dumping margins often outweighs the interest of finality, particularly where the correction does not pose a significant burden on Commerce. (Id. at 13.) Kanzen contends the CAFC's holding in *NTN Bearing Corp. v. United States*, 74 F.3d 1204 (Fed. Cir. 1995) is controlling and the alleged errors should be corrected. (Kanzen 56.2 Br. at 24.) Kanzen notes the issue in *NTN Bearing* was whether Commerce's refusal to accept corrections resulting from the respondent's error after the time for submitting new factual information had expired was an abuse of discretion. The CAFC held Commerce's refusal did constitute an abuse of discretion because "[c]orrection of NTN errors would neither have required beginning anew nor have delayed making the final determination. A straightforward mathematical adjustment was all that was required." (Id. at 23, quoting *NTN Bearing*, 74 F.3d at 1208.)

Kanzen contends Commerce's rejection of Kanzen's request for correction of ME's as untimely is clearly not in accordance with *NTN Bearing* because the statutory provision cited by the CAFC, as well as Commerce's regulation, expressly provide that Commerce is permitted to correct clerical errors after a final determination is issued. (Kanzen 56.2 Br. at 24, citing 19 U.S.C. § 1675(h); 19 C.F.R. § 351.224(c).) Correcting the errors would not pose a burden on Commerce since it would merely require an adjustment to the computer program to correct the deficiency. Commerce could then simply rerun the program. (Kanzen 56.2 Br. at 21–22.)

Kanzen asserts this Court has also specifically recognized that computer programming errors are the type of ME's Commerce should correct. (Id. at 26–27, citing *Toyota Motor Sales, U.S.A., Inc. v. United States,* 930 F. Supp. 636 (Ct. Int'l Trade 1996); *Torrington Co. v. United States,* 853 F. Supp. 446 (Ct. Int'l Trade 1994); *Federal Mogul Corp. v. United States,* 872 F. Supp. 1011 (Ct. Int'l Trade 1994).) Kanzen concedes the three cases cited involved situations in which the errors committed were in Commerce's own margin calculation program. (Id. at 27.) Nonetheless, Kanzen argues in each case this Court sought accurate determinations, demonstrating that accuracy frequently weighs more heavily in the balance against finality. (Id.)

Second, Kanzen argues that nothing in the statute, legislative history, or Commerce's regulations *prohibits* Commerce from correcting the

clerical errors existing in this case. (Id. at 18 (emphasis added).) Kanzen notes that neither the statute nor Commerce's regulation specify whose errors may be deemed ministerial. (Id. at 18–20, citing 19 U.S.C. § 1673d(e); 19 C.F.R. § 351.224(c)(1), (e), & (f).) Furthermore, Kanzen argues, the Conference Report accompanying Section 1333 of the Omnibus Trade and Competitiveness Act of 1988 (establishing procedures for the correction of ME's) expresses concern for the accuracy of Commerce's final determinations, but it does not create any requirement that Commerce correct only its own errors. (Kanzen 56.2 Br. at 19, citing H.R. Conf. Rep. 100–576 at 109, Apr. 20, 1988.) Kanzen concedes that the *Preamble* states the regulation applies only "to errors made by the Department." (Kanzen 56.2 Br. at 20, citing *Preamble*, 62 Fed. Reg. at 27,327.) However, Kanzen asserts Commerce qualifies this by acknowledging it has a practice of correcting clerical errors made by a respondent "if the Department can assess from the information already on the record that an error has been made, that the error is obvious from the record, and that the correction is accurate." (Kanzen 56.2 Br. at 20, citing *Preamble*, 62 Fed. Reg. at 27,327.) Kanzen argues that it satisfies each of the three prongs of this test. (Kanzen 56.2 Br. at 20–21.)

Third, Kanzen contends Commerce's decision is unsupported by substantial evidence. (Id. at 28.) Kanzen argues the record clearly shows the final margin calculated by Commerce incorporated incorrect credit expenses reported for certain sales. This error was an inadvertent programming conversion error that fundamentally affects the accuracy of the margin. Kanzen argues Commerce's determination cannot be supported by substantial evidence when contrary evidence demonstrates the *Final Determination* is fundamentally inaccurate. (Id.) Kanzen contends the Court should remand to Commerce for correction of these errors. (Id. at 30.)

b. Defendant/United States & Plaintiffs/Alloy

The United States and Alloy contend Commerce's decision not to correct Kanzen's alleged ministerial errors is supported by substantial evidence on the record and otherwise in accordance with law.

First, United States and Alloy argue that the respondents bear the burden of creating an adequate and accurate record within the prescribed statutory time limits. (U.S. Br. at 30–31, citing, *Tianjin Machinery Import & Export Corp. v. United States*, 806 F. Supp. 1008, 1015 (Ct. Int'l Trade 1992); Domestic Industry's Response to Kanzen Tetsu's Rule 56.2 Motion for Judgment Upon the Agency Record ("Alloy Resp. Br.") at 14, citing *RHP Bearings v. United States,* 875 F. Supp. 854, 857 (Ct. Int'l Trade 1995).) United States and Alloy contend this Court has held Commerce is not required to correct a respondent's errors when erroneous data is reported and not timely corrected. (Alloy Resp. Br. at 14–15.) Accordingly, United States and Alloy argue Kanzen's failure to submit correct data in the August 15, 2000 submission remains its own responsibility, and Commerce did not abuse its discretion by not correcting the alleged errors. (U.S. Br. at 31; Alloy Resp. Br. at 15.)

Second, United States and Alloy distinguish the case law used by Kanzen in support of its position that Commerce should have corrected Kanzen's alleged error. In *Koyo Seiko*, United States and Alloy note that the final margin was 70.44 percent, a drastic difference from the final margin of 7.51 percent in this case. Thus, there was no reason to believe the *Final Determination* was tainted with numerous ME's as in Koyo Seiko. Additionally, unlike the scenario in *Koyo Seiko*, Commerce never possessed a hard copy of the Excel spreadsheet data and only learned of the alleged errors after issuing the *Final Determination*. (U.S. Br. at 32–34; Alloy Resp. Br. at 17, n.7.) In *Technoimportexport*, the respondents notified Commerce prior to the final determination and the Court directed Commerce to make the correction. (U.S. Br. at 34.) Finally, in *Serampore*, the Court had already ordered a remand for Commerce to reconsider a separate issue and so also directed Commerce to determine whether there was an error in the computer input calculation. Here, there has been no remand ordered, thus there is no similar basis to remand for the correction of the alleged errors. (U.S. Br. at 35.) Furthermore, United States and Alloy emphasize that in all three computer error cases cited by Kanzen, Commerce committed the programming errors. Thus, the computer error cases support the position that only Commerce's ministerial errors are the type of errors to be corrected. (Id. at 35–36.)

United States and Alloy also distinguish *NTN Bearing* from the present case. United States and Alloy note in *NTN Bearing* the respondent informed Commerce of its own error in its case brief filed three months prior to the issuance of the final determination. (Id. at 39.) The CAFC noted that because the respondent informed Commerce of the alleged errors shortly after the preliminary determination, "the tension between finality and correctness simply did not exist at the time NTN requested correction." (Id. at 39, quoting *NTN Bearing*, 74 F.3d at 1208.) In this case, Kanzen notified Commerce of the alleged errors *after* the *Final Determination*, heightening the "tension" between the strict statutory time limits for correcting ME's and the need for correctness. (U.S. Br. at 39–40.) United States and Alloy posit that if interested parties were allowed to submit unlimited lists of their own alleged errors after a final determination, Commerce might never be able to complete its work within the statutory time limits. (Id. at 40.)

Third, United States and Alloy argue neither the statute, legislative history, nor Commerce's regulations *require* Commerce to correct respondent's errors following a final determination. (Id. at 36.) (emphasis added). United States and Alloy assert Congress provided for the correction of ME's because it recognized the need to report dumping margins as accurately as possible. (Id.) However, United States and Alloy note the *Preamble* clearly applies the procedures for correction of ME's only to errors attributable to Commerce. (Id. at 38, citing *Preamble*, 62 Fed. Reg. at 27,327.) In addition, United States and Alloy argue Commerce will accept corrections of respondent's errors under the six conditions

outlined in *Certain Fresh Cut Flowers From Colombia; Final Results of Antidumping Duty Administrative Reviews,* 61 Fed. Reg. 42,833 (Aug. 19, 1996) ("*Colombian Flowers*"). (U.S. Br. at 41.) United States and Alloy point out that Commerce corrected other clerical errors properly brought to its attention immediately after the *Preliminary Determination*, but Kanzen failed to avail itself of these corrective procedures for the errors at issue in this case. (Id. at 41–42, citing Decision Memo at Comment 1.)

Fourth, United States and Alloy reject Kanzen's argument that the error in this case is "obvious," and therefore excepts a respondent from the burden of submitting accurate data. (Alloy Resp. Br. at 21.) United States and Alloy claim the error could not be "obvious" since Kanzen did not notice its own error in the four months that passed between its August 15, 2000 submission and the issuance of the *Final Determination*. (Id.) United States and Alloy also reject Kanzen's argument that Commerce should have realized an error existed because the final margin calculations were affirmative in comparison to the *de minimis* preliminary determination. (Alloy Resp. Br. at 22.) United States and Alloy argue Commerce made many significant changes between the *Preliminary* and *Final Determinations*, including changes to the third-country and U.S. databases, Kanzen's addition of new U.S. selling expenses in the August 15, 2000 submission, and the use of facts available in certain instances. (Id. at 22; U.S. Br. at 43.)

Finally, United States and Alloy contend correction of Kanzen's alleged error would require additional fact-finding. (Alloy Resp. Br. at 23.) United States and Alloy assert that during the course of the investigation, Kanzen did not fully disclose the nature of its U.S. credit expense calculation. Further, Kanzen never submitted its Excel database or disclosed that it was submitting new payment dates for certain sales on August 15, 2000, and it never revealed that it had not received payment for other sales. (Id. at 24.) United States and Alloy argue that it would have been improper for Commerce to have accepted at face value the new claims and factual assertions submitted by Kanzen after the *Final Determination* was issued. (Id.) Thus, Commerce's decision to reject Kanzen's claims that a clerical error had been submitted was not an abuse of discretion.

2. Analysis

The statute governing the correction of ministerial errors directs Commerce to "establish procedures for the correction of ministerial errors in final determinations within a reasonable time after the determinations are issued * * *." 19 U.S.C. § 1673d(e). The regulations promulgated pursuant to the statute set out the "[p]rocedures for the correction of ministerial errors," allowing parties to "submit comments concerning any ministerial error" in the calculations and commanding the Secretary to "analyze any comments received and, if appropriate, * * * correct any ministerial error by amending the final determination * * *." 19 C.F.R. § 351.224(c), (e) (2000). The term "ministerial error" is

defined in the regulation as "an error in addition, subtraction, or other arithmetic function, clerical error resulting from inaccurate copying, duplication, or the like, and any other similar type of unintentional error which the Secretary considers ministerial." § 351.224(f).

Commerce's stated practice is to correct only its own errors: "The provisions of § 351.224—covering disclosure of *the Department's* calculations and procedures for correction of ministerial errors * * * [apply] only to errors made by the Department." *Preamble*, 62 Fed. Reg. at 27,327 (emphasis in original). Furthermore, Commerce has stated that "[e]rrors made by *respondents* in their submissions to the Department, such as transposing digits as a result of a data input error or other computer errors resulting in the omission of data * * * are not governed by the provisions of § 351.224." *Id.* (emphasis in original). The Court finds it is a reasonable application of the statute for Commerce to limit the correction of ME's to those attributable to Commerce.

Applying Commerce's standard practice to the facts of this case, it is clear that Kanzen's alleged errors are not properly subject to correction under the provisions of 19 C.F.R. § 351.224. The errors allegedly occurred during the conversion of data from Microsoft Excel to SAS. The data was under the control of Kanzen both before and after the conversion. Thus, this is an issue of "[e]rrors made by respondents in their submission" to Commerce "as a result of a data input error or other computer errors." *Id*.

The general rule with regard to a respondent's submission of data to Commerce during the course of an AD investigation or review is that the respondent bears the burden and responsibility of creating an accurate record within the statutory timeline. *See RHP Bearings v. United States,* 875 F. Supp. 854, 857 (Ct. Int'l Trade 1995); *see also Yamaha Motor Co., Ltd. v. United States,* 910 F. Supp. 679, 687 (Ct. Int'l Trade 1995) ("It is the respondent's obligation to supply Commerce with accurate information."); *Societe Nouvelle De Roulements v. United States,* 910 F. Supp. 689, 694 (Ct. Int'l Trade 1995) ("SNR") ("Respondents 'must submit accurate data' and 'cannot expect Commerce, with its limited resources to serve as a surrogate to guarantee the correctness of submissions.'").

Furthermore, this Court has held that Commerce is not required to correct a respondent's errors when erroneous data are reported and not timely corrected. *See Sugiyama*, 797 F. Supp. at 994 (stating "[e]ven if Commerce possessed the personnel to identify errors Plaintiffs made in their data base within the statutory deadlines, Commerce would have no basis for deciding which portion of the submission was correct or erroneous."); *Makita Corp. v. United States*, 974 F. Supp. 770, 780 (Ct. Int'l Trade 1997); *see also Acciai Speciali Terni S.p.A. v. United States*, 142 F. Supp. 2d 969, 982 (Ct. Int'l Trade 2001) ("It is respondent's obligation to supply Commerce with accurate information. * * * In general, Commerce is not required to correct a respondent's errors when erroneous

data [are] reported and not timely corrected.") (internal quotations and citations omitted).

However, recognizing that the volume of information respondents must submit to Commerce during an investigation can lead to errors, Commerce has long had a policy of correcting a respondent's clerical errors submitted prior to the final determination. In the *Preamble,* Commerce explained that "[p]rior to the deadline for submission of factual information, the Department's practice normally is to accept a respondent's correction of an error in its own data because the Department has time to review, analyze, and where applicable, verify the corrected data." 62 Fed. Reg. at 27,327. Even though it has not promulgated a regulation, Commerce's current practice is outlined in *Colombian Flowers*. Commerce explained that it would accept corrections to a respondent's clerical errors under the following six conditions:

> (1) The error in question must be demonstrated to be a clerical error, not a methodological error, an error in judgment, or a substantive error; (2) the Department must be satisfied that the corrective documentation provided in support of the clerical error allegation is reliable; (3) the respondent must have availed itself of the earliest reasonable opportunity to correct the error; (4) the clerical error allegation, and any corrective documentation, must be submitted to the Department no later than the due date for the respondent's administrative case brief; (5) the clerical error must not entail a substantial revision of the response; and (6) the respondent's corrective documentation must not contradict information previously determined to be accurate at verification.

Colombian Flowers, 61 Fed. Reg. at 42,834. This Court recognized this methodology in *World Finer Foods, Inc. v United States,* No. 99–03–00138, 2000 WL 897752 (CIT June 26, 2000). In this case, Commerce promptly corrected those clerical errors brought to its attention immediately after the *Preliminary Determination*. *See* Decision Memo at Comment 1. Based on this methodology, the Court finds it was Kanzen's responsibility to ensure the accuracy of the data it submitted on August 15, 2000. Kanzen's failure to meet its responsibility does not shift the burden to Commerce. Therefore, Commerce's decision not to reexamine Kanzen's data to determine when, how, and why Kanzen's alleged error was committed was not an abuse of discretion. Respondent simply did not avail itself of a system specifically designed to remedy the issue in this case.

The parties' arguments regarding the obviousness of the alleged errors in this case are misplaced. After *NTN Bearing*, Commerce has shifted its focus from obviousness and the other factors of the three-pronged test to the six factors outlined in *Colombian Flowers*.[9] It was in response to the CAFC's ruling that Commerce decided to reevaluate its methodology for correcting a respondent's clerical errors and developed

[9] The CAFC held that "while it may be a reasonable exercise of ITA's discretion to restrict the correction of its own clerical errors to those *obvious* from the record, the same rule applied to a respondent's errors becomes arbitrary." *NTN Bearing,* 74 F.3d at 1208. (emphasis added).

the six factor approach outlined in *Colombian Flowers*. *See Preamble,* 62 Fed. Reg. at 27,327.

The Court recognizes the tension between finality and correct result raised by the issues in this case. *See NTN Bearing*, 74 F.3d at 1208. Unlike the situation in *NTN Bearing* and *World Finer Foods,* however, Kanzen did not raise this issue until after the *Final Determination* was issued. In *World Finer Foods*, respondent had attempted to make the correction from the time of the publication of the preliminary results. *World Finer Foods*, 2000 WL 897752, at *9. Similarly, in *NTN Bearing*, respondent had informed Commerce of the alleged errors shortly after the preliminary determination. Thus, in both cases the courts found that at the time respondents requested the correction, the tension between finality and correctness simply did not exist. *See NTN Bearing*, 74 F.3d at 1208; *World Finer Foods*, 2000 WL 897752, at *9. Kanzen had more than enough time to check its data between the date of submission and the issuance of the *Final Determination*.

The following examples demonstrate that Kanzen's claim that its ministerial error correction request would not require Commerce to conduct any further factual analysis in order to correct the ministerial errors is simply incorrect. Commerce even examined one of the particular sales that Kanzen claims included the alleged error during the sales verification. In respect to that sale Commerce noted "[r]egarding the pay date, which had been reported as 2/1/00, Kanzen did not know why this date was included in the data set." *Sales Verification Report* at 23. Commerce then "confirmed that there were no transactions on that day with any of Kanzen's banks which pertained to a POI sale of subject merchandise." *Id*. Kanzen suggests that the data conversion error resulted in the incorrect 02/11/00 payment date being reported. (Kanzen's 56.2 Br. at 5, n. 8.) However, that Commerce later found that a reported payment date was erroneous at verification does not explain why the conversion from Excel to SAS would have spontaneously created a payment date that previously did not exist. Also, the credit expense of "42.00" was reported for sales with different payment dates, not just the February 11, 2000 payment date.

Additionally, and perhaps most significant is the fact that Kanzen did not submit its Microsoft Excel spreadsheet containing the original credit expense data as part of its August 15, 2000 submission. Therefore, Commerce would necessarily have to make some factual inquiries to determine what data was originally submitted by Kanzen. Commerce could not simply apply a new programming methodology without investigating the original data before and after the conversion. Kanzen should have been alerted to potential errors and investigated its data submission after its exchange with Commerce during verification. Procedures exist allowing respondents to correct submitted data. Kanzen's failure to follow those procedures in this case is fatal to its position.

CONCLUSION

For the reasons stated above, the Court finds Commerce's *Final Determination* is supported by substantial evidence and is otherwise in accordance with law. Defendant-Intervenors' renewed motion to supplement the administrative record is denied. Furthermore, Plaintiffs' and Defendant-Intervenors' respective motions for judgment upon the agency record are denied. Defendant-Intervenors' application for oral argument is denied.