Slip Op. 10–99

PAKFOOD PUBLIC COMPANY LIMITED, ET AL., PLAINTIFFS, – v – THE UNITED STATES, *ET AL.*, DEFENDANTS.

Before: Pogue, Judge
Consol. Court No. 09–00430

[Granting in part and denying in part Plaintiffs' Motions for Judgment on the Agency Record, and remanding in part to Department of Commerce]

Dated: September 1, 2010

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White & Case LLP (*Walter J. Spak* and *Jay C. Campbell*) for Consolidated Plaintiffs and Defendant-Intervenors Andaman Seafood Co., Ltd.; Chanthaburi Frozen Food Co., Ltd.; Chanthaburi Seafoods Co., Ltd.; Phatthana Seafood Co., Ltd.; Phatthana Frozen Food Co., Ltd.; Thailand Fishery Cold Storage Public Co., Ltd.; Thai International Seafoods Co., Ltd.; Sea Wealth Frozen Food Co., Ltd.; and Rubicon Resources, LLC.

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Picard Kentz & Rowe LLP (*Andrew W. Kentz* and *Nathaniel J. Maandig Rickard*) for Consolidated Plaintiff and Defendant-Intervenor Ad Hoc Shrimp Trade Action Committee.

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Tony West, Assitant Attorney General; *Jeanne E. Davidson*, Director; *Patricia M. McCarthy*, Assistant Director, Commercial Litigation Branch, Civil Division, United States Department of Justice (*Stephen C. Tosini*), and, of counsel, *Jonathan M. Zielinski*, Attorney, Office of the Chief Counsel for Import Administration, Department of Commerce, for Defendant United States.

OPINION

Pogue, Judge:

Introduction

This consolidated action[1] challenges four determinations made by the United States Department of Commerce ("Commerce" or the "Department") in the final results of the third administrative review of an antidumping ("AD") duty order on frozen warmwater shrimp

[1] The actions consolidated herein include Court Nos. 09–00443, 09–00445, and 09–00447.

from Thailand.[2] Two of the four challenges come from Plaintiff Ad Hoc Shrimp Trade Action Committee ("AHSTAC"), and two come from the two mandatory respondents selected by the Department for individual examination in this review, the "Rubicon Group"[3] and "Pakfood"[4] (collectively the "Respondent Plaintiffs"[5]).

Plaintiff AHSTAC contests: (I) the Department's exclusive reliance on "type 3" entry data[6] obtained from United States Customs and Border Protection ("CBP entry data") in selecting respondents for individual examination in this review; and (II) Commerce's determination — underlying the agency's grant of a constructed export price ("CEP") offset to Rubicon's normal value ("NV") — that the level of trade ("LOT") of Rubicon's CEP sales was less advanced than the LOT of its NV sales. The Respondent Plaintiffs in turn contest: (III) Commerce's refusal to accept Pakfood's contractual exchange rate data after the expiration of the Department's party-initiated submission deadline; and (IV) the Department's refusal to offset interest earned on long-term deposits, used to secure access to lines of credit, against the costs of production and constructed value of two of Rubicon's affiliates.

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[2] *See Certain Frozen Warmwater Shrimp from Thailand*, 74 Fed.Reg. 47,551 (Dep't Commerce Sept. 16, 2009) (final results and partial rescission of AD duty administrative review) (*"Final Results"*) and accompanying Issues & Decision Mem., A-549–822, ARP 07–08 (Sept. 8, 2009), Admin. R. Pub. Doc. 281 (*"I & D Mem. "*). The period of review ("POR") was February 1, 2007 through January31, 2008. *Final Results*, 74 Fed. Reg. at 47,552.

[3] Throughout the remainder of this opinion, the "Rubicon Group" or "Rubicon" refers to Andaman Seafood Co., Ltd.("Andaman"), Wales & Co. Universe Ltd., Chanthaburi Frozen Food Co., Ltd. ("CFF"), Chanthaburi Seafoods Co., Ltd. ("CSF"), Intersia Foods Co., Ltd. (formerly Y2K Frozen Foods Co., Ltd.), Phattana Seafood Co., Ltd. ("PTN"), Phattana Frozen Food Co.,Ltd. ("PFF"), S.C.C. Frozen Seafood Co., Ltd., Thailand Fishery Cold Storage Public Co., Ltd. ("TFC"), Thai International Seafoods Co., Ltd. ("TIS"), and Sea Wealth Frozen Food Co., Ltd. ("Sea Wealth"). *Final Results*, 74 Fed. Reg. at 47,551. The group consists of affiliated firms, collapsed for AD analysis pursuant to 19 C.F.R. § 351.401(f) (2009).

[4] Throughout the remainder of this opinion, "Pakfood" refers to Plaintiffs Pakfood Public Co., Ltd. and its subsidiaries, Asia Pacific (Thailand) Co., Ltd., Chaophraya Cold Storage Co., Ltd., Okeanos Co., Ltd., Okeanos Food Co., Ltd., and Takzin Samut Co., Ltd. *Final Results*, 74 Fed. Reg. at 47,551. Like Rubicon, this group consists of affiliated firms, collapsed for AD analysis pursuant to 19 C.F.R. § 351.401(f).

[5] The following entities were included within the Rubicon Group in this review but are not named Plaintiffs in this action: Wales & Co. Universe Ltd.; Intersia Foods Co., Ltd.; and S.C.C. Frozen Seafood Co., Ltd. *Final Results*, 74 Fed. Reg. at 47,551. (*See Compl., Andaman Seafood Co. v. United States*, No. 09–00047 (Nov. 9, 2009).) Plaintiff Rubicon Resources, LLC, is the Rubicon Group's U.S. affiliate, and is included within all references to the "Respondent Plaintiffs" throughout the remainder of this opinion.

[6] Type 3 refers to consumption entries of merchandise subject to AD duties.

The court has jurisdiction over this matter pursuant to Section 516A(a)(2) of the Tariff Act of 1930, as amended, 19 U.S.C. § 1516a(a)(2) (2006)[7] and 28 U.S.C. § 1581(c).

As explained more fully below, the court concludes that (I) because the Department, without adequate explanation, treated this case materially differently from similarly situated proceedings, Commerce's exclusive reliance on CBP entry data in selecting the mandatory respondents for this review was arbitrary and not in accordance with law; (II) Commerce did not arbitrarily deviate from precedent in determining, on the record of this review, that the LOT of Rubicon's CEP sales was less advanced than the LOT of its NV sales, and the agency's LOT determination was supported by substantial evidence on the record of this review; (III) because Pakfood failed to exhaust its administrative remedies with respect to the issue of its contractual exchange rates, Pakfood failed to preserve this issue for review; and (IV) Commerce acted in accordance with its established practice in denying an interest offset to Rubicon for interest earned on long-term deposits, and the Department's determination to deny the offset was supported by substantial evidence.

Accordingly, the court remands to Commerce solely on the issue of the agency's methodology for selecting mandatory respondents in this review, and Plaintiffs' requests for judgment on the agency record with regard to the remaining three challenges at issue here are each denied.[8]

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[7] All further citations to the Tariff Act of 1930, as amended, are to Title 19 of the U.S. Code, 2006 edition.

[8] In the interest of judicial economy, and despite the court's conclusion that a remand is necessary on the issue of Commerce's methodology for choosing mandatory respondents in this review, the court will nevertheless consider each of Plaintiffs' remaining challenges to Commerce's treatment of the mandatory respondents in this review, because the Respondent Plaintiffs will likely remain mandatory respondents regardless of whether or not the Department continues on remand to rely exclusively on CBP entry data in supporting its choices. *See Certain Frozen Warmwater Shrimp from Thailand*, 73 Fed. Reg. 12,088, 12,089 (Dep't Commerce Mar. 6, 2008) (preliminary results and preliminary partial rescission of AD duty administrative review) ("*Based upon our consideration of the responses to the Q&V questionnaire* received and the resources available to the Department, we determined that it was not practicable to examine all exporters/producers of subject merchandise for which a review was requested. As a result, . . . *we selected the four largest producers/exporters* of certain frozen warmwater shrimp from Thailand during the POR, *[including] Pakfood, [and] the Rubicon Group*, . . . as the mandatory respondents in this proceeding." (emphasis added)) (unchanged in final results, *see Certain Frozen Warmwater Shrimp from Thailand*, 73 Fed. Reg. 50,933, 50,934,50,937 (Dep't Commerce Aug. 29, 2008) (final results and final partial rescission of AD duty administrative review)). In addition, the court notes that the question of the Department's exclusive reliance on CBP data in selecting mandatory respondents for this review remains live even if the use of a different methodology would not alter the results of the selection process. As explained below, the use of CBP data may affect determinations of affiliation, and hence also the composition of the set of companies assigned the mandatory respondents' AD duty rates.

Standard of Review

Where, as here, an action is brought under 19 U.S.C. § 1516a(a)(2) (providing a cause of action for, *inter alia*, challenges to final determinations by Commerce in administrative reviews of AD duty orders), "[t]he court shall hold unlawful any determination, finding, or conclusion found . . . to be unsupported by substantial evidence on the record, or otherwise not in accordance with law." 19 U.S.C. § 1516a(b)(1)(B)(i).

Substantial evidence is "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Consol. Edison Co. of N.Y. v. NLRB*, 305 U.S. 197, 229 (1938); *Gallant Ocean (Thailand) Co. v. United States*, 602 F.3d 1319, 1323 (Fed. Cir. 2010) (same).

A determination, finding, or conclusion is not in accordance with law if, *inter alia*, it is arbitrary. *See SKF USA Inc. v. United States*, 263 F.3d 1369, 1378, 1382 (Fed. Cir. 2001) (reviewing a challenge brought under 19 U.S.C. § 1516a(a)(2) and holding Commerce's determination to be not in accordance with law under 19 U.S.C. 1516a(b)(1)(B)(i) because "it is well-established that an agency action is arbitrary when the agency offers insufficient reasons for treating similar situations differently" (quotation and alteration marks and citation omitted)); *Nat'l Fisheries Inst. v. United States*, __ CIT __, 637 F. Supp. 2d 1270, 1282 (2009) (noting the court's holding that Commerce's decision was "arbitrary . . . and therefore contrary to law").

Discussion

I. Commerce's Use of CBP Entry Data to Select Mandatory Respondents in this Review

A. Background

In its Notice of Initiation for the instant administrative review,[9] the Department announced that it would be exercising its discretion under 19 U.S.C. § 1677f-1(c)(2) to limit the number of respondents selected for individual investigation. *See Notice of Initiation*, 73 Fed. Reg. at 18,765. Relying solely on CBP entry data, the Department identified Pakfood and Rubicon as the two largest producers/exporters of the subject merchandise, and accordingly selected these entities as mandatory respondents in this review. *See id.*; *Certain Frozen Warmwater Shrimp from Thailand*, 74 Fed. Reg.

[9] *Certain Frozen Warmwater Shrimp from Brazil, Ecuador, India, and Thailand*, 73 Fed. Reg. 18,754 (Dep't Commerce Apr. 7,2008) (notice of initiation of AD reviews) ("*Notice of Initiation* ").

10,000, 10,001 (Dep't Commerce Mar. 9, 2009) ("*Prelim. Results*") (unchanged in final results, *see Final Results*, 74 Fed. Reg. at 47,553); *I & D Mem.* Cmt. 2.

AHSTAC argues, *inter alia*, that Commerce's exclusive reliance on CBP entry data in selecting the mandatory respondents for this review was contrary to law because it is both inconsistent with prior practice (i.e. arbitrary and capricious[10]) and an abuse of discretion.[11] (*See* Mem. of Law in Supp. of Pl. [AHSTAC]'s Rule 56.2 Mot. for J. on Agency R. ("AHSTAC's Br.") 13.) In response, Commerce contends that it reasonably relied on CBP entry data in selecting the largest exporters/producers for individual examination, and that such reliance is not arbitrary or capricious because, "although [the Department] has relied upon [data from] quantity and value ["Q & V"] questionnaires in certain proceedings, . . . Commerce's 'current practice is to select respondents using CBP [entry] data.'" (Def.'s Opp'n to Pls.' Mots. for J. Upon Admin. R. ("Def.'s Br.") 8 (quoting *I & D Mem.* Cmt. 2 at 9–10).)

B. Commerce's Exclusive Reliance on CBP Entry Data to Select Mandatory Respondents in this Review Was Arbitrary and Therefore Not in Accordance with Law.

Contrary to the Department's claims, Commerce does not employ a consistent practice, supported with adequate reasoning, for selecting mandatory respondents based on import volume, pursuant to 19 U.S.C. § 1677f-1(c)(2). While the Department has used CBP entry data to select mandatory respondents in some administrative reviews initiated prior to the review under consideration here,[12] the Department has also continued the practice of selecting mandatory respon-

[10] *See Consol. Bearings Co. v. United States*, 348 F.3d 997,1007 (Fed. Cir. 2003) (Commerce acts arbitrarily and capriciously when it "consistently follow[s] a contrary practice in similar circumstances and provide[s] no reasonable explanation for the change in practice").

[11] "Arbitrary, capricious, or an abuse of discretion review. . . is now routinely applied by the courts as one standard under the heading of 'arbitrary and capricious' review. And it encompasses both review of the factual basis of an agency's action, and review of an agency's reasoning as distinguished from its fact finding." *Eagle Broad. Grp. v. FCC*, 563 F.3d 543, 551 (D.C. Cir. 2009) (internal quotation and alteration marks omitted) (citing C*itizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 416 (1971); *Bownman Transp., Inc. v. Ark. Best Freight Sys., Inc.*, 419 U.S. 281, 285–86 (1974)).

[12] *See, e.g., Wooden Bedroom Furniture from the People's Republic of China*, 73 Fed. Reg. 12,392, 12,392 (Dep't Commerce Mar. 7, 2008) (notice of initiation of administrative review of the AD duty order) ("For this administrative review, the Department intends to select respondents based on [CBP entry] data for U.S. imports during the [POR]. . . . The Department invites comments regarding the CBP [entry] data and the selection of respondents within seven days of the publication of this Federal Register notice."). The Department has also used CBP entry data to select mandatory respondents in some investigations of sales at less than fair value ("LTFV") initiated prior to the AD proceeding at issue here.

dents on the basis of Q & V questionnaires.[13] Without explanation, Commerce continues to use Q & V questionnaires in some administrative proceedings — including reviews, such as the review under consideration in this case, of AD duty orders with at least two prior completed reviews[14] — and to use CBP entry data in others.

As AHSTAC correctly points out (AHSTAC's Br. 10), because CBP entry data do not contain information with respect to company affiliations, where the Department relies exclusively on such data, it is forced to use affiliation-related information obtained in the course of

See, e.g., Lemon Juice from Argentina, 72 Fed. Reg. 20,820, 20,821 (Dep't Commerce Apr. 26,2007) (preliminary determination of sales at LTFV and affirmative preliminary determination of critical circumstances) ("Based on our analysis of import data obtained from [CBP], we selected two producers/exporters . . . as the mandatory respondents in this investigation because they were the largest [] producers/exporters of [subject merchandise]."). In other AD proceedings, the Department has also used a combination of CBP entry data and company-specific export data. *See, e.g., Prestressed Concrete Steel Wire Strand from the Republic of Korea*, 68 Fed. Reg. 42,393, 42,394 (Dep't Commerce July 17, 2003) (notice of preliminary determination of sales at LTFV) ("[B]ecause there were numerous producers/exporters of subject merchandise during the period of investigation (POI), we examined company-specific export data and [CBP] import data for the POI and selected as mandatory respondents the two companies that accounted for the majority of subject imports from [the relevant countries].").

[13] *See Wooden Bedroom Furniture from the People's Republic of China*, 74 Fed. Reg. 8,776, 8,777 (Dep't Commerce Feb. 26,2009) (initiation of AD duty administrative review) ("In the event that the Department limits the number of respondents for individual examination in the administrative review of wooden bedroom furniture, the Department intends to select respondents based on information obtained from the companies requested for review . . . . Therefore, . . . we will be requiring all parties for whom a review has been requested to respond to a Q&V questionnaire.") (subsequently using Q & V questionnaires to select mandatory respondents, 75 Fed. Reg. 5,952, 5,953 (Dep't Commerce Feb. 5, 2010) (preliminary results of AD duty administrative review and intent to rescind review in part) ("[U]sing Q&V data[,] the Department limited the number of companies to be individually examined . . . ."); *Polyethylene Retail Carrier Bags from the People's Republic of China*, 73 Fed. Reg. 52,282, 52,283 (Dep't Commerce Sept. 9, 2008) (preliminary results of AD duty administrative review) ("Based upon responses to the Q&V questionnaires, the Department selected [two companies] for individual examination in this administrative review . . . ."). *See also Certain Polyester Staple Fiber from the People's Republic of China*, 74 Fed. Reg. 32,125, 32,125 (Dep't Commerce July 7, 2009) (preliminary results of AD duty administrative review and extension of time limit for final results) ("On October 1, 2008, the Department sent out a [Q & V] questionnaire to all 27 companies for which a review was requested because a significant amount of the volume in the CBP [entry] data was unclear.").

The Department has also used Q & V questionnaires in combination with CBP entry data. *Wooden Bedroom Furniture from the People's Republic of China*, 75 Fed. Reg. 9,869, 9,870 (Dep't Commerce Mar. 4, 2010) (initiation of administrative review of the AD duty order) ("[T]he Department has decided to send Q&V questionnaires to the 20 companies for which reviews were requested with the largest total values of subject merchandise imported into the United States during the POR according to CBP data.").

[14] *See Wooden Bedroom Furniture from the People's Republic of China*, 74 Fed. Reg. at 8,777 (fourth review).

prior proceedings.[15] Such affiliation-related data may or may not remain accurate with regard the POR at issue. Unlike cases in which Commerce issues and verifies Q & V questionnaires, when the Department uses CBP entry data to select mandatory respondents, disclosure of accurate affiliation information for the relevant POR becomes discretionary for the producers/exporters. To the extent that producers/exporters *see* benefit in correcting outdated information, they may do so; to the extent, however, that the producers/exporters do not view correction of outdated information as beneficial, the burden to discover and correct any inaccuracies now falls on petitioners who, unlike the producers/exporters, are not likely to be in possession of the relevant information.[16] As a result, the domestic producers of some merchandise bear the burden of analyzing and correcting potentially outdated affiliation information (when CBP entry data are used) in administrative reviews of AD duty orders imposed on their foreign counterparts, whereas the domestic producers of other merchandise bear no similar burden (when Q & V questionnaires are issued and verified).[17]

As mentioned above, where an agency is afforded a measure of discretion in administering a statute, the exercise of that discretion is not in accordance with law if it is arbitrary, such as where the agency treats like cases differently. *See, e.g., Martin v. Franklin Capital Corp.*, 546 U.S. 132, 139 (2005) ("Discretion is not whim, and limiting discretion according to legal standards helps promote the basic principle of justice that like cases should be decided alike." (citation omitted)); *SKF*, 263 F.3d at 1382 ("[I]t is well-established that an agency action is arbitrary when the agency offers insufficient reasons for treating similar situations differently." (quotation and alteration marks and citation omitted)).

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[15] *See* Mem. Re. Selection of Respondents for Individual Review, A-549–822, ARP 07–08 (May 27, 2008), Admin. R. Pub. Doc. 67, at 7 ("[W]e have developed considerable information regarding the affiliations of the requested companies during the previous segments . . .. [W]e will continue to treat any affiliated companies found to be collapsible in previous segments of the proceeding as a single entity in the current segment.").

[16] The Notice of Initiation gave interested parties ten days from the date of its publication to submit comments on the CBP entry data. *Notice of Initiation*, 73 Fed. Reg. at 18,766. Because the CBP entry data were not received by interested parties until after the Notice of Initiation was published, the parties were afforded less than one week to analyze and comment on any inaccuracies found in the CBP entry data. *See* Letter from Dewey & Le Boeuf, LLP, A-549–822, ARP 07–08 (Apr. 17, 2008), Admin. R. Pub. Doc. 44, at 10; *see also Notice of Initiation*, 73 Fed. Reg. at 18,765 ("We intend to release the CBP [entry] data . . . within five days of publication of this Federal Register notice . . . .").

[17] *Compare, e.g., Lemon Juice from Argentina*, 72 Fed. Reg. at 20,821 (use of CBP entry data to select mandatory respondents) *with Wooden Bedroom Furniture from the People's Republic of China*, 74 Fed. Reg. at 8,777 (use of Q & V questionnaires).

By using CBP entry data in some reviews and Q & V questionnaires in others, Commerce is, without explanation, placing a higher burden on producers of some merchandise than on producers of other merchandise. Regardless of the reasonableness of using CBP entry data to select mandatory respondents, therefore, the Department's apparently arbitrary and inconsistent employment of this methodology is not, without more adequate explanation, consistent with basic principles of the rule of law. *See, e.g., Green Country Mobilephone, Inc. v. FCC*, 765 F.2d 235, 237 (D.C. Cir. 1985) ("We reverse the [agency] not because the strict rule it applied is inherently invalid, but rather because the [agency] has invoked the rule inconsistently. We find the [agency] has not treated similar cases similarly."); *Nakornthai Strip Mill Pub. Co. v. United States*, __ CIT __, 587 F. Supp. 2d 1303, 1307 (2008) ("Agencies have a responsibility to administer their statutorily accorded powers fairly and rationally, which includes not treating similar situations in dissimilar ways." (quotation and alteration marks and citation omitted)).

The court accordingly concludes that a remand is necessary on the issue of the Department's methodology for selecting mandatory respondents in this review. On remand, Commerce must either provide an adequately reasoned explanation distinguishing the present case from apparently similar cases in which the Department has employed and continues to employ a materially different methodology, or else apply a methodology consistent with those similarly situated cases. The chosen methodology must comport with a reasonable interpretation of the AD statute.[18]

II. Commerce's Grant of a CEP Offset to the Rubicon Group

A. Background

An AD duty is based upon the difference between the NV, i.e., the price charged for the subject merchandise in its home or third country

[18] Because neither the AD statute nor any of Commerce's regulations directly address the methodology by which the Department is to arrive at the number of "exporters and producers accounting for the largest volume of the subject merchandise from the exporting country that can be reasonably examined," 19 U.S.C.§ 1677f-1(c)(2)(B), the court will uphold Commerce's methodology if it is reasonable, *see Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 843 (1984), and is not arbitrarily applied. *See, e.g., Caribbean Ispat Ltd. v. United States*, 450F.3d 1336, 1340 (Fed. Cir. 2006) (denying *Chevron* deference where the statutory interpretation advanced by the agency "d[id] not represent the [agency]'s considered, consistent, or formal interpretation of [the statute]" and particularly where the agency, in a case similar to that under consideration, employed a methodology contrary to that being challenged). *See also Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 212 (1988) ("We have never applied [*Chevron* deference] to agency litigating positions that are wholly unsupported by regulations, rulings, or administrative practice.").

comparison market,[19] and the "export price" ("EP"), i.e., the price charged for such merchandise in the United States, or, where, as here, a foreign producer sells to an affiliated purchaser in the United States, the CEP. *Micron Tech., Inc. v. United States*, 243 F.3d 1301, 1303 (Fed. Cir. 2001).

To ensure a fair comparison of the NV to the appropriate U.S. price, Commerce is required to establish the NV "to the extent practicable, at the same [LOT] as the [EP] or [CEP]." 19 U.S.C. § 1677b(a)(1)(B)(i).[20] While the phrase "same [LOT]" is left undefined by both the statute and the Statement of Administrative Action ("SAA"),[21] the Department's regulations provide that "sales are made at different [LOTs] if they are made at different marketing stages (or their equivalent)." 19 C.F.R. § 351.412(c)(2).[22]

In determining whether sales are made at different LOTs in the U.S. and comparison markets, the Department "analyze[s] [the exporter/producer's] selling functions to determine if [LOTs] identified by a party are meaningful[;] [i]n situations where some differences in selling activities are associated with different sales, whether that difference amounts to a difference in the [LOTs] [is] evaluated in the context of the seller's whole scheme of marketing." *Antidumping Duties; Countervailing Duties*, 62 Fed. Reg. 27,296, 27,371 (Dep't Commerce May 19, 1997) (final rule). "Each more remote [LOT] must be characterized by an additional layer of selling activities, amounting in the aggregate to a substantially different selling function." *Id.*

[19] A third country market price will be the basis for the NV in a dumping margin calculation when Commerce 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." 19 U.S.C.§ 1677b(a)(1)(C)(ii). In this case, because the Rubicon Group's aggregate volume of home market sales of the foreign like products of the subject merchandise was insufficient to permit a proper comparison with the U.S. CEP sales, the Department used the Rubicon Group's sales to Canada, its largest third-country market, as the basis for comparison-market sales, in accordance with 19 U.S.C. § 1667b(a)(1)(C) and 19 C.F.R. § 351.404. *See Prelim. Results*, 74 Fed. Reg. at 10,003.

[20] *See also Micron*, 243 F.3d at 1313 ("[T]he over arching purpose of the [AD] statute is to permit a 'fair, 'apples-to-apples' comparison between foreign market value and United States price . . . .'" (quoting *Torrington Co. v. United States*, 68 F.3d1347, 1352 (Fed. Cir. 1995))); 19 U.S.C. § 1677b(a) ("[A] fair comparison shall be made between the [EP] or [CEP] and [NV].").

[21] *See generally* 19 U.S.C. §§ 1677, 1677b(a)(1)(B); SAA, H.R. Doc. No. 103–316, 103d Cong., 2d Sess. (1994), *reprinted in* 1994 U.S.C.C.A.N. 4040. *Accord Micron*, 243 F.3d at 1305.

[22] *See also Micron*, 243 F.3d at 1305 ("[W]e understand the term ['same LOT'] to mean comparable marketing stages in the home and United States markets . . . . [Requiring comparison of CEP and NV to be, to the extent practicable, at the same LOT] ensures, for example, that a [NV] wholesale price will not be compared to a United States CEP retail price."); *Prelim. Results*, 74 Fed. Reg. at 10,003 (relying on 19 C.F.R. § 351.412(c)(2)).

Accord Micron, 243 F.3d at 1314 (same). *See also* SAA at 829 (characterizing "difference in the [LOT]" as "a difference between the actual functions performed by the sellers at the different [LOTs] in the two markets," and noting that "Commerce will require evidence from the foreign producers that the functions performed by the sellers at the same [LOT] in the U.S. and foreign markets are similar, and that different selling activities are actually performed at the allegedly different [LOTs]").

If the Department determines that a respondent's NV and CEP sales were at different LOTs, and if "the difference in [LOT] . . . is demonstrated to affect price comparability, based on a pattern of consistent price differences between sales at different [LOTs] in the country in which [NV] is determined," 19 U.S.C. § 1677b(a)(7)(A)(ii), the Department is required to make an LOT adjustment to NV. *Id.* However, where the record does not contain data sufficient to make an LOT adjustment,[23] and where the NV is established at an LOT that is more remote from the factory than that of the CEP,[24] the Department may grant a capped CEP offset to NV pursuant to 19 U.S.C. § 1677b(a)(7)(B).[25] The grant of a CEP offset reduces the

[23] *See* SAA at 830–31 ("In some circumstances, the data may not permit Commerce to determine the amount of the [LOT] adjustment. For example, there may be no, or very few sales of a sufficiently similar product by a seller to independent customers at different [LOTs]. This could be the case where there is only one foreign respondent and all sales are to affiliated purchasers. Also, there could be restrictive business practices which result in too few appropriate sales to determine a price effect. Similarly, the data could indicate a clearly contradictory result, for example contradictory patterns during different periods. In such situations, although an adjustment might have been warranted, Commerce may be unable to determine whether there is an effect on price comparability. In such situations, although there is a difference in [LOTs], Commerce may be unable to quantify the adjustment. Where this occurs, Commerce will make a capped '[CEP] offset' adjustment under [19 U.S.C. § 1677b(a)(7)(B)], in lieu of the [LOT] adjustment that would be warranted under [19 U.S.C. § 1677b(a)(7)(A)].").

[24] *See* SAA at 831 ("The [CEP] offset adjustment will be made only where [NV] is established at a [LOT] more remote from the factory than the [LOT] of the [CEP]; *i.e.*, where adjustment under [19 U.S.C. § 1677b(a)(7)(A)], if it could have been quantified, would likely have resulted in a reduction of the [NV].").

[25] *See also* 19 C.F.R. § 351.412(f)(3) ("Where available data permit [Commerce] to determine . . . whether the difference in[LOT] affects price comparability, [Commerce] will not grant a [CEP] offset. In such cases, . . . [Commerce] will make a [LOT] adjustment."); *Antidumping Duties; Countervailing Duties*, 62 Fed. Reg. at 27,370 (noting that 19 C.F.R. § 351.412(f) "clarifies that the Department will grant a CEP offset only where a respondent has succeeded in establishing that there is a difference in the [LOTs], but, although the respondent has cooperated to the best of its ability, the available data do not permit the Department to determine whether that difference affects price comparability"); *Micron*, 243 F.3d at 1305 ("In some instances, the [LOT] in the home [or third country comparison] market will constitute a more advanced stage of distribution than the [LOT] in the United States, yet Commerce will lack sufficient data regarding the sales in the two markets to make a [LOT] adjustment, that is, it will be unable to determine how much to reduce the

respondent's NV by the lesser of the indirect selling expenses ("ISEs") incurred on sales of the foreign like product in the country in which NV is determined or the expenses incurred on U.S. sales by the U.S. affiliate which are deducted from the CEP under 19 U.S.C. § 1677a(d)(1)(D). *See* 19 U.S.C. § 1677b(a)(7)(B); *Micron*, 243 F.3d at 1305 ("The effect [of a CEP offset] is to reduce the price of the more advanced [LOT] by 'indirect selling expenses' that have been included in the price on the apparent theory that such costs would not have been incurred if the sale had been made on a less advanced [LOT]. However, the 'CEP offset' may not exceed 'the amount of such expenses for which a deduction is made under section 1677a(d)(1)(D).'" (quoting 19 U.S.C. § 1677b(a)(7)(B))).[26]

In this case, "[i]n order to determine whether the comparison-market sales and CEP sales were made at different marketing stages, [Commerce] compared the various selling activities performed by [Rubicon] for sales to unaffiliated customers in Canada to the selling activities performed for [Rubicon]'s sales to [its] U.S. affiliate, Rubicon Resources." *I & D Mem.* Cmt. 8 at 27. "In contrast to the many selling activities performed by the [Rubicon Group] for sales to Canada, [the Department] confirmed at verification the limited selling functions that the [Rubicon Group] perform[ed] for sales to Rubicon Resources." *Id*. (citing Mem. to File, *Verification of the Sales Responses of [CFF] and Rubicon Resources LLC [ ] in the [AD] Review of Certain Frozen Warmwater Shrimp from Thailand*, A-549822, ARP 07–08 (May 8, 2009), Admin. R. Pub. Doc. 252).

Specifically:

> In comparing the Canadian LOT to the CEP LOT, [Commerce] found that the selling activities performed by the Thai packers[27] for CEP sales were significantly fewer than the selling activities that were performed for the Canadian sales. The Thai packers provided the following selling functions: sales forecasting; mar-

foreign sale price to arrive at a price comparable to the U.S. price. In those cases, the statute provides for the award of a [CEP offset], i.e., a reduction in [NV] equal to 'the amount of indirect selling expenses incurred in the country in which [NV] is determined on sales of the foreign like product. . . .'" (quoting 19 U.S.C. § 1677b(a)(7)(B))).

[26] *See also Micron*, 243 F.3d at 1314 ("[T]he [LOT] comparison is to be made at the [LOT] that most nearly corresponds to EP— i.e., a sale to an unaffiliated importer and at the [LOT] which will be used in the duty calculation. This is the [LOT] reflected in adjusted CEP. Admittedly, Commerce's methodology results in comparison of adjusted CEP with unadjusted [NV]. However, [] the very purpose of the comparison is to determine whether an adjustment should be made to [NV]. That adjustment itself results in comparability.").

[27] The following companies in the Rubicon Group produced subject merchandise during the POR and are collectively referred to as the "Thai packers": Andaman, CSF, CFF, PTN, PFF, TFC, TIS, and Sea Wealth.

> ket research; sales promotion; advertising; trade shows; inventory maintenance; order input/processing; freight and delivery arrangements; visits, calls and correspondence to customers; development of new packaging and new markets (with customer); packing; and after-sales services for Canadian sales. The only selling functions that the Thai packers provided for CEP sales were inventory maintenance, order input/processing, freight and delivery arrangements, and packing. *Therefore, the Thai packers provided many more selling functions for Canadian sales than they provided for CEP sales, thus making the Canadian LOT more advanced than the CEP LOT.*

Prelim. Results, 74 Fed. Reg. at 10,004–05 (emphasis added) (unchanged in *Final Results*, 74 Fed. Reg. 47,551, *see I & D Mem.* Cmt. 8).[28]

Having found the LOT of Rubicon's third country market NV comparison sales to be more advanced than the LOT of Rubicon's CEP sales in the U.S., "because the data available did not form an appropriate basis for making a [LOT] adjustment but the Canadian LOT was at a more advanced stage of distribution than the CEP LOT, [Commerce] made a CEP offset to NV in accordance with [19 U.S.C. § 1677b(7)(B)]." *I & D Mem.* Cmt. 8 at 21.[29]

AHSTAC contests the Department's finding that the Canadian LOT was at a more advanced stage of distribution than the CEP LOT (AHSTAC's Br. 14–20), *see also I & D Mem.* Cmt. 8 at 22, arguing that the Department's grant of a CEP offset to Rubicon's NV in this review

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[28] *See also Prelim. Results*, 74 Fed. Reg. at 10,005 ("The Rubicon Group provided evidence on the record of this review supporting its contention that the selling activities that the Thai packers performed for Canadian customers were much more extensive than those performed for U.S. sales to its affiliate Rubicon Resources. While sales to Canada consumed a great deal of the Thai packers' time and resources, the interaction between the Thai packers and Rubicon Resources appeared to be perfunctory, consuming very little of the Thai packers' time and resources." (citing Response of Rubicon Group to the Department's Supplemental Sections A, B, and C Questionnaire, A-549–822, ARP 07–08 (Oct. 29, 2008), Admin. R. Pub. Doc. 152)). Further, the Department noted that "[t]he record of this review also contain[ed] information concerning Wales & Co. Universe Ltd.'s (Wales') [a member of the Rubicon Group] activities with respect to sales made by the Thai packers to Rubicon Resources. According to Wales, it had limited communications with Rubicon Resources on behalf of the Thai packers because the Thai packers did not communicate directly with Rubicon Resources regarding U.S. sales made during the POR." *Id.* (footnote omitted).

[29] In accordance with 19 U.S.C. § 1677b(a)(7)(B), Commerce calculated the CEP offset to be "the lesser of: (1) the [ISEs] incurred on the third-country sales, or (2) the [ISEs] deducted from the starting price in calculating the CEP [i.e., expenses for which a deduction is made under section 1677a(d)(1)(D)]." *Prelim. Results*, 74 Fed. Reg. at 10,005 (unchanged in final results).

was both contrary to established practice and unsupported by substantial evidence on the record of the third review.[30]

B. Commerce Did Not Act Contrary to Precedent In Granting a CEP Offset to Rubicon's NV in This Review.

AHSTAC first argues that, "[a]lthough Commerce makes determinations in a review based on the record developed in that proceeding, the agency has an established practice of giving weight to previous determinations made in prior proceedings regarding whether a CEP offset is appropriate,"[31] and that the Department should have therefore given more weight to its determinations in the LTFV investigation underlying this AD order, as well as the second administrative review of this order, where Commerce declined to grant Rubicon a CEP offset. (AHSTAC's Br. 16–17.)

In response, the Department asserts that "Commerce makes determinations based upon the record of the relevant segment of the proceeding, not previous segments, and [that] the record of this re-

[30] AHSTAC does not contest the Department's finding that the data available on this record do not provide an appropriate basis to calculate an LOT adjustment under 19 U.S.C. § 1677b(a)(7)(A). (*See generally* AHSTAC's Br.)

[31] (AHSTAC's Br. 16; *see also id.* at 16–17 (quoting Issues & Decision Mem., A-351–840, ARP 07–08 (Aug. 11, 2009), *available at* http://ia.ita.doc.gov/frn/summary/BRAZIL/E9–19223–1.pdf (last visited Sept. 1, 2010) (incorporated by reference in *Certain Orange Juice from Brazil*, 74 Fed. Reg. 40,167, 40,167 (Dep't Commerce Aug. 11, 2009) (final results of AD duty administrative review)) Cmt. 2 at 10 ("There is no meaningful change in the selling functions provided by [the respondent] in both the home market and the U.S. market between the last review and the current review . . . ."); Issues & Decision Mem., A-351–840, ARP05–07 (Aug. 5, 2008), *available at* http://ia.ita.doc.gov/frn/summary/BRAZIL/E8–18479–1.pdf (last visited Sept. 1, 2010) (incorporated by reference in *Certain Orange Juice from Brazil*, 73 Fed. Reg. 46,584, 46,585 (Dep't Commerce Aug. 11, 2008) (final results and partial rescission of AD duty administrative review)) Cmt. 5 at 18 ("Our analysis in this administrative review is consistent with the analysis performed in the LTFV investigation, and we disagree with [the respondent] that the evidence on the record here is any more probative than it was in the past."); *Certain Orange Juice from Brazil*, 73 Fed. Reg. 18,773, 18,776 (Dep't Commerce Apr. 7, 2008) (preliminary results and partial rescission of AD duty administrative review) (denying CEP offset "because no compelling evidence exists that [the respondent]'s sales process changed during the POR of this administrative review"); Issues & Decision Mem., A-580–834, ARP 04–05 (Jan. 23, 2007), *available at* http://ia.ita.doc.gov/frn/summary/KOREA-SOUTH/E7–1462–1.pdf (last visited Sept. 1, 2010) (incorporated by reference in *Stainless Steel Sheet and Strip in Coils from the Republic of Korea*, 72 Fed. Reg. 4,486, 4,489 (Dep't Commerce Jan. 31, 2007) (final results and rescission of AD duty administrative review in part)) Cmt. [1] at 8–9 (denying CEP offset after granting one in a previous proceeding where the records in the respective proceedings were "inherently different"), and citing Issues & Decision Mem., A-549–822, ARP 06–07 (Aug. 29, 2008), *available at* http://ia.ita.doc.gov/frn/summary/THAILAND/E8–20165–1.pdf (last visited Sept. 1, 2010) (incorporated by reference in *Certain Frozen Warmwater Shrimp from Thailand*, 73 Fed. Reg. 50,933,50,937 (Dep't Commerce Aug. 29, 2008) (final results and final partial rescission of AD duty administrative review)) ("*2d AR I &D Mem.* ") Cmt. 5 at 15).)

view supports Commerce's determination." (Def.'s Br. 12; *see also id.* at 13 (noting that "the Court has rejected explicitly the contention that denial of a [CEP] offset in an early segment of the proceeding, even if the facts were identical, should control Commerce's decision in a subsequent review" (citing *Alloy Piping Prods., Inc. v. United States*, No. 08–00027, 2009 WL 983078, at *6 (CIT 2009) ("Even assuming Commerce's determinations at issue are factually identical, as a matter of law a prior administrative determination is not legally binding on other reviews before this court. Thus, the court is not persuaded by Plaintiffs' suggestion to follow the analysis in [a prior review] given that Commerce has demonstrated with substantial evidence, and in accordance with law, that a CEP offset is proper under the facts of the present case." (citing *Timken U.S. Corp. v. United States*, 434 F.3d 1345, 1352 (Fed. Cir. 2006))))).)

While it is true that "[a]n agency is obligated to follow precedent," *M.M. & P. Mar Advancement, Training, Educ. & Safety Program v. Dep't Commerce*, 729 F.2d 748, 755 (Fed. Cir. 1984), "Commerce [nevertheless] has 'discretion to . . . adapt its views and practices to the particular circumstances of the case at hand, so long as the agency's decisions are explained and supported by substantial evidence on the record.'" *Nakornthai*, __ CIT at __, 587 F. Supp. 2d at 1307 (quoting *Trs. in Bankr. of N. Am. Rubber Thread Co. v. United States*, __ CIT __, 533 F. Supp. 2d 1290, 1297 (2007)). *Accord Alloy Piping*, 2009 WL 983078, at *6.

In this case, the Department determined that, unlike the evidence presented to the agency in the LTFV investigation and the second review, "[t]he verified record evidence supports Rubicon's [CEP] offset." (Def.'s Br. 10.) *See I & D Mem.* Cmt. 8 at 29 ("[B]ased on the facts on the record of the current review, . . . we find it appropriate to [] grant a CEP offset to the Rubicon Group . . . ."). The question before the court is thus whether this determination was adequately explained and supported by substantial evidence on the record.[32] *See Nakornthai*, __ CIT at __, 587 F. Supp. 2d at 1307–08; *Alloy Piping*, 2009 WL 983078, at *6.

AHSTAC essentially argues that Commerce has failed to adequately distinguish the record evidence of the third review from that of the second review and LTFV investigation, and that the agency

[32] AHSTAC's contention that "the agency's established practice is to require not only that the respondent seeking a[]CEP offset bear the burden of demonstrating that such an adjustment is warranted, but, where a CEP offset was denied in the past, the respondent has also been required to demonstrate how the record in the current proceeding differs from previous records through 'compelling evidence'" (AHSTAC's Br. 17) is simply a reformulation of the well-established rule that agencies must treat similar situations similarly or else explain their failure to do so. *E.g., M.M. & P. Mar*, 729 F.2d at 755.

must accordingly follow its past precedent in those prior segments. (*See* AHSTAC's Br. 17–18.) The court disagrees.

In the LTFV investigation underlying this AD duty order, the Department explained that, to show entitlement to a CEP offset, "[a] respondent must first demonstrate that substantial differences in selling functions exist between the third country [NV] and CEP [LOTs]." Issues & Decision Mem., A-549–822, Investigation (Dec. 23, 2004), *available at* http://ia.ita.doc.gov/frn/summary/thailand/04–28171–1.pdf (last visited Sept. 1, 2010) (incorporated by reference in *Certain Frozen and Canned Warmwater Shrimp from Thailand*, 69 Fed. Reg. 76,918, 76,919 (Dep't Commerce Dec. 23, 2004) (notice of final determination of sales at LTFV and negative final determination of critical circumstances)) ("*LTFV I & D Mem.* ") Cmt. 5 at 21. Commerce then determined, on the record of that segment, that a CEP offset for Rubicon was not warranted, because it found that Rubicon "performed essentially the same selling functions for its third country/EP transactions and for its sales to the U.S. affiliate." *Id.* at 20.

Similarly, in the second administrative review of the resulting AD duty order (the next time that the Rubicon Group was selected for individual examination[33]) Commerce again "analyzed the selling functions that the Rubicon Group performed through each [channel of] distribution [ ] for sales to Canada, as well as the selling functions it performed to sell to its U.S. EP customers and to Rubicon Resources," *2d AR I & D Mem.* Cmt. 5 at 12, and determined that a CEP offset for Rubicon was not warranted on the record of that review, because the Department found that "the Rubicon Group performed essentially the same selling functions for its third country/EP transactions and for its sales to the U.S. affiliate." *Id.* at 15 (citation omitted).[34] With regard to the evidence on the record before the agency in the second review, the Department noted that, "although the Rubicon Group provided evidence of Rubicon Resources' interaction with its U.S. customers in this review, it provided very little detail concerning the activities performed by the Thai packers for

[33] The Rubicon Group was not selected for individual examination in the first administrative review of this AD duty order. *See Certain Frozen Warmwater Shrimp from Thailand*, 72 Fed.Reg. 10,669, 10,670 (Dep't Commerce Mar. 9, 2007) (preliminary results and partial rescission of AD duty administrative review).

[34] *See also id.* (noting that "[i]n order for the Department to grant a CEP offset, the respondent must first demonstrate that substantial differences in selling functions exist between the third country and CEP LOTs, in accordance with 19 C.F.R.§ 351.412(c)(2)." (citing *Roller Chain, Other Than Bicycle, from Japan*, 61 Fed. Reg. 64,322, 64,326 (Dep't Commerce Dec. 4, 1996) (final results of AD duty administrative review, and determination not to revoke in part))).

sales to Rubicon Resources and no evidence of these activities." *Id.* at 16. Commerce accordingly concluded that, because, "based on information gathered in the LTFV investigation, at a minimum, the Thai packers regularly provide[d] sales forecasting in the form of shipment schedules to Rubicon Resources," *id.*, and because Rubicon had "neither argued nor provided evidence that this activity was no longer performed by the Thai packers during the time period covered by this review," *id.*, "substantial differences in selling activities" did not exist between Rubicon's Canadian sales and its sales to its U.S. affiliate. *Id.* (noting that "the standard articulated in the regulations [ ] requires the Department to find 'substantial differences in selling activities' before determining that there is a difference in the stage of marketing" (quoting 19 C.F.R. § 351.412(c)(2))).

The third review, however, was different. In the third review — the subject of this action — Commerce determined that Rubicon had provided sufficient verified evidence that its selling functions with respect to sales to its U.S. affiliate were at a substantially lesser stage of marketing than its selling functions with regard to its NV sales. *I & D Mem.* Cmt. 8 at 27. Unlike the LTFV investigation, where Rubicon reported, and Commerce verified, essentially identical sales activities with regard to its Canadian sales as with regard to its sales to its U.S. affiliate,[35] and unlike the second administrative review, where Rubicon "provided very little detail concerning the activities performed by the Thai packers for sales to Rubicon Resources [the U.S. affiliate] and no evidence of these activities,"[36] in the third review, the Department emphasized that Rubicon reported, and Commerce verified, significantly more selling functions for its Canadian sales than for its sales to its U.S. affiliate.[37] Accordingly, relying on

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[35] *Compare Certain Frozen and Canned Warmwater Shrimp from Thailand*, 69 Fed. Reg. 47,100, 47,106 (Dep't Commerce Aug. 4,2004) (notice of preliminary determination of sales at LTFV, postponement of final determination, and negative critical circumstances determination) ("*LTFV Prelim. Results* ") ("[F]ordirect sales (*i.e.*, EP [and Canadian] sales), the Rubicon Groupreported the following selling functions: sales forecasting/market research, sales promotion/trade shows/advertising, inventory maintenance, order processing/invoicing, freight and delivery arrangements, and direct sales personnel.") *with id.* ("For sales to the U.S. affiliate, the Rubicon Group reported the following selling functions: sales promotion/trade shows/advertising, inventory maintenance, order processing/invoicing, freight and delivery arrangements, and direct sales personnel."). Accordingly, "[a]fter analyzing the selling functions performed for each sales channel, [the Department] [found] that the distinctions in selling functions [were] not material." *Id.*

[36] *2d AR I & D Mem.* Cmt. 5 at 16.

[37] *Compare Prelim. Results*, 74 Fed. Reg. at 10,004 ("The Thai packers provided the following selling functions [for Canadian sales]: sales forecasting; market research; sales promotion; advertising; trade shows; inventory maintenance; order input/processing; freight and delivery arrangements; visits, calls and correspondence to customers; development of new packaging and new markets (with customer); packing; and after-sales services

the AD statute and the SAA, and explaining that the Department's LOT analysis involves a comparison of the respondent's selling functions for its various channels of distribution, the Department concluded, on the record of the third review, that "the Thai packers provided many more selling functions for Canadian sales than they provided for CEP sales, thus making the Canadian LOT more advanced than the CEP LOT." *Prelim. Results*, 74 Fed. Reg. at 10,005 (unchanged in *Final Results*, 74 Fed. Reg. 47,551); *see also I & D Mem.* Cmt. 8 at 27.

Thus, because "Commerce's analysis includes an explanation of the standards it applied[ ] and the analysis that led to its conclusion, demonstrating a rational connection between the facts on the record and the conclusions drawn," *Alloy Piping*, 2009 WL 983078, at *5, the court concludes that Commerce's LOT analysis is supported by substantial evidence, and that the Department has sufficiently distinguished the evidentiary record of the third administrative review from that of the LTFV investigation and the second administrative review. Accordingly, the agency's conclusions from those earlier segments do not serve as precedent controlling its conclusions in the instant review. *See Nakornthai*, __ CIT at __, 587 F. Supp. 2d at 1307.

C. Commerce's Treatment of Rubicon's ISE Ratios as Part of its LOT Analysis Was Reasonable and Supported by Substantial Evidence.

AHSTAC further contends that Commerce's determination to grant a CEP offset to Rubicon in this review is both arbitrary (because contrary to established practice) and not supported by substantial evidence, because the Department should have given more weight to Rubicon's reported ISE ratios as part of its LOT analysis. (*See* AHSTAC's Br. 18–19.).

First, the court cannot agree with AHSTAC that the Department has an established practice of giving more weight to a respondent's ISEs as part of its LOT analysis than it did in this case.

In support of their argument in this regard, AHSTAC points to the results of an administrative review of an AD order on hot-rolled flat-rolled carbon-quality steel from Japan and the LTFV investigation underlying the AD order now at issue. (AHSTAC's Br. 19.) In analyzing the LOTs involved in *Steel from Japan*, the Department "examined the selling functions" of the respondent, and noted that "[a] qualitative evaluation of the similarities and differences in selling functions suggest[ed] that the differences may be substantial."

. . . .") *with id.* at 10,004–05 ("The only selling functions that the Thai packers provided for CEP sales were inventory maintenance, order input/processing, freight and delivery arrangements, and packing.").

Issues & Decision Mem., A-588846, ARP 99–00 (Jan. 17, 2002), *available at* http://ia.ita.doc.gov/frn/summary/japan/02–1268–1.txt (last visited Sept. 1, 2010) (incorporated by reference in *Hot-Rolled Flat-Rolled Carbon-Quality Steel Products from Japan*, 67 Fed. Reg. 2,408, 2,409 (Dep't Commerce Jan. 17, 2002) (final results of AD duty administrative review)) ("*Steel from Japan I & D Mem.* ") Cmt. 1 at 6. "As a rule of thumb check on the alleged differences in selling functions, *and subsequent to the Preliminary Results*, [Commerce] calculated the weighted-average [ISEs], by channel of distribution, to help determine the extent of selling activities performed for sales through each channel." *Id*. (emphasis added). "*[B]ased on [its] qualitative analysis of selling functions* and the differences in selling expenses, [Commerce] [found] that the differences in [the respondent's] selling activities were, collectively, 'substantial.'" *Id.* (emphasis added).

In the LTFV investigation underlying this AD duty order, as noted above, the Department "examined the selling activities performed [by Rubicon] for each channel [of distribution]," *LTFV Prelim. Results*, 69 Fed. Reg. at 47,106, and, "[a]fter analyzing the selling functions performed for each sales channel, [found] that the distinctions in selling functions [were] not material." *Id.* Based on this analysis, the Department concluded that Rubicon's sales to its U.S. affiliate were at the same LOT as its sales to its Canadian customers. *Id.* In addition, having found Rubicon's claim that it performed additional and/or higher intensity selling activities for sales to Canada than for those to its U.S. affiliate to have been unsubstantiated by the record evidence,[38] the Department also "note[d] that the Rubicon Group has reported a higher level of [ISEs] for sales made to Rubicon Re-

[38] *LTFV I & D Mem.* Cmt. 5 at 21 ("Regarding the additional selling function[s] [claimed by Rubicon for its sales to Canada but not to its U.S. affiliate], [Commerce] disagree[d] that the Rubicon Group perform[ed] substantial marketing or sales forecasting activities for sales to its third country customers. [The Department] did not find at verification that the Rubicon Group performed significant marketing or forecasting activities for sales to Canada, nor did the Rubicon Group attempt to demonstrate at verification the activities or expenses related to this function. Therefore, [Commerce] [found] that the Rubicon Group's claim that it performed this selling function for sales to Canada but not for CEP sales to be unsubstantiated." (footnote omitted)); *see also id.* at 21–22 ("Neither do we agree with the Rubicon Group's claim that record evidence shows that it performed certain selling functions at such different levels of intensity that the Department must conclude that it sold shrimp at different marketing stages across markets. [. . .] While we acknowledge that the selling functions performed for the unaffiliated customer may have shifted from the Thai packers to Rubicon Resources with the creation of the joint venture, we disagree that this argument is persuasive because the focus of the CEP offset analysis is selling functions performed to sell tothe U.S. affiliate. When we analyze the functions performed to sell to Rubicon Resources, we find that the Thai packers perform substantially the same functions as they do to sell to unaffiliated customers.").

sources," *LTFV Prelim. Results*, 69 Fed. Reg. at 47,106, claiming this fact as additional support for the agency's conclusion that the U.S. LOT for Rubicon's CEP sales was not less advanced than the LOT of its Canadian sales. *Id.* Nevertheless, the Department emphasized that its decision was based primarily on its analysis of Rubicon's selling functions with respect to sales to Canada and its U.S. affiliate,[39] and that Rubicon's reported ISE ratios simply added support to Commerce's LOT analysis. *LTFV I & D Mem.* Cmt. 5 at 23.[40]

Contrary to AHSTAC's contentions, therefore, the court finds no basis in either *Steel from Japan* or the LTFV investigation underlying this AD order to suggest that the Department's practice with regard to its LOT analysis is anything other than, as the agency explained in the instant review, to "focus on [the respondent's] selling activities." *I & D Mem.* Cmt. 8 at 27. *Accord Alloy Piping*, 2009 WL 983078, at * 5 ("[T]he focus of the LOT adjustment analysis, which may ultimately lead to a CEP offset, is on *selling activities* and not on expenses as the Plaintiffs suggest." (footnote omitted, emphasis in original) (citing 19 U.S.C. § 1677b(a)(7)(A)(i); 19 C.F.R. § 351.412(c)(2); SAA at 829; *Antidumping Duties; Countervailing Duties*, 62 Fed. Reg. at 27,371))). Although the agency has in the past used a respondent's ISE ratios to corroborate its analysis of selling functions, *Steel from Japan I & D Mem.* Cmt. 1 at 6; *LTFV Prelim. Results*, 69 Fed. Reg. at 47,106, there are numerous subsequent instances where the Department has not considered a respondent's selling expenses as part of its LOT analysis at all,[41] and AHSTAC has not pointed the court to, and the court is not

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[39] *LTFV I & D Mem.* Cmt. 5 at 21 ("[W]e find that the Rubicon Group performed essentially the same selling functions when selling in both Canada and the United States (for both the EP and CEP sales). *Therefore*, we determine that these sales are at the same LOT and no LOT adjustment is warranted." (emphasis added) (quoting *LTFV Prelim. Results*, 69 Fed. Reg. at 47,106)); *see* id. at 21 ("We have not altered our decision from that stated in the preliminary determination.").

[40] *See id.* ("We disagree with the [] implication that were lied heavily on the reported value-based [ISE] ratios in denying the CEP offset. Rather, we considered the ratios in combination with the analysis of selling functions, in order to determine if the ratios substantiated the narrative explanation of selling functions, in accordance with our practice." (citing *Brass Sheet and Strip from Canada*, 62 Fed. Reg. 16,759, 16,760 (Dep't Commerce Apr. 8, 1997) (final results of AD duty administrative review); *Hot-Rolled Steel from Japan* Cmt. 1)). *See also id.* at 24 ("[W]e determined that [Rubicon] is not entitled to [a CEP offset] based on the evidence on this record that there were no significant differences between the selling functions performed for third country and affiliated party U.S. sales.").

[41] *See, e.g., Purified Carboxymethylcellulose from Finland*, 74 Fed. Reg. 16,180, 16,184 (Dep't Commerce Apr. 9, 2009) (notice of preliminary results of AD duty administrative review) (unchanged in final results, 74 Fed. Reg. 28,886 (Dep't Commerce June 18, 2009)); *Certain Welded Carbon Steel Pipe and Tube from Turkey*, 74 Fed. Reg. 6,368, 6,370–71 (Dep't Commerce Feb. 9,2009) (notice of preliminary results of AD duty administrative review) (unchanged in final results, 74 Fed. Reg. 22,883 (Dep't Commerce May 15, 2009));

aware of, any precedent where, rather than corroborating the Department's conclusions with regard to a respondent's selling functions, the respondent's expenses have been used to reverse those conclusions. (*See generally* AHSTAC's Br.)

Accordingly, the court concludes that Commerce did not act contrary to its established practice by not giving more weight to Rubicon's ISE ratios as part of its LOT analysis in this review.

Second, to the extent that AHSTAC's argument is that the agency's finding with regard to Rubicon's LOTs is unsupported by substantial evidence because the Department should in any case have given more weight to Rubicon's expense ratios, it is not for this Court to re-weigh the evidence or substitute its own judgment for that of the agency. *E.g., Chia Far Indus. Factory Co. v. United States*, 28 CIT 1336, 1362, 343 F. Supp. 2d 1344, 1369 (2004). As the Department explained, the evidence submitted by Rubicon and verified by Commerce in this review with regard to Rubicon's selling functions in both the U.S. and Canadian markets was, unlike the evidence submitted in the LTFV investigation and the second review, sufficient for the agency to determine that Rubicon's Canadian sales were at an LOT that was more remote from the factory than the LOT of its sales to its U.S. affiliate. *I & D Mem.* Cmt. 8 at 27. Accordingly, the court concludes that Commerce's determination in this regard was supported by substantial evidence on the record of the third review. The Department's conclusion that more weight should not have been given to Rubicon's ISE ratios as part of Commerce's LOT analysis is reasonable in light

Carbon and Certain Alloy Steel Wire Rod from Canada, 73 Fed. Reg. 39,646, 39,649–50 (Dep't Commerce July 10, 2008) (notice of preliminary results of AD duty administrative review) (unchanged in final results, 73 Fed. Reg. 77,005 (Dep't Commerce Dec. 18, 2008) and accompanying Issues & Decision Mem., A-122–840, ARP 06–07 (Dec. 11, 2008),*available at* http://ia.ita.doc.gov/frn/summary/CANADA/E8–30090–1.pdf (last visited Sept. 1, 2010) Cmt. 1 at 3 ("[N]or do differences in reported [ISEs] for different sales channels necessarily reflect different LOTs. Rather, pursuant to 19 C.F.R. § 351.412(c)(2), to determine whether comparison market sales were at a different LOT than sales to the United States, we examine stages in the marketing process and selling functions along the chain of distribution between the producer and the unaffiliated (or arm's length) customers.")). *See also Arcelormittal USA Inc. v. United States*, No. 06–00085, 2008 WL 2223071, at *11 (upholding grant ofCEP offset where "Commerce reasonably relied on the evidence of the selling functions performed by defendant-intervenors' United States affiliates in deciding to grant the companies a CEP offset," and making no mention of selling activities); *Alloy Piping*, 2009 WL 983078, at *5 ("If Commerce, or this Court, in reviewing an administrative determination, were to narrow the focus of its LOT analysis to selling expenses, it could act contrary to law and cause misleading results. Expenses do not necessarily translate directly into activities, nor do they capture the intensity of the activities. Moreover, expenses related to several selling activities may fall under a single expense field.").

of the record as a whole, [42] and is neither contrary to the statute, *see* 19 U.S.C. § 1677b(a)(7)(A)(i), nor to previous opinions from this Court. *See, e.g., Arcelormittal*, 2008 WL 2223071, at *11.

The court therefore concludes that Commerce's determination that Rubicon's sales to its U.S. affiliate were at a lesser LOT than its sales in the third country comparison market was supported by substantial evidence on the record as a whole and was not contrary to law.

III. Commerce's Rejection of Pakfood's Forward Contract Exchange Rate Data

A. Background

After the publication of the Preliminary Results for this review and after the expiration of the regulatory deadline for party-initiated factual submissions,[43] Pakfood, on March 13, 2009, and for the first time in this proceeding, requested permission to submit to Commerce its U.S. sales data reflecting the exchange rates in its forward contracts. Letter from Trade Pacific PLLC, A-549–822, ARP 07–08 (Mar. 13, 2009), Admin. R. Pub. Doc. 226 ("*First Request to Supp.*"). Although the statute and Department's regulations explicitly provide that if "a currency transaction on forward markets is directly linked to an export sale under consideration, [Commerce will use] the ex-

[42] The Department explained that, "[i]n this case, a quantitative analysis [was] inappropriate because it assumes that the expense data reported by the Rubicon Group are an accurate depiction of the level of intensity at which the selling activities are performed," *I & D Mem.* Cmt. 8 at 28, as well as because "[s]elling expenses do not translate directly into selling activities, nor do they always capture the degree to which the activities are performed." *Id.* The Department also noted that the Rubicon Group had argued before it that "the ISE ratios reported for the Thai packers' sales to Rubicon Resources [the U.S. affiliate] [were] inherently overstated," *id.* at 25, explaining that "[Rubicon] differentiated between ISEs for direct sales to unaffiliated customers and ISEs for sales to Rubicon Resources solely based on the accounts for marketing staff salaries," *id.*, and that, "[u]sing this approach, . . . the amounts for other ISE accounts also were mostly attributable to the Thai packers' sales to unaffiliated customers[;] [h]owever, because there was no systematic or practicable way to attempt to allocate each ISE account between sales to unaffiliated customers and sales to Rubicon Resources, the Rubicon Group did not do so."*Id.* Under these circumstances, and in light of the substantial evidence, discussed above, supporting Commerce's determinations regarding the differences in Rubicon's selling functions in the U.S. and Canada, the court concludes that it was reasonable forthe Department to give less weight to Rubicon's reported ISEratios than to the verified evidence on the record regarding Rubicon's actual selling functions in both markets.

[43] Under 19 C.F.R. § 351.301(b)(2), the deadline for party-initiated submissions is 140 days after the last day of the anniversary month — i.e., "the calendar month in which the anniversary of the date of publication of an [AD duty] order . . . occurs." *Ass'n of Am. Sch. Paper Suppliers v. United States*, __ CIT __, 683 F. Supp. 2d 1317, 1321 (2010). Accordingly, because the anniversary month in this case was February 2008, *see Notice of Inititation*, 73 Fed. Reg. at 18,754,the deadline for party-initiated factual submissions in this review was July 18, 2008.

change rate specified . . . to convert the foreign currency," 19 U.S.C. § 1677b-1(a); 19 C.F.R. § 351.415(b), Pakfood argued that, because the department had not previously requested data on contractual exchange rates, "the need to provide this information thus was not previously evident." *First Request to Supp.* at 2.

Commerce denied Pakfood's request, Letter to Trade Pacific PLLC, A-549–822, ARP 07–08 (Mar. 16, 2009), Admin. R. Pub. Doc. 228, ("*First Denial of Request to Supp.* "), explaining that:

> [t]o properly consider this new information in its margin calculations, the Department would require significant additional time to analyze the data, request clarification or supplemental information . . ., and allow for comments . . . . Given that [Pakfood's] request was made at a late stage . . . the Department would not be able to properly analyze the data within the statutory time frame . . . .

Id. Upon Pakfood's request to reconsider this decision, Letter from Trade Pacific PLLC, A-549–822, ARP 07–08 (Apr. 21, 2009), Admin. R. Pub. Doc. 248, the Department reiterated its reasons for denying Pakfood's request. *See* Letter to Trade Pacific PLLC, A-549–822, ARP 07–08 (Apr. 22, 2009), Admin. R. Pub. Doc. 250 ("*2d Denial of Request to Supp.* ").

Following this exchange of letters, and in response to Commerce's Preliminary Results, which did not incorporate the exchange rates from Pakfood's forward contracts, *see Prelim. Results*, 74 Fed. Reg. at 10,007, Pakfood submitted a case brief that did not address the contractual exchange rates issue. *See generally* Letter from Trade Pacific PLLC, A-549–822, ARP 07–08 (May 29, 2009), Admin. R. Pub. Doc. 261. As Pakfood did not address this issue in its case brief, Commerce did not comment on the issue in either the Final Results or the Issues and Decision Memorandum. *See generally Final Results*, 74 Fed. Reg. 47,551; *I & D Mem.*

B. Pakfood Failed to Exhaust its Administrative Remedies and Therefore Failed to Preserve This Issue for Judicial Review.

Commerce argues that Pakfood failed to exhaust its administrative remedies regarding its exchange rate claim and that Pakfood is therefore precluded from bringing this claim before the court. (Def.'s Br. 15–18.) Pakfood responds that its failure to exhaust its administrative remedies should be excused both because pressing its argument in its case brief at the administrative level would have been futile and because Commerce fully considered the exchange rate issue in this

segment. (*See* Resp'ts' Joint Reply Br. ("Resp't Pls.' Reply") 1–4.)

The court agrees with the Department that Pakfood's failure to exhaust its administrative remedies on this issue precludes the issue's review at this time. "[A]bsent a strong contrary reason, the court should insist that parties exhaust their remedies before the pertinent administrative agencies." *Corus Staal BV v. United States* 502 F.3d 1370, 1379 (Fed. Cir. 2007).[44] Generally, the "prescribed remedy" for a party in disagreement with Commerce's Preliminary Results is to file a case brief, *Ta Chen Stainless Steel Pipe, Ltd. v. United States*, 28 CIT 627, __, 342 F. Supp. 2d 1191, 1205 (2004), and that "case brief must present *all* arguments that *continue* in the submitter's view to be relevant to [Commerce]'s final determination or final results . . . ." 19 C.F.R. § 351.309(c)(2)(emphasis added).

Thus, in general, under the Department's regulations, requiring the inclusion within the case brief of all issues which remain in controversy is "appropriate" in actions challenging the results of AD duty order administrative reviews. *See* 28 U.S.C. § 2637(d) ("[T]he Court of International Trade shall, where appropriate, require the exhaustion of administrative remedies."). *See also Ad Hoc Shrimp Trade Action Comm. v. United States*, __ CIT __, 675 F. Supp. 2d 1287, 1300 (2009) ("It is 'appropriate' for litigants challenging [AD] actions to have exhausted their administrative remedies by including all arguments in their case briefs submitted to Commerce." (quoting 28 U.S.C. § 2637(d))); *id.* (noting that, even where a party has previously raised an issue with the agency, usually "[t]he failure to include an argument in a case brief is a failure to exhaust administrative remedies with respect to that argument because it deprives Commerce of

[44] The preference for exhaustion (1) prevents the "frequent and deliberate flouting of administrative processes which could weaken the effectiveness of an agency," *Randolph-Sheppard Vendors of Am. v. Weinberger*, 795 F.2d 90, 105 (D.C. Cir. 1986) (internal quotation and alteration marks and citation omitted); *see also Luoyang Bearing Factory v. United States*, 26 CIT 1156, 1186,240 F. Supp. 2d 1268, 1297 (2002); (2) protects the autonomy and efficiency of agency decision making within the agency's sphere of expertise, *Sandvik Steel Co. v. United States*, 164 F.3d 596, 600 (Fed. Cir. 1998); (3) aids judicial review by encouraging the development of factual issues pertinent to the legal dispute, *Carpenter Tech. Corp. v. United States*, 30 CIT 1373, 1375, 452 F. Supp. 2d 1344, 1346–1347 (2006); and (4) promotes judicial economy by ensuring that the court does not duplicate the agency's fact-finding function and providing the agency with the chance to correct its errors, potentially obviating the need for judicial review, *Sandvik Steel*, 164 F.3d at 600. *See Carpenter Tech.*, 30 CIT at 1597, 464 F. Supp. 2d at 1346 ("[E]xhaustion is generally appropriate in the [AD] context because it allows the agency to apply its expertise, rectify administrative mistakes, and compile a record adequate for judicial review — advancing the twin purposes of protecting administrative agency authority and promoting judicial efficiency." (citation omitted)).

an opportunity to consider the matter, make its ruling, and state the reasons for its action" (internal quotation and alteration marks and citation omitted)).

In this case, Pakfood does not contest that it omitted its request that Commerce use contractual exchange rates from its case brief. (Mem. of Points & Auth. in Supp. of Mot. by [the Resp't Pls.] for J. Upon the Agency R. ("Resp't Pls.' Br.") 13 n.6.) Nor does Pakfood contest that this omission constitutes a failure to exhaust its administrative remedies. (*Id*. ("Pakfood did not present this argument in its case brief before the agency, and therefore did not exhaust its administrative remedies." (citing 28 U.S.C. § 2637(d); 19 C.F.R. § 351.309(c)(2))).)

It is true that a party's failure to exhaust its administrative remedies should not preclude judicial review of its claims where the benefits of exhaustion are inapplicable or outweighed by other concerns, *Timken Co. v. United States*, 10 CIT 86, 93, 630 F. Supp. 1327, 1334 (1986) (quoting *Hormel v. Helvering*, 312 U.S. 552, 558 (1941) ("[The exhaustion doctrine] should not be applied where the obvious result would be a plain miscarriage of justice.")). Moreover, this Court has recognized certain exceptions to the requirement.[45] For example, Pakfood correctly notes that the court has waived the exhaustion requirement where it would have been futile for the party to raise its argument at the administrative level, as well as where the record indicates that - either as a result of other parties' arguments or the agency's decision-making process — the agency in fact thoroughly considered the issue in question. (*See* Resp't Pls.' Reply 2.) *See, e.g., Asociacion Colombiana de Exportadores de Flores v. United States*, 916 F.2d 1571, 1575 (Fed. Cir. 1990) (allowing waiver of exhaustion requirement on basis of futility); *Valley Fresh Seafood, Inc. v. United States*, No. 06–00132, 2007 WL 4380137, at *5 (CIT Dec. 17, 2007) (waiver of exhaustion requirement on ground that agency fully considered the issue) (citing *Holmes Prods. Corp. v. United States*, 16 CIT 1101, 1104 (1992)).

As the court will explain, however, neither of these exceptions is applicable here.[46]

1. The Futility Exception to the Exhaustion Requirement is Not Applicable Here.

[45] This Court is "authorized to determine proper exceptions to the doctrine of exhaustion." *Luoyang Bearing*, 26 CIT at 1186 n.26, 240 F. Supp. 2d at 1297 n.26 (citation omitted). For a list of previously accepted exceptions to this Court's exhaustion requirement, *see, e.g., Ta Chen*, 28 CIT at 645 n.18, 342 F. Supp. 2d at 1206 n.18.

[46] Pakfood does not contend that any additional exceptions are applicable to the case at bar. (*See generally* Resp't Pls.' Reply 1–4.)

To show that an argument would be futile, "a party must demonstrate that it would be required to go through obviously useless motions in order to preserve its rights." *Mittal Steel*, 548 F.3d at 1384 (internal quotation and alteration marks and citation omitted). This exception applies in circumstances where, for example, an agency is unable to provide an appropriate remedy, *PPG Indus., Inc. v. United States*, 14 CIT 522, 542, 746 F. Supp. 119, 137 (1990) (futility applies where "the agency has no power to provide the remedy sought, or where the remedy would be manifestly inadequate" (citations omitted)), or where "an agency has articulated a very clear position on the issue which it has demonstrated it would be unwilling to reconsider," *Randolph-Sheppard*, 795 F.2d at 105. In the latter case, however, the agency's commitment to its position must be so strong as to render requiring a party to raise the issue with the agency "inequitable and an insistence of a useless formality," *Luoyang Bearing*, 26 CIT at 1186 n.26 (internal quotation marks and citation omitted); *PPG Indus.*, 14 CIT at 542, 746 F. Supp. at 137 (futility requires that exhaustion be a "clearly useless act[]" (internal quotation marks and citation omitted)).

Pakfood argues that it would have been futile to press its exchange rate issue in its case brief because Commerce had dismissed the issue at an earlier stage, explaining that to do so would have caused delays. (Resp't Pls.' Br. 13 n.6.) But the mere fact that Commerce rejected an argument at an earlier stage of an administrative proceeding does not, without more, suffice to render a party's continued adherence to such argument an exercise in futility. *See PPG Indus.*, 14 CIT at 543, 746 F. Supp. at 137 ("[T]hat a party to an administrative proceeding finds an argument may lack merit, or had failed to prevail in a prior proceeding based on different facts, does not, without more, rise to the level of futility . . . ."). Even where it is likely that Commerce would have rejected a party's arguments without changing course, "it would still [be] preferable, for purposes of administrative regularity and judicial efficiency, for [the party] to make its arguments in its case brief and for Commerce to give its full and final administrative response in the final results." *Corus Staal*, 502 F.3d at 1380. By including arguments in its case brief, even arguments Commerce has repeatedly dismissed, a party ensures the full development of a factual record that facilitates judicial review. *See, e.g., Carpenter Tech.*, 30 CIT at 1375–76, 452 F. Supp. 2d at 1346–47.

In this case, Pakfood's communications with Commerce do not justify Pakfood's conclusion that pressing its exchange rate issue in its case brief would have been futile. Commerce did not demonstrate a complete unwillingness to reconsider its use of market exchange

rates, and no statute or regulation obligated Commerce to refuse Pakfood's requests. To the contrary, both the statute and Commerce's regulations indicated that the Department favored the use of timely-established contractual exchange rates. *See* 19 U.S.C. § 1677b-1(a); 19 C.F.R. § 351.415(b).[47] Had Pakfood pressed this issue in its case brief, Commerce would have been put on notice that Pakfood still considered the issue relevant and would have had an opportunity to fully consider and explain its exchange rate choices. In these circumstances, requiring exhaustion of Pakfood's administrative remedies is not "inequitable and an insistence of a useless formality." *Luoyang Bearing*, 26 CIT at 1186 n.26, 240 F. Supp. 2d at 1297 n.26 (internal quotation marks and citation omitted).

Accordingly, in this case, because Pakfood's omission of the exchange rate claim from its case brief denied Commerce the opportunity to fully consider the issue, thus failing to establish an adequate record for judicial review,[48] the court concludes that the exhaustion requirement should not here be waived for futility.

2. The Issue Was Not Fully Considered by Commerce.

Pakfood also argues that the court should waive the exhaustion requirement because Commerce actually considered Pakfood's exchange rate issue in the administrative proceeding. (Resp't Pls.' Reply 2 ("Commerce fully considered whether to allow Pakfood to provide its forward contract exchange rate information, and determined not once, but twice that it would not accept the proffered data.").) However, the sole fact that "objections were previously communicated to Commerce does not circumvent the exhaustion requirement." *Ad Hoc Shrimp*, __ CIT __, 675 F. Supp. 2d at 1301. Accordingly, "[r]aising an issue . . . in advance of case brief submission does not dispense with the requirement for case brief inclusion." *Id.* (citing *Carpenter Tech. Corp. v. United States*, 30 CIT 1595, 1597–98, 464 F. Supp. 2d 1347, 1349 (2006)).

Pakfood's exchange rate claim is not discussed in the Final Results or in the accompanying Issues and Decision memorandum. *See gen-*

[47] *See also Certain Frozen Warmwater Shrimp from India*, 74 Fed. Reg. 9,991, 9,998 (Dep't Commerce Mar. 9, 2009) (preliminary results and preliminary partial rescission of AD duty administrative review) (incorporating exchange rates from respondents' forward exchange contracts and citing 19 C.F.R.§ 351.415(b)).

[48] As mentioned, because Pakfood omitted the exchange rates issue from its case brief, Commerce did not address the issue in its final results or the accompanying issues and decision memorandum. *See Final Results*, 74 Fed. Reg. 47,551; *I & D Mem.* Instead, the only record evidence of Commerce's reasoning regarding exchange rates is contained in Commerce's two redundant, one-page rejections of Pakfood's requests to submit exchange rate data. *First Denial of Request to Supp.*, Admin. R. Pub. Doc. 228; *2d Denial of Request to Supp.*, Admin. R. Pub. Doc. 250.

erally Final Results, 74 Fed. Reg. 47,551; *I & D Mem. Compare Valley Fresh*, 2007 WL 4380137, at *5 (excusing plaintiff's failure to raise argument in case brief before Commerce where the issue had been given clear consideration in the final results of the administrative review). Because it is reasonable for the Department to have assumed that Pakfood's failure to raise this issue in its case brief meant that Pakfood's objections had been satisfied and that no further resources needed to be devoted to the issue, *see Mittal Steel*, 548 F.3d at 1384, and because there is in fact no indication in the Final Results and/or the Issues and Decision Memorandum that the agency did indeed fully consider the issue, the court cannot conclude that Pakfood's failure to argue this point in its case brief should be excused on the basis that Commerce nevertheless had full and adequate opportunity to consider the objection in the first instance.

Moreover, although the court may define new exceptions to its exhaustion requirement where no previously established exception applies, *Luoyang Bearing*, 26 CIT at 1186 n.26, 240 F. Supp. 2d at 1297 n.26, the court declines to do so here. Pakfood has provided no compelling explanation for its failure to exhaust its administrative remedies. It learned of Commerce's exchange rate decision from the Preliminary Results, twice requested alternative treatment, twice received clear negative responses from Commerce, and submitted a case brief that did not address the issue. Where a party is aware of an issue that continues to be relevant to the final results and simply decides not to pursue it based on prior interactions with Commerce, "[w]hatever prejudice that may inure to [that party] from this scenario [is] brought on by [the party's] own acts," *PPG Indus.*, 14 CIT at 543, 746 F. Supp. at 137, and therefore does not counsel in favor of waiving any otherwise generally-applicable requirements.

IV. Commerce's Denial of Interest Income Offset to Rubicon

A. Background

In response to Commerce's initial questionnaire, the Rubicon Group proposed to offset the financial expenses of two of its affiliates — CSF and PTN — with interest income from certain deposits CSF and PTN placed in financial institutions.[49] While Rubicon classified these twelve-month term deposits as *non-current assets*, it noted that the deposits were "maintained by the respective financial institutions as

[49] (Resp't Pls.' Br. 6 (citing Letter from White & Case LLP, A-549–822, ARP 07–08 (Jan. 27, 2009), Admin. R. Con. Doc. 43 [Admin. R. Pub. Doc. 187] ("*Rubicon's Resp. to Supp. Sec. D Quest.* ") 15–16 & Exhs. 2d Supp. D-6 (itemizing interest income reported as offset to financial expenses by CSF) & 2d Supp. D-7 (itemizing interest income reported by PTN)).) *See also I & D Mem.* Cmt. 7 at 20.

guarantees on [the affiliates'] revolving line[s] of credit," *Rubicon's Resp. to Supp. Sec. D Quest.* 15, and were "required by [the afiliates'] banks to secure their respective lines of credit." *Id.* at 16. Rubicon explained that the lines of credit were "necessary for the general day-to-day operations of the compan[ies]," *id.*, and that the supporting funds were "not deposited for investing purposes." *Id.* at 15. Rubicon argued that, because Commerce had established a "policy of offsetting interest expenses with income associated with the general operations of the company and not related to investing activities," *id.*, the interest income from these deposits should be offset against its affiliates' financial expenses. *Id.* at 15–16.

The Department confirmed Rubicon's explanation that these deposits were required as a condition for obtaining credit, but did not offset CSF and PTNs' financial expenses with interest from the twelve-month deposits. *I & D Mem.* Cmt. 7 at 20 (noting that "it is the Department's practice to allow a respondent to offset financial expenses with short-term interest income generated from a company's current assets and working capital accounts"). Commerce explained that, as the deposits "were appropriately classified as non-current assets in the Rubicon Group companies' financial statements," "*id.*", the Department "[did] not consider these compensating balances to be liquid working capital reserves which would be readily available for the companies to meet their daily cash requirements . . . ." *Id.*

Rubicon argues that Commerce acted unlawfully in rejecting the request to offset CSF and PTN's financial expenses with the interest income earned on these deposits.[50] Rubicon contends that Commerce has established a practice of offsetting all interest income demonstrably related to the general operations of a respondent, even if the interest income derives from a long-term asset, and argues that the Department acted arbitrarily by failing to follow this practice in this case. (Resp't Pls.' Br. 17 (arguing that it is Commerce's practice to allow offsets on interest income from long-term assets "if there is a showing that the interest income is related to the general operations of the firm"(internal quotation marks omitted) (quoting *Hyundai Elec. Indus. Co. v. United States*, 28 CIT 517, 539, 342 F. Supp. 2d

[50] The AD statute requires Commerce to incorporate into its calculations of cost of production and constructed value for foreign like products the respondent's "general" and "administrative expenses," "based on actual data pertaining to production and sales of the foreign like product" for cost of production, and "in connection with the production and sale of a foreign like product, in the ordinary course of trade" for constructed value. 19 U.S.C. § 1677b(b)(3)(B) (cost of production); *id.* (e)(2)(A) (constructed value). The parties agree that Commerce has consistently construed this statute to permit respondents to offset their financial expenses with interest income from short-term assets related to a company's general operations, but disagree as to the nature of Commerce's practice regarding long-term interest bearing accounts. (*Compare* Def.'s Br. 24 *with* Resp't Pls.' Reply 6–7.)

1141, 1161 (2004))); *Rubicon's Resp. to Supp. Sec. D Quest.* 15 (arguing that an offset in this case would be consistent with Commerce's "policy of offsetting interest expenses with income associated with the general operations of the company and not related to investing activities").

The Department denies Rubicon's characterization of its practice, and argues that its practice is to offset financial expenses solely with short-term interest income from a company's current assets and working capital accounts. (Def.'s Br. 24–25 (arguing that Commerce looks to "'the underlying interest-bearing asset that generated the income'" and grants an offset only where the asset is a current operating expense (quoting Issues & Decision Mem., A-331–802, ARP 06–07 (July 3, 2008), *available at* http://ia.ita.doc.gov/frn/summary/ECUADOR/E8–15830–1.pdf (last visited Sept. 1, 2010) (incorporated by reference in *Certain Frozen Warmwater Shrimp from Ecuador*, 73 Fed. Reg. 39,945, 39,946 (Dep't Commerce July 11, 2008) (final results and partial rescission of AD duty administrative review)) ("*Shrimp from Ecuador I & D Mem.* ") Cmt. 3 at 7)).) *See also I & D Mem.* Cmt. 7 at 20 ("[I]t is the Department's practice to allow a respondent to offset financial expenses with short-term interest income generated from a company's current assets and working capital accounts." (citing *Chlorinated Isocyanurates from Spain*, 70 Fed. Reg. 24,506 (Dep't Commerce May 10, 2005) (notice of final determination of sales at LTFV) and accompanying Issues & Decision Mem. Cmt. 10 ("*Isocyanurates from Spain I & D Mem.* "); *Certain Frozen Warmwater Shrimp from Brazil*, 73 Fed. Reg. 39,940 (Dep't Commerce July 11, 2008) (final results and partial rescission of AD duty administrative review))).

B. Rubicon Has Not Established that Commerce Followed a Contrary Practice in Similar Circumstances, and the Department's Disallowance of Rubicon's Long-Term Interest Income Offset Was Supported by Substantial Evidence.

First, regardless of the nature of Commerce's practice with respect to the grant or denial of interest income offsets in the past,[51] at the time of the instant review, Commerce had clearly established a prac-

[51] In support of their contention that Commerce has an established practice of offsetting financial expenses by interest income from long-term assets where it is shown that such income relates to the general operations of the firm, Respondent Plaintiffs cite to *Dynamic Random Access Memory Semiconductors of One Megabit or Above from the Republic of Korea*, 64 Fed. Reg. 69,694, 69,707 (Dep't Commerce Dec. 14, 1999) (final results of AD duty administrative review and determination not to revoke the order in part) ("*DRAMS* ") (granting offset for interest income earned on long-term deposits because the deposits were "an integral part of certain loans" and were "directly related to specific loans," but denying

tice of allowing income expense offsets solely for short-term income from current assets and working capital accounts.[52] As early as

offset for severance deposits maintained with insurance companies to finance current severance and retirement payments, because these deposits were "only held by [the respondent] as restricted deposits to allow [the respondent] to claim a tax deduction"), and *Hyundai Elecs. Indus. Co. v. United States*, 28 CIT 517, 539–40, 342 F. Supp. 2d 1141,1161–1162 (2004) (affirming "Commerce's decision not to treat income interest generated from severance deposits as an offset to Hyundai's interest expense"). (Resp't Pls.' Br. 17–19.)

DRAMS was decided more than a decade ago and appears inconsistent with the Department's subsequent practice of requiring that income interest be generated from current assets and working capital accounts prior to granting an offset. See *infra* note 52. *See also* Issues & Decision Mem., A-549–821, ARP 07–08 (Dec. 7, 2009), *available at* http://ia.ita.doc.gov/frn/summary/thailand/E9–29597–1.pdf (last visited Sept. 1, 2010) (incorporated by reference in *Polyethylene Retail Carrier Bags from Thailand*, 74 Fed. Reg. 65,751, 65,751 (Dep't Commerce Dec. 11, 2009) (final results of AD duty administrative review)) Cmt. 4 at 9 ("We do not consider our decision in [] *DRAMS* to be consistent with our normal practice of only permitting an offset for short-term interest income generated from a company's current assets and working capital accounts.").

Although, in *Hyandai*, the court affirmed Commerce's determination in *DRAMS* with regard to interest income generated from deposits used to make severance payments, the agency's decision regarding interest income earned on long-term deposits was neither challenged by the plaintiff nor revisited by the court. *See* 28 CIT at 539–40, 342 F. Supp. 2d at 1161–62. Further, in discussing the sole issue with regard to interest income raised in that case — whether interest income generated from deposits used to make severance payments should have been used to offset the respondent's expenses, *id.* — the *Hyuandai* court relied solely on *Timken Co. v. United States*, 18 CIT 1,852 F. Supp. 1040 (1994), *NTN Bearing Corp. v. United States*, 19 CIT 1221, 905 F. Supp. 1083 (1995), and *Gulf States Tube Div.of Quanex Corp. v. United States*, 21 CIT 1013, 981 F. Supp. 630(1997). *Timken* and *NTN* presented challenges to Commerce's treatment of a respondent's *short-term* interest income, and are accordingly inapposite to the Respondent Plaintiffs' argument, *Timken*, 18 CIT at 9, 852 F. Supp. at 1048; *NTN*, 19 CIT at 1237,905 F. Supp. at 1097, whereas *Gulf States* explicitly rejected the plaintiff's argument that "long-term interest income must also betaken into account in calculating a respondent's net interest expense." 21 CIT at 1038, 981 F. Supp. at 651.

Accordingly, *DRAMS* has been superceded by subsequent practice and *Hyuandai* is inapposite to the Respondent Plaintiffs' claim.

[52] *See, e.g.*, Issues & Decision Mem., A-351–806, ARP 03–04 (Feb. 3, 2006), *available at* http://ia.ita.doc.gov/frn/summary/BRAZIL/E6–1987–1.pdf (last visited Sept. 1, 2010) (incorporated by reference in *Silicon Metal from Brazil*, 71 Fed. Reg. 7,517, 7,518 (Feb. 13, 2006) (notice of final results of AD duty administrative review)) ("*Silicon Metal from Brazil I & D Mem.* ") Cmt. 4 at 7 (citing the Department's practice of excluding "income from long-term financial assets because such income is related to investing activities and is not associated with the general operations of the company," and refusing offsets where the respondent "did not meet its burden of proof . . . [to] provide documentation adequate to support the claim that [the] income [in question] [wa]s short-term in nature . . . ."); *Chlorinated Isocyanurates from Spain I & D Mem.* Cmt. 10 at 36 (citing "long-standing practice [of] offset[ing] interest expense by short-term interest income generated from a company's working capital," denying offset because respondent "ha[d] not provided any record evidence that the financial income received [] was related to short-term interest bearing accounts," and justifying the practice because" a company must maintain a working capital reserve to meet its daily cash requirements" and "companies normally maintain this working capital reserve in interest bearing accounts."); Issues & Decision Mem., A-122–850, Investigation (Mar. 4, 2005),

2005,[53] and as late as just eight months prior to the publication of its Preliminary Results in this review, for example, Commerce reiterated that its practice with regard to the grant or denial of interest income offsets is "to examine the underlying interest-bearing asset that generated the income to determine whether or not the interest income is considered short-term, as opposed to examining liabilities that may or may not be associated with the interest income earned due to the fungible nature of money." *Shrimp from Ecuador I & D Mem.* Cmt. 3 at 7 (explaining that Commerce will "offset (i.e., reduce) financial expenses with short-term interest income earned from a respondent's short term interest-bearing assets," but will not offset "the interest income earned by [the respondent] [that] is the result of a long-term receivable" (citations omitted)). *See also* Issues & Decision Mem., A-351–838, ARP 06–07 (July 3, 2008), *available at* http://ia.ita.doc.gov/frn/summary/BRAZIL/E8–15827–1.pdf (last visited Sept. 1, 2010) (incorporated by reference in *Frozen Warmwater Shrimp from Brazil*, 73 Fed. Reg. at 39,944) ("*Shrimp from Brazil I & D Mem.* ") Cmt. 9 at 17 (citing practice of permitting offsets for "financial expenses with short-term interest income earned from its working capital accounts" and allowing offsets "for only the income that . . . related to short-term" assets).

Moreover, Commerce's stated explanation for its practice — the necessity of maintaining working capital to meet companies' daily cash requirements[54] — is inconsistent with offsets for long-term accounts that cannot serve daily cash needs.[55]

available at http://ia.ita.doc.gov/frn/summary/canada/E5–1029–1.pdf (last visited Sept. 1, 2010) (incorporated by reference in *Live Swine from Canada*, 70 Fed. Reg. 12,181, 12,184 (Dep't Commerce Mar. 11,2005) (notice of final determination of sales at LTFV)) Cmt. 68 at 133 ("Because the non-operating and other income items in question are either long-term in nature or relate to investments, we have excluded [the items from the respondent's offsets].").

[53] *See supra* note 52.

[54] *I & D Mem.* Cmt. 7 at 20 (explaining that the assets at issue were not offset against Rubicon's financial expenses because they were not "liquid working capital reserves which would be readily available for the companies to meet their daily cash requirements (e.g., payroll, suppliers, etc.)"); *Isocyanurates from Spain I & D Mem.* Cmt. 10 at 36 (same). (*See also* Def.'s Br. 24 ("[B]ecause short term assets are used for current company operations, that is, the funds are readily available and used for the company's day-to-day cash requirements, Commerce permits companies to offset the expense of those assets by the interest earned upon them. Conversely, Commerce does not permit company offsets for interest earned upon long-term assets because [] the funds [] held [in] those accounts are not readily available and are not used for day-to-day cash requirements." (citations omitted)).)

[55] *See, e.g., Silicon Metal from Brazil I & D Mem.* Cmt. 4 at 7 (disallowing offset to financial expenses for "income [that] has not been demonstrated to be short-term in nature," and explaining that "the Department's practice [is] to exclude income from long-term financial assets because such income . . . is not associated with the general operations of the company").

Accordingly, Commerce has shown that, under its established methodology, the first crucial question in calculating an offset is whether or not the interest income is short-term — i.e. derived from current assets or working capital accounts. The "burden of proof to substantiate and document [the nature of the accounts] is on the respondent making a claim for [an] offset," *Shrimp from Brazil I & D Mem.* Cmt. 9 at 17 (citations omitted), and Commerce will not allow an offset where a respondent cannot demonstrate that the interest income in question is short-term in nature. *Id.*

In this case, the Department found that Rubicon failed to demonstrate that the interest income at issue was short-term in nature, and the agency accordingly concluded that an interest income offset was therefore not warranted. *I & D Mem.* Cmt. 7 at 20 (explaining that "the interest income at issue is related to certain long-term interest-bearing accounts, which were appropriately classified as non-current assets in the Rubicon Group companies' financial statements"). Because the Department's decision with regard to the Rubicon Group's interest income is consistent with Commerce's prior decisions restricting offsets to short-term income, as well as with the agency's explanations that, because current assets and working capital accounts are necessary to meet a company's daily cash requirements, the Department will grant offsets only where the income in question derives from such assets, the court concludes that Rubicon has failed to establish that Commerce "consistently followed a contrary practice in similar circumstances." *Consol. Bearings Co. v. United States*, 412 F.3d 1266, 1269 (Fed. Cir. 2005) (internal quotation marks and citation omitted).

Further, Commerce had "such relevant evidence as a reasonable mind might accept as adequate to support [the] conclusion [that Rubicon failed to establish the short-term nature of the assets at issue]," *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 477 (1951) (internal quotation marks and citation omitted); *Micron*, 117 F.3d at 1393, and could "rationally draw support for [its] finding [that the assets in question were long-term in nature] from the relevant record evidence [indicating that the accounts were non-current assets]." *Penrod Drilling Co. v. Johnson*, 905 F.2d 84, 87 (5th Cir. 1990). Accordingly, the court concludes that Commerce's findings regarding Rubicon's claimed interest offset were supported by substantial evidence.

Conclusion

For all of the foregoing reasons, this matter is remanded to the agency, for further consideration in accordance with this opinion,

solely on the issue of the methodology used to select mandatory respondents in this review. Commerce shall have until November 1, 2010 to complete and file its remand redetermination. Plaintiffs shall have until November 22, 2010 to file comments. Defendant and Defendant-Intervenors shall have until December 6, 2010 to file any reply.

It is **SO ORDERED**.

Dated: September 1, 2010
New York, N.Y.

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

Slip Op. 10–100

GLOBE METALLURGICAL INC., PLAINTIFF, v. UNITED STATES, DEFENDANT.

Before: Leo M. Gordon, Judge
Court No. 08–00290

[Remand results sustained.]

Dated: September 1, 2010

DLA Piper LLP (US) (*William D. Kramer*, *Martin Schaefermeier*, *Arlette Grabczynska*) for Plaintiff Globe Metallurgical Inc.

Tony West, Assistant Attorney General, *Jeanne E. Davidson*, Director, *Reginald T. Blades, Jr.* , Assistant Director, Commercial Litigation Branch, Civil Division, U.S. Department of Justice (*L. Misha Preheim)* ; and Office of the Chief Counsel for Import Administration, U.S. Department of Commerce (*Aaron P. Kleiner*), of counsel, for Defendant United States.

OPINION

Gordon, Judge:

Introduction

This action involves an administrative review conducted by the U.S. Department of Commerce ("Commerce") of the antidumping duty order covering silicon metal from China. *Silicon Metal from the People's Republic of China*, 73 Fed. Reg. 46,587 (Dep't of Commerce Aug. 11, 2008) (final results admin. review) ("*Final Results* "); *see also Issues and Decision Memorandum for the Final Results of the 2006–2007 Antidumping Duty Administrative Review of Silicon Metal from the People's Republic of China*, A-570–806 (Aug. 4, 2008), *available at* http://ia.ita.doc.gov/frn/summary/PRC/E8–18477–1.pdf (last visited Sept. 1, 2010) ("*Decision Memorandum* "). Before the court are the Final Results of Redetermination (Apr. 8, 2010) ("Remand Re-

sults") filed by Commerce pursuant to *Globe Metallurgical Inc. v. United States*, No. 08–00290 (USCIT Dec. 18, 2009) (order remanding to Commerce) ("Remand Order"). The court has jurisdiction pursuant to Section 516A(a)(2)(B)(iii) of the Tariff Act of 1930, as amended, 19 U.S.C. § 1516a(a)(2)(B)(iii) (2006),[1] and 28 U.S.C. § 1581(c) (2006).

Background

During the administrative review Plaintiff, Globe Metallurgical Inc. ("Globe"), alleged that Ferro-Alliages et Mineraux Inc. ("Ferro-Alliages") may have circumvented the antidumping order by shipping subject merchandise to the United States by way of Canada and then labeling that merchandise as Canadian-origin. Commerce inquired of Ferro-Alliages about entries of subject merchandise and Ferro-Alliages certified that it had no such entries. Commerce reviewed data from U.S. Customs and Border Protection ("CBP") and found no evidence of entries of subject merchandise by Ferro-Alliages during the period of review. In the preliminary results Commerce rescinded the review with respect to Ferro-Alliages. Globe challenged that decision in its case brief, but Commerce maintained its position.

In this action Globe challenges Commerce's decision to rescind the administrative review for Ferro-Alliages. More specifically, Globe challenges Commerce's determination not to further investigate (within the administrative review) Globe's allegation that Ferro-Alliages had transshipped Chinese-origin silicon metal to the United States during the period of review. In its opening brief Globe asserted that Commerce was statutorily obligated to investigate Globe's transshipment claim in the administrative review, and that Commerce's refusal was inconsistent with actions Commerce had taken in a prior administrative proceeding, *Certain Tissue Paper Products from the People's Republic of China*, 72 Fed. Reg. 58,642 (Dep't. of Commerce Oct. 16, 2007) (final results admin. review) ("*Tissue Paper* "). Globe further asserted that Commerce had not articulated a reasonable basis for its determination that a scope or circumvention proceeding, rather than an administrative review, would be the proper venue for Commerce to consider Globe's allegation.

In December 2009 the court remanded the administrative review to Commerce. The court, however, rejected Globe's argument that the statutory provision governing administrative reviews, 19 U.S.C. § 1675(a), obligates Commerce to investigate transshipment allegations in administrative reviews:

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

> Globe argues that the antidumping statute requires in every instance that Commerce, within an administrative review, investigate fully any allegations of transshipments of subject merchandise. Pl.'s Br. in Supp. of Mot. for J. upon Agency Rec. at 10–12. For Globe this is a *Chevron* step-one issue, and the statutory language reveals a clear Congressional intent. The court does not agree. The section of the statute governing Commerce's administrative reviews, 19 U.S.C. § 1675(a), does not obligate Commerce to investigate transshipment allegations. Section 1675(a) provides that Commerce, if requested, must "review and determine the amount of any antidumping duty" for entries of subject merchandise. 19 U.S.C. § 1675(a). It does not provide any guidance on when and how Commerce should investigate transshipment allegations. An argument could be made that transshipment allegations more properly fall within the ambit of a scope/circumvention determination (which addresses whether particular merchandise is subject to an antidumping duty order), *see* 19 C.F.R. § 351.225(a) (2008), a point emphasized by Commerce in the *Final Results*. 73 Fed. Reg. at 46,587 ("[A]s this is an administrative review, not a scope or circumvention inquiry, we find that this is not the proper proceeding to pursue [Globe's] claims.").
>
> If taken to its logical conclusion, Globe's statutory argument would seem to negate the need for scope/anticircumvention proceedings altogether, and mandate the handling of those issues within an administrative review. This is too extraordinary a leap for the court to indulge. It suffices to say that on the question of investigating transshipment allegations, the statute does not dictate which proceeding must be used. Commerce, therefore, has a measure of *Chevron* step-two, gap-filling discretion.

Remand Order at 8–9.

The court did, however, conclude that Commerce had failed to articulate a reasonable basis not to investigate Globe's allegation in the administrative review given that Commerce had more thoroughly investigated transshipment allegations in *Tissue Paper*. *Id.* at 10–12. Additionally, the court determined that Commerce erred in its conclusion that Globe had provided "no evidence" to support its transshipment allegation. *Id.* at 12. Thus, the court instructed Commerce to reconsider its determination of Globe's transshipment claim. *Id.* at 13.

> In April 2010 Commerce issued its Remand Results. Commerce explained:

[U]pon reexamination of the record, we have determined the Department's statement in the *Final Results* that no evidence existed on the record of the review with respect to circumvention/transshipment to be in error. We acknowledge that petitioner had placed some evidence on the record to support its allegations with respect to Ferro-Alliages. However, after further examination of our practice and statutory authority and framework, we find that the issue of whether, and how, to address allegations that subject merchandise has been exported to the United States through a third-country is primarily a procedural question. In that regard, the Department has concluded that the proper venue and procedural framework to conduct inquiries regarding transshipment involving third-country processing are those providing for scope and circumvention inquiries, as further discussed below.

. . .

As explained in the preceding *Background*, the Department's decision not to pursue petitioner's transshipment allegation within the context of the administrative review was based on Ferro-Alliages' certification that it made no shipments of subject merchandise during the POR and confirmation of this certification from [Custom's and Border Protection "CPB"] data, and the Department's view that the proper venue for review of petitioner's allegation involving third country processing is a scope or circumvention inquiry. Here, the Department maintains that a scope or circumvention inquiry is the proper venue for such allegations.

. . .

. . . the Department's regulations regarding scope and circumvention inquiries cover instances where there is a question as to the country-of-origin of the merchandise based upon processing activities that take place in a third country. The introduction to 19 CFR 351.225 indicates that "a domestic interested party may allege that changes to an imported product or the place where the imported product is assembled constitutes circumvention under section 781 of the Act." *See* 19 CFR 351.225(a). In addition, 19 CFR 351.225(h) allows for "imported merchandise completed or assembled in a foreign country other than the country to which the order applies" to be included in the scope of an antidumping duty order. *See* 19 CFR 351.225(h). By linking the Department's authority to investigate country-of-origin claims

to whether a third-country party conducted some type of work on the merchandise before it is exported to the United States, the Department's regulations set forth a manageable framework for the Department to investigate country-of-origin claims involving such activity.

The Department's approach is consistent with the Court's statement in the *Remand Order* that the statutory deadlines governing administrative reviews may necessitate reliance upon a more flexible mechanism to investigate country-of-origin claims. As the Court noted, "[a]scertaining whether entries may fall within the scope of an antidumping duty order is a task that may not be completed within the various deadlines required for an administrative review." *See Remand Order* at 10. The Department concurs with the Court that the statutory timeline for administrative reviews presents a barrier to investigating country-of-origin claims in administrative reviews.

Investigating country-of-origin issues involving third-country processing in the context of the administrative review process would postpone the normal work associated with an administrative review to such an extent that it would become even more challenging for the Department to satisfy the statutory time limits for administrative reviews — for example, the Department has a maximum of 365 days to complete all the work necessary to issue our preliminary results. In contrast with the statutory scheme governing administrative reviews, the timeline for scope and circumvention inquiries may be extended and, accordingly, provides the Department with the necessary flexibility to thoroughly investigate country-of-origin issues involving third country processing and determine the appropriate course of action with regard to a party's activities. *See* 19 USC 1677j(f).

The administrative record demonstrates that petitioner recognizes the Department's position that such country-of-origin claims would be better pursued in scope or circumvention inquiries. In fact, after meeting with Department officials, petitioner withdrew its request for review of Jiangxi Gangyuan Silicon Industry Company, Ltd., MPM Silicones, LLC, and GE Silicones (Canada) (also known as Momentive Performance Materials Canada ULC), citing Department statements that "there are Department procedures other than administrative reviews that address alleged circumvention activities. . . .

Moreover, the Department notes that, after the conclusion of the Silicon Metal Review, petitioner filed a scope request regarding Ferro-Alliages' exports to the United States of products which may be subject to the antidumping duty order. Pursuant to these allegations and supporting evidence not present on the record of the instant administrative review, the Department initiated a formal scope inquiry in the matter. *See, e.g.*, Notice of Scope Rulings, 74 FR 49859 (September 29, 2009) (listing the Silicon Metal Scope among pending inquiries). To date, the Department has issued questionnaires to Ferro-Alliages and received and analyzed responses to these questionnaires. The Department has also received and analyzed numerous comments from petitioner over the course of this scope inquiry. Though the Court rejected the scope inquiry as a basis to find the instant case moot, the Department respectfully notes that the scope review remains relevant to the instant case, as it demonstrates that the Department's actions are consistent with its statements that scope or circumvention inquiries are the proper venue for country-of-origin claims involving third country processing. *See* Remand Order at 8 (discussing the effect of the Department's scope review).

. . .

With regard to *Tissue Paper*, where the Department pursued an allegation of transshipment in the context of an administrative review, the Department's experience in *Tissue Paper* demonstrates that administrative reviews do not provide a viable venue for such country-oforigin inquiries. The factual context surrounding the transshipment claim in *Tissue Paper*, and the Department's efforts to investigate that claim, are relevant here. The transshipment claim raised in *Tissue Paper* was brought by the *Tissue Paper* petitioner, Seaman Paper Company of Massachusetts, Inc. ("Seaman"). Seaman claimed that a respondent, the Sansico Group ("Sansico"), had transshipped Chinese-origin tissue paper through Indonesia to circumvent the antidumping duty order on tissue paper from the PRC. However, the Department preliminarily rescinded the administrative review with respect to Sansico, pursuant to Sansico's claim that it made no shipments of subject merchandise during the *Tissue Paper* review period. The Department noted that Sansico's claim was supported by CBP data, as in the instant case. *See Certain Tissue Paper from the People's Republic of China: Preliminary*

Results and Preliminary Rescission, In Part, of Antidumping Duty Administrative Review, 72 FR 17477, 17480 (Apr. 9, 2007).

Seaman's transshipment allegation centered on sales to Sansico by one of Sansico's suppliers, "supplier A," who was not affiliated with Sansico. According to Seaman, "supplier A" imported Chinese-origin tissue paper into Indonesia for sale to Sansico, which was then sold to the United States. "Supplier A" refused to allow the Department to verify its books and records in the course of the Department's verification of Sansico. *See Tissue Paper* Issues and Decision Memorandum at Comment 3. The Department's inability to pursue such allegations regarding parties who are not interested parties under the statute highlights the impracticality and ineffectiveness of attempting to investigate such claims through the administrative review process.

As a result, the Department determines that *Tissue Paper* does not set forth a manageable approach to investigating country-of-origin issues, based upon all the reasons listed above. Our experience in *Tissue Paper* further reinforced that the time constraints of an administrative review hinder the Department's ability to effectively investigate transshipment claims. The *Tissue Paper* petitioner placed a large amount of evidence on the record of the administrative review in support of its transshipment allegation, including detailed technical information regarding product characteristics and manufacturing processes. *See Tissue Paper* Issues and Decision Memorandum at Comment 3. The time and resources necessary to evaluate and verify such information, in addition to parties' responses and comments upon the regular questionnaires that the Department issues in the court [sic] of an administrative review, creates an overwhelming burden in administrative reviews, where the Department's statutory time constraints are always of concern. There were also no suspended entries of subject merchandise upon which to assess antidumping duties on in *Tissue Paper*, and petitioner's claims should have been pursued in a scope or circumvention inquiry, if third country processing was involved, or may have been beyond the Department's authority if the allegations involved mislabeled country-of-origin declarations to CBP. Furthermore, the Department's regulations under 19 CFR 351.225, cited above, clearly indicate that the optimal venue for addressing country of origin issues involving third country processing is a scope or circumvention inquiry. In sum, the Depart-

ment recognizes here that *Tissue Paper* does not establish a viable practice for the Department to examine such claims.

As noted earlier, the issue here is primarily a procedural matter. Nonetheless, the Department acknowledges that evidence was placed on the record on the review. Petitioner placed on the record information regarding Ferro-Alliages' lines of business and import and export activity, as well as general statistics regarding importation of Chinese silicon metal into Canada. *See* No Shipment Comments at 1–2 and Exhibits 2–3, Withdrawal of Requests for Review at 1–2 and Exhibits 2–3, Globe Case Brief at 2–5, and Closed Hearing Transcript. Our statement, therefore, in the *Final Results* that no evidence existed to support petitioner's allegations was in error. However, for all the reasons outlined above, our decision not to pursue petitioner's claims of transshipment within the context of an administrative review was correct and in accordance with our statutory and regulatory framework.

Also, as noted earlier, we emphasize that the Department's statutory authority to investigate circumvention of an order is limited to circumstances where some further processing is performed on the product in the third country before exportation to the United States, such that for purposes of AD/CVD law, the country of origin of the final product is unclear. *See* 19 USC 1677j. As explained above, the Department's regulations allow the Department to assess antidumping duties on "imported merchandise completed or assembled in a foreign country other than the country to which the order applies." *See* 19 CFR 351.225(h). Allegations that concern transshipment, without any further processing of subject merchandise in a third country are better addressed under CBP's authority to impose monetary penalties pursuant to fraud, gross negligence, and negligence. *See* 19 USC 1592. Without reaching the question of whether petitioner's allegations present a viable matter for CBP's inquiry, the Department notes that its authority to investigate such country-of-origin claims is not as expansive as the authority granted to CBP.

Remand Results at 7–15.

After Globe clarified for Commerce that Globe was not alleging Ferro-Alliages was further processing subject merchandise, but rather simply transshipping Chinese-origin subject silicon metal

through Canada into the United States to circumvent the antidumping duty order, Commerce further explained:

> With respect to the Department's authority to investigate transshipment claims and its administrative practice, the Department acknowledges that it previously misunderstood petitioner's allegations. Until receipt of petitioner's March 16, 2010, comments on the Draft Remand, the Department understood petitioner's allegations to reflect concerns that Ferro Alliages was further processing Chinese-origin silicon metal in Canada prior to exportation to the United States. This understanding was informed by petitioner's submissions regarding Ferro-Alliages' business activities ("crushing, screening, blending, drying, stocking, packaging, and selling various ferroalloy and mineral products") and questions that petitioner requested the Department ask Ferro-Alliages (*i.e.*, "3. Please state whether your company commingles its inventory silicon metal purchased from different suppliers. Also please describe the method by which your company records and tracks inventory from different suppliers and on what basis your company is able to determine the supplier of the silicon metal sold."). *See* No Shipment Comments at 2 and Exhibit 1. Based upon petitioner's March 16, 2010, comments, however, petitioner has clarified that it is alleging that Ferro-Alliages has not properly identified the country-of-origin of its U.S. sales, but petitioner is not alleging that the merchandise was subject to any processing in Canada. Given this, the Department maintains, as stated above and in the *Draft Remand*, that the Department does not possess the authority to investigate claims regarding transshipment with no further processing in the third country.
>
> The Department's authority to investigate whether merchandise that enters the United States from a country other than the country that is covered by the order, such as merchandise that is exported to the United States from Canada but may be subject to an antidumping duty order covering merchandise from China, is limited. Specifically, the Department's authority to address such scenarios is constrained by the requirement that there must be some processing taking place in the third-country (*i.e.*, Canada) for the Department to determine whether the merchandise is subject to the order. The governing statute expressly links the Department's authority to the question of whether there is third-country processing taking place. For example, 19 USC 1677j, which concerns the Department's authority to prevent the circumvention of AD/CVD orders through the

> importation of merchandise completed or assembled in other foreign countries, sets forth that the Department must examine processing of the merchandise in the third-country. *See* 19 USC 1677j(b)(1). Indeed, the overall approach of 19 USC 1677j instructs the Department to evaluate third-country processing in its analyses. *See generally* 19 USC 1677j.
>
> The Department's analysis is consistent with this statutory instruction. As explained above and in the *Draft Remand*, the Department's regulations regarding scope and circumvention inquiries specifically note that scope and circumvention inquiries may be used to determine whether merchandise further manufactured in a third country properly falls under the scope of an antidumping duty order. *See Analysis* section above and *Draft Remand* at 8–9. Thus, as stated above, allegations that concern transshipment, without any further processing of subject merchandise in a third country are better addressed under CBP's authority to impose monetary penalties pursuant to fraud, gross negligence, and negligence. *See* 19 USC 1592.

Remand Results at 18–20.

Standard of Review

When reviewing Commerce's antidumping determinations under 19 U.S.C. § 1516a(a)(2)(B)(iii) and 28 U.S.C. § 1581(c), the U.S. Court of International Trade sustains Commerce's "determinations, findings, or conclusions" unless they are "unsupported by substantial evidence on the record, or otherwise not in accordance with law." 19 U.S.C. § 1516a(b)(1)(B)(i). More specifically, when reviewing agency determinations, findings, or conclusions for substantial evidence, the court assesses whether the agency action is reasonable given the record as a whole. *Nippon Steel Corp. v. United States*, 458 F.3d 1345, 1350–51 (Fed. Cir. 2006). Substantial evidence has been described as "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Consol. Edison Co. v. NLRB*, 305 U.S. 197, 229 (1938). Substantial evidence has also been described as "something less than the weight of the evidence, and the possibility of drawing two inconsistent conclusions from the evidence does not prevent an administrative agency's finding from being supported by substantial evidence." *Consolo v. Fed. Mar. Comm'n ,* 383 U.S. 607, 620 (1966). Fundamentally, though, "substantial evidence" is best understood as a word formula connoting reasonableness review. 3 Charles H. Koch, Jr., *Administrative Law and Practice* § 10.3[1] (2d. ed. 2009). Therefore, when addressing a substantial evidence issue

raised by a party, the court analyzes whether the challenged agency action "was reasonable given the circumstances presented by the whole record." Edward D. Re, Bernard J. Babb, and Susan M. Koplin, 8 *West's Fed. Forms, National Courts* § 13342 (2d ed. 2009).

Separately, the two-step framework provided in *Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 842–45 (1984), governs judicial review of Commerce's interpretation of the antidumping statute. *Dupont Teijin Films USA, LP v. United States*, 407 F.3d 1211, 1215 (Fed. Cir. 2005); *Agro Dutch Indus. Ltd. v. United States*, 508 F.3d 1024, 1030 (Fed. Cir. 2007). "[S]tatutory interpretations articulated by Commerce during its antidumping proceedings are entitled to judicial deference under *Chevron*." *Pesquera Mares Australes Ltda. v. United States*, 266 F.3d 1372, 1382 (Fed. Cir. 2001); *see also Wheatland Tube Co. v. United States*, 495 F.3d 1355, 1359 (Fed. Cir. 2007) ("[W]e determine whether Commerce's statutory interpretation is entitled to deference pursuant to *Chevron* .").

Discussion

In its comments to the court on the Remand Results, Globe contends that Commerce's Remand Results are inconsistent with Commerce's actions in *Tissue Paper* and other administrative precedents. Globe Cmts. on Remand Results at 6–14 ("Globe Cmts."). Globe further contends that Commerce's preference for considering transshipment allegations in scope and circumvention reviews is unreasonable because those reviews do not provide the same relief as administrative reviews. *Id.* at 15–20. Finally, Globe claims that Commerce's determination is unsupported by substantial evidence because Commerce did not consider additional evidence of Ferro-Alliages' alleged transshipments during the period of review. *Id.* at 2–6.

Commerce may change an administrative practice so long as it provides a reasoned explanation for the change. *See Huvis Corp. v. United States*, 570 F.3d 1347, 1354 (Fed. Cir. 2009) ("When it changes a past practice, an agency must also show that there are good reasons for its new policy."). In the Remand Results Commerce concluded that it would no longer investigate a standalone transshipment claim in an administrative review as it had done in *Tissue Paper*. Commerce re-examined its experience from *Tissue Paper*, and concluded it was too difficult to analyze all of the evidence related to the standalone transshipment claim within the statutory deadlines for an administrative review given the workload associated with its normal statutory functions. Remand Results at 13. These are good and sufficient reasons to change course.

Globe argues that Commerce understates its authority in concluding that 19 U.S.C. § 1677j limits Commerce's circumvention investigations to instances when there is some processing taking place in a third country. Globe Cmts. at 15; *see* Remand Results at 18–20. Commerce's interpretation, however, is consistent with section 1677j. Likewise, Commerce's recognition of CPB's authority to investigate fraud, gross negligence, or negligence involving entries of merchandise, and that CPB is better positioned to address a standalone country-of-origin issue is also consistent with 19 U.S.C. § 1592. This is not to suggest that Commerce lacks any statutory authority whatsoever to address a standalone transshipment allegation like Globe's within an administrative review, but there is a difference between Commerce pursuing such an inquiry through the exercise of its gap-filling, policy-making discretion, and the court directing Commerce to do so by affirmative injunction. Globe has not persuaded the court that Commerce, in addition to its statutory duty to calculate dumping margins for known entries of subject merchandise within an administrative review, must also, within the same administrative review, investigate an importer with no known entries of subject merchandise, that has certified it has no such entries (confirmed by CPB data), and that *may* be fraudulently evading an antidumping order by mislabeling entries of subject merchandise. Suffice it to say, Commerce's handling of Globe's transshipment allegation represents a permissible construction of the antidumping statute to which the court must defer.

In addition, Globe's argument that CBP plays only a ministerial role in the enforcement of the antidumping law misses the point of Commerce's reference to 19 U.S.C. § 1592 in the Remand Results. Commerce explained that CBP's authority under section 1592 is relevant because Globe's allegation does not involve third-country processing and, thus, Globe is alleging that Ferro-Alliages had simply misidentified the country-of-origin of its merchandise. Remand Results at 15. Commerce correctly explained that "its authority to investigate such country-of-origin claims is not as expansive as the authority granted to CBP." *Id.* Moreover, Commerce's determination that a standalone transshipment allegation, such as Globe's, is better addressed by CBP has found application in prior administrative proceedings. *See, e.g.*, *Expandable Polystyrene Resins from the Republic of Korea*, 65 Fed. Reg. 69,284 (Dep't of Commerce Nov. 16, 2000) (final determ.), Decision Memorandum, cmt. 1.

Globe also argues that Commerce must investigate transshipment allegations within an administrative review and not within a circumvention proceeding because the two proceedings provide different

relief (one retrospective and the other prospective). Globe is correct that the two proceedings have different remedies (at least temporally). That difference though is unremarkable at least as far as informing whether Commerce must always consider a standalone transshipment allegation within an administrative review. If, as Globe contends, the retrospective relief of an administrative review is somehow the one and only true remedy of the antidumping statute, then taken to its logical conclusion, Globe's argument "would seem to negate the need for scope/anticircumvention proceedings altogether, and mandate the handling of those issues within an administrative review." Remand Order at 9.

Globe also argues that Commerce erred by not supplementing the administrative review record with information from the scope review record or other sources. Globe Cmts. at 2–4. This argument, however, is not responsive to the Remand Results. Commerce explained that it would no longer investigate a standalone transshipment allegation within an administrative review. Globe's argument assumes otherwise. In any event, the court did not require Commerce to supplement the administrative review record. *See* Remand Order at 8, 12–13.

Conclusion

The Remand Results offer a cogent, complete, and reasonable explanation for Commerce's handling of Globe's standalone transshipment allegation against Ferro-Alliages, and therefore must be sustained. Judgment will be entered accordingly.

Dated: September 1, 2010
New York, New York

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

Slip Op. 10–101

QVD FOOD CO., LTD., PLAINTIFF, v. UNITED STATES, DEFENDANT.

Before: Leo M. Gordon, Judge
Consol. Court No. 09–00157

[Administrative review results sustained.]

Dated: September 1, 2010

Grunfeld, Desiderio, Lebowitz, Silverman & Klestadt LLP (*Mark E. Pardo*, *Andrew T.* Schutz) for Plaintiff QVD Food Co., Ltd.

Tony West, Assistant Attorney General, *Jeanne E. Davidson*, Director, *Franklin E. White, Jr.*, Assistant Director, Commercial Litigation Branch, Civil Division, U.S. Department of Justice (*Richard P. Schroeder)* ; and Office of the Chief Counsel for

Import Administration, U.S. Department of Commerce (*David W. Richardson*), of counsel, for Defendant United States.

Akin, Gump, Strauss, Hauer & Feld, LLP (*Valerie A. Slater*, *Jarrod M. Goldfeder*, *Nicole M. D'Avanzo*, *Natalya D. Dobrowolsky*) for Defendant-Intervenors Catfish Farmers of America, America's Catch, Consolidated Catfish Companies, LLC, d/b/a Country Select Fish, Delta Pride Catfish Inc., Harvest Select Catfish Inc., Heartland Catfish Company, Pride of the Pond, Simmons Farm Raised Catfish, Inc., and Southern Pride Catfish Company, LLC.

OPINION

Gordon, Judge:

I. Introduction

This consolidated action involves an administrative review conducted by the U.S. Department of Commerce ("Commerce") of the antidumping duty order covering certain frozen fish fillets from the Socialist Republic of Vietnam. *See Certain Frozen Fish Fillets from the Socialist Republic of Vietnam*, 74 Fed. Reg. 11,349 (Dep't of Commerce Mar. 17, 2009) (final results admin. review), as amended, *Certain Frozen Fish Fillets from the Socialist Republic of Vietnam,* 74 Fed. Reg. 17,816 (Dep't of Commerce Apr. 17, 2009) (amend. final results admin. review) ("*Final Results* "); *see also* Issues and Decision Memorandum for Certain Frozen Fish Fillets from the Socialist Republic of Vietnam, A-552–801 (Mar. 9, 2009), available at http://ia.ita.doc.gov/frn/summary/vietnam/E9–5744–1.pdf (last visited Sept. 1, 2010) ("*Decision Memorandum* ").

Before the court are motions for judgment on the agency record filed by QVD Food Co., Ltd. ("QVD"), and Catfish Farmers of America, and individual U.S. catfish processors, America's Catch, Consolidated Catfish Companies, LLC, d/b/a Country Select Fish, Delta Pride Catfish Inc., Harvest Select Catfish Inc., Heartland Catfish Company, Pride of the Pond, Simmons Farm Raised Catfish, Inc., and Southern Pride Catfish Company, LLC (collectively "Catfish Farmers"). The court has jurisdiction pursuant to Section 516A(a)(2)(B)(iii) of the Tariff Act of 1930, as amended, 19 U.S.C. § 1516a(a)(2)(B)(iii) (2006),[1] and 28 U.S.C. § 1581(c) (2006).

After the opening briefs were submitted, but before response briefs were filed, the court ruled on several issues to help expedite the disposition of the action by narrowing the focus of the litigation to issues that the court believed had sufficient merit to warrant a response from the Defendant. *See QVD Food Co. v. United States*, No. 09–00157 (USCIT Feb. 16, 2010) (order). This opinion addresses the remaining issues, which include: (1) QVD's challenge to Commerce's

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

surrogate value selection of a Bangladeshi fish producer's 2000–2001 financial statement to value whole live fish rather than the same producer's 2006–2007 financial statements; (2) Catfish Farmers' challenge to Commerce's surrogate value selection of Indonesian data for broken fish fillets rather than Bangladeshi data; (3) QVD's challenge to Commerce's handling of QVD's freight expenses on a net weight basis, which differed from prior reviews in which Commerce used QVD's reported gross weight; and (4) QVD's challenge to Commerce's alleged failure to make ministerial error corrections.

II. Standard of Review

For administrative reviews of antidumping duty orders, the court sustains determinations, findings, or conclusions of the U.S. Department of Commerce ("Commerce") unless they are "unsupported by substantial evidence on the record, or otherwise not in accordance with law." 19 U.S.C. § 1516a(b)(1)(B)(i). More specifically, when reviewing agency determinations, findings, or conclusions for substantial evidence, the court assesses whether the agency action is reasonable given the record as a whole. *Nippon Steel Corp. v. United States*, 458 F.3d 1345, 1350–51 (Fed. Cir. 2006). Substantial evidence has been described as "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Dupont Teijin Films USA v. United States*, 407 F.3d 1211, 1215 (Fed. Cir. 2005) (quoting *Consol. Edison Co. v. NLRB*, 305 U.S. 197, 229 (1938)). Substantial evidence has also been described as "something less than the weight of the evidence, and the possibility of drawing two inconsistent conclusions from the evidence does not prevent an administrative agency's finding from being supported by substantial evidence." *Consolo v. Fed. Mar. Comm'n*, 383 U.S. 607, 620 (1966). Fundamentally, though, "substantial evidence" is best understood as a word formula connoting reasonableness review. 3 Charles H. Koch, Jr., *Administrative Law and Practice* § 10.3[1] (2d. ed. 2009). Therefore, when addressing a substantial evidence issue raised by a party, the court analyzes whether the challenged agency action "was reasonable given the circumstances presented by the whole record." Edward D. Re, Bernard J. Babb, and Susan M. Koplin, 8 West's Fed. Forms, National Courts § 13342 (2d ed. 2009).

Separately, the two-step framework provided in *Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 842–45 (1984), governs judicial review of Commerce's interpretation of the antidumping statute. *Dupont Teijin Films USA, LP v. United States*, 407

F.3d 1211, 1215 (Fed. Cir. 2005); *Agro Dutch Indus. Ltd. v. United States*, 508 F.3d 1024, 1030 (Fed. Cir. 2007). "[S]tatutory interpretations articulated by Commerce during its antidumping proceedings are entitled to judicial deference under *Chevron*." *Pesquera Mares Australes Ltda. v. United States*, 266 F.3d 1372, 1382 (Fed. Cir. 2001); *see also Wheatland Tube Co. v. United States*, 495 F.3d 1355, 1359 (Fed. Cir. 2007) ("[W]e determine whether Commerce's statutory interpretation is entitled to deference pursuant to *Chevron*.").

III. Discussion

A. Surrogate Value Selection

When valuing the factors of production in a nonmarket economy proceeding, Commerce must use the "best available information" in selecting surrogate data from "one or more" surrogate market economy countries. 19 U.S.C. § 1677b(c)(1), (4). Commerce's regulations provide that surrogate values should "normally" be publicly available and (other than labor costs) from a single surrogate country. 19 C.F.R. § 351.408(c) (2007). When making its surrogate value selections (and when comparing and contrasting various data sets), Commerce considers "the quality, specificity, and contemporaneity of the available values." *Certain Frozen Fish Fillets from the Socialist Republic of Vietnam*, 73 Fed. Reg. 52,015, 52,020 (Dep't of Commerce Sept. 8, 2008) (prelim. results admin. review) ("*Preliminary Results*"). Commerce prefers data that reflects a broad market average, is publicly available, contemporaneous with the period of review, specific to the input in question, and exclusive of taxes on exports. *Certain Pneumatic Off-the-Road Tires from the People's Republic of China*, 73 Fed. Reg. 40,485 (Dep't of Commerce July 15, 2008) (final LTFV determ.) and accompanying Issues and Decision Memorandum for Certain Pneumatic Off-the-Road Tires from the People's Republic of China, A-570–912 (July 7, 2008), cmt. 10 at 26, available at http://ia.ita.doc.gov/frn/summary/PRC/E8–16156–1.pdf (last visited Sept. 1, 2010).

When reviewing substantial evidence issues involving Commerce's selection of the best available surrogate values, the court evaluates "whether a reasonable mind could conclude that Commerce chose the best available information." *Goldlink Indus. Co. v. United States*, 30 CIT 616, 619, 431 F. Supp. 2d, 1323, 1327 (2006); *see also CITIC Trading Co. v. United States*, 27 CIT 356, 366 (2003) ("while the standard of review precludes the court from determining whether [Commerce's] choice of surrogate values was the best available on an absolute scale, the court may determine the reasonableness of Commerce's selection of surrogate prices.").

1. Whole Live Fish

In the *Preliminary Results* Commerce used the 2006–2007 financial statements of Bangladeshi fish producer, Gachihata Aquaculture Farms, Ltd. ("Gachihata"), to set a surrogate value of 45 takas per kilogram for whole live pangas fish (a primary input for the subject merchandise). Prelim. Surr. Val. Mem. at 4, PD 106.[2] Commerce followed this same approach in the immediately preceding administrative review. *See Certain Frozen Fish Fillets from the Socialist Republic of Vietnam*, 73 Fed. Reg. 15,479 (Dep't of Commerce Mar. 24, 2008) (final results admin. review), as amended, 73 Fed. Reg. 47,885 (Dep't of Commerce Aug. 15, 2008) ("*Third Administrative Review* ") and accompanying Issues and Decision Memorandum for Certain Frozen Fish Fillets from the Socialist Republic of Vietnam, A-552–801 (Mar. 17, 2008), cmt. 4 at 10–14, available at http://ia.ita.doc.gov/frn/summary/vietnam/E8–5889–1.pdf (last visited Sept. 1, 2010) ("*Third Review Decision Memorandum*").

For the *Final Results* Commerce changed course and used Gachihata's 20002001 financial statements to derive the surrogate value for whole live fish (inflating the 2000–2001 prices to the period of review), ultimately valuing whole live fish at 97.89 takas per kilogram. Final Surr. Val. Mem. at 2, PD 137. QVD challenges this surrogate value choice, arguing that the best available information to value whole live fish was the pricing information contained in the more contemporaneous 2006–2007 Gachihata financial statement that Commerce used in the *Third Administrative Review*. In selecting the 2000–2001 financial statements, Commerce explained:

> From the less-than-fair-value ("LTFV") investigation through the preliminary results of the third administrative review, the Department valued the whole fish input based on the sales value contained within the 2000–2001 Gachihata financial statements. In the final results of the third administrative review, the Department had both 2000–2001 and the 2006-2007 Gachihata financial statements on the record and relied on price[s] from the 2006–2007 Gachihata financial statements to value the whole fish input. In the final results of this second new shipper and fourth administrative reviews, we have the same two financial statements on the record. However, the record of the instant review also contains the Director's Report for the 2006–2007 Gachihata financial statement in addition to *pangas* fish pricing information from a paper submitted to the United Nations Food and Agriculture Organization ("FAO") regarding

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

the economics of aquaculture in Bangladesh. For these final results, we have determined that the Gachihata 2000–2001 financial statement is the most appropriate basis for calculating the whole fish input surrogate value.

Section 773(c)(1)(B) of the Act directs the Department to use "the best available information" from the appropriate market-economy country to value FOPs. In selecting the most appropriate surrogate values, the Department considers several factors including whether the surrogate value is: publicly available, contemporaneous with the POR, represents a broad market average, chosen from an approved surrogate country, are tax and duty-exclusive, and specific to the input. The Department's preference is to satisfy the breadth of the aforementioned selection criteria. However, where all the criteria cannot be satisfied, the Department will choose a surrogate value based on the best available information on the record.

On February 3 and 10, 2009, the Department received the parties' case and rebuttal briefs, respectively, and on February 25, 2009, the Department held public and closed hearings for the administrative and new shipper reviews. In the briefs and during the hearings, parties presented their concerns with using the 2000–2001 and the 2006–2007 Gachihata financial statements as the basis for calculating the whole fish input surrogate value. Based on those presentations, the Department found it appropriate to make one final research effort for other potential whole fish surrogate values. On March 3, 2009, the Department placed on the record of this review *pangas* fish pricing information from a paper submitted to the United Nations FAO regarding the economics of aquaculture in Bangladesh.

However, after considering the parties' March 5 comments on this new data, we agree with Petitioners that additional time is necessary for both the interested parties and the Department to consider the merits and detailed information contained within the FAO report. Specifically, while QVD argues that the FAO study is a high quality report that satisfies the Department's criteria for finding the best information available, Petitioners raise several questions regarding the report, including the timing of the data and supporting documentation. Therefore, we do not find it appropriate to use the FAO report to calculate the whole fish input surrogate value in these reviews. Notwithstanding this, we find that the data contained within the FAO report is deserving of consideration in future proceedings where

> the Department and interested parties have sufficient time to fully consider the data gathering methods, pricing information, *etc*. As such, we intend to place the FAO information on the record of future and on-going proceedings so that it can be fully considered as a potential basis for calculating the whole fish surrogate value in those segments.
>
> We agree with Petitioners that the 2006–2007 Gachihata financial statements, in particular the Director's Report, illustrate numerous financial concerns that, when taken together, cast considerable doubt on the reliability of using it as the basis for calculating a whole fish input surrogate value (*e.g.*, (a) the financial condition of the company had continued to deteriorate from prior years, (b) the Bangladeshi Government refused to provide financial assistance to overcome the company's losses despite Gachihata's pleas, (c) the company defaulted on bank loans due to cash flow, (d) the Bangladeshi SEC imposed penalties on the company directors for securities violations, (e) production of the company was at all-time lows because of shortage in working capital and operating losses).
>
> Therefore, based on the concerns discussed above with the paper submitted to the United Nations FAO that the Department has had insufficient time to consider and concerns regarding the 2006–2007 Gachihata financial statements, we find that the 2000–2001 Gachihata financial statement is the best available information on the record of this review for calculating the whole fish surrogate value. While both financial statements are publicly available and specific to the input in question, the 2000–2001 financial statement contains more reliable pricing data. Although less contemporaneous that the 2006–2007 financial statement, consistent with our practice, we will inflate the value to the POR.

Decision Memorandum at 9–10.

QVD challenges Commerce's choice of the surrogate data for whole live fish as unreasonable given the available record information, arguing that the best available information for this surrogate is not the 2000–2001 inflated data, but the more contemporaneous 2006–2007 data. More specifically, QVD argues:

> The record evidence in the instant case demonstrates that the price of whole pangasius fish in Bangladesh steadily declined for

the six years between 2001 and 2007, as reflected by the whole fish price contained in the Gachihata financial statements for this period:

2000/2001: 68 takas/Kg.
2001/2002: 50 takas/Kg.
2002/2003: 49.7 takas/Kg.
2003/2004: 48 takas/Kg.
2006/2007: 45 takas/Kg.

QVD's Br. in Supp. of Pl.'s R. 56.2 Mot. for J. on Agency Rec. at 12 ("QVD Br."). The problem with this argument is that it does not fairly or accurately portray the record evidence for whole live fish that Commerce had to choose from during the administrative review. QVD's argument ignores Commerce's previous determination that the whole live fish data in Gachihata's 2001–2002, 2002–2003, and 2003–2004 financial statements were unreliable because "the independent auditor's notes in those statements called into question Gachihata's internal control procedures and valuation of biological assets." *Third Review Decision Memorandum* at 13; *see also Certain Frozen Fish Fillets from the Socialist Republic of Vietman*, 71 Fed. Reg. 14,170 (Dep't of Commerce Mar. 21, 2006) (final results of first admin. review) and accompanying Issues and Decision Memorandum for the 1st Administrative Review of Certain Frozen Fish Fillets from the Socialist Republic of Vietnam, A-552–801 (Mar. 13, 2006), cmt. 3A at 1314, available at http://ia.ita.doc.gov/frn/summary/vietnam/E6–4070–1.pdf (last visited Sept. 1, 2010) (finding unreliable Gachihata's 2002–2003, 2003–2004 financial statements).

Nobody argued that Commerce should use the 2001–2002, 2002–2003, 20032004 data. It was understood to be unreliable. These considerations alter QVD's pricing table:

2000/2001: 68 takas/Kg.
2006/2007: 45 takas/Kg.

Commerce's analysis focused on the two relevant options: the 2000–2001 and 2006–2007 data. The 2000–2001 was reliable, but not contemporaneous. The 2006–2007 data was contemporaneous and had been used in the immediately prior review, but new record information, the Director's Report, cast a pall on the overall reliability of the 2006–2007 financial statements. Once Commerce determined that the 2006–2007 Gachihata financial statement was too unreliable from which to draw data, Commerce was left with the 2000–2001 data. QVD argues that Commerce wrongly focused on Gachihata's poor financial condition, which QVD maintains is irrelevant to the

price of pangas because of an auditor's statement that the company's books (and product sales) were market-based. QVD Br. 18. This is a fair observation. The 2001–2002, 2002–2003, and 2003–2004 financial statements were rejected because they contained a caveat about suspect internal control procedures and valuation of biological assets. The 2006–2007 statements did not have this caveat. This was an important reason Commerce selected the 2006–2007 data to derive the live fish surrogate values in the prior administrative review. The instant administrative review, however, presented Commerce with new evidence in the Director's Report that was not on the record in the prior review. After analyzing that evidence Commerce concluded that the 2006–2007 financial statements were too unreliable as a whole to derive surrogate data.

The court has reviewed the Director's Report. It portrays a very grim and unsettling picture of Gachihata's financial condition (*see* PD 78, Ex. 4), so much so that the court, like Commerce, would have been leery about relying on it to derive *any* surrogate data (and defend the reasonableness of that choice on judicial review). In short, the court cannot fault or find unreasonable Commerce's determination that Gachihata's 2006–2007 financial statements were too unreliable *as a whole* to derive surrogate values.

In the court's view, this is not a case in which the agency arbitrarily changed its mind from one review to the next, but of Commerce reasonably reaching a different result when confronted with an evolving administrative record, after wrestling with competing considerations of contemporaneity on the one hand, and quality and reliability on the other. Commerce knew that the 2000–2001 and 2006–2007 financial statements presented imperfect alternatives, finding it "appropriate to make one final research effort for other potential whole fish surrogate values." *Decision Memorandum* at 10. That effort uncovered additional information in the form of the UN FAO report, but Commerce also acknowledged (with the deadline for the final results only days away) that there was insufficient time for Commerce and the parties to vet the new information. *Id.* Commerce was left with a choice between imperfect alternatives. Commerce exercised its prerogative to choose the best available information after applying its selection criteria, and Commerce's choice, as explained above, was reasonable given the administrative record. The court must therefore sustain Commerce's surrogate value selection for whole live fish.

2. Broken Fish Fillets

QVD reported broken fish fillets, a fish byproduct, as a factor of production. *See* QVD Sec. D Quest. Resp. at 4 and 18, PD 51. When calculating factors of production for subject merchandise, Commerce typically allows an offset for the value of the by-product. The record contained four potential surrogate values for the by-product of broken fish fillets.

Commerce placed on the record the 2007 World Trade Atlas Indonesian data for "Other Fish Meat of Marine Fish," which indicated an average value of Indonesian imports of broken fish fillets to be $2.34 per kilogram (170,827 kilograms for $400,552, rounded). Prelim. Surr. Val. Mem. at 8 & Att. 9, PD 106. Catfish Farmers submitted the 2003 UN COMTRADE data for Bangladeshi imports (HTS 0304.90.100 "Fish Meat Other Than Fillets"), which indicated a price of approximately $.25 per kilogram (372 kilograms of imports valued at $75 = $0.20), adjusted for inflation. *See* Catfish Farmers' Surr. Val. Subm. at 4 & Exh. 4–5, PD 74. Catfish Farmers also suggested, as an alternative, that Commerce select the 2003 World Trade Atlas Indonesian data used in the *Third Administrative Review*. Catfish Farmers' Admin. Case Br. at 32, PD 121.Finally, QVD proposed a valuation of $3.13 per kilogram, taken from 2007 UN COMTRADE data for imports into Indonesia ("[f]ish meat & mince, except liver, roe & fillets, frozen"). QVD Surr. Val. Subm. at 4 & Exh. 5 (showing $3.1326), PD 75.

For the preliminary results Commerce selected the Indonesian 2007 World Trade Atlas data. Prel. Surr. Val. Mem. at 8, PD 106. Catfish Farmers challenged that selection in its administrative case brief:

> In the *Preliminary Surrogate Value Memo*, the Department stated that it relied upon Indonesian import statistics from HS#0304.90.100, "Other Fish Meat of Marine Fish," to derive a value for broken/trimmed fish meat of $2.34 per kilogram. However, the price of broken meat used in the *Preliminary Results* is so high that the Department cannot reasonably consider it to be suitable for use. In particular, Petitioners placed on the record the import data for broken meat from Bangladesh - the primary surrogate country - showing that the price was only $0.25 per kilogram. In other words, the price that the Department used from a secondary surrogate country was nearly *ten times greater* than the value from the primary surrogate country and the surrogate country from which it derived the whole live fish price, underscoring the unreliability of the Indonesian import price.

> Accordingly, the Department should use the Bangladeshi price in the Final Results because it is more reasonable than the price used in the *Preliminary Results*. Alternative [sic], the Department should use the Indonesian import price used in the *3rd Review Final Results*.

Catfish Farmers' Admin. Case Br. at 31–32 (footnotes omitted). Catfish Farmers therefore tried to persuade Commerce *as a factual matter* that the Bangladeshi data was more reliable than the Indonesian data. The point heading in their brief makes this clear—"The Department Should Use a More Reliable Price for Broken Meat". Catfish Farmers' Admin. Case Br. at 31. Catfish Farmers even suggested, as an alternative, that Commerce should use other *Indonesian* data.

In the *Final Results* Commerce reasonably addressed Catfish Farmer's factual argument about the reliability of the Indonesian data:

> Although Petitioners argue that the value of $2.34 per kilogram for broken fillets is high, we find that it is appropriate given the similarity between it and regular fish fillets. In the Section D Questionnaire Response ("SDQR"), QVD refers to the byproduct as "broken fillets." *See* SDQR at page 18 and supplemental section D questionnaire response at exhibits SD 16, 17, and 19. No party has disputed that the broken fillets are anything other than broken fillets. While broken fillets are not whole fillets, the Department finds that they do not fall into the category of fish meat other than fillets. As the Department finds the Indonesian data to be a more appropriate value to use than that of other fish meat other than fillets. Because the Indonesian data is contemporaneous with the POR, comes from a country that is economically comparable to Vietnam, and represents a broader market average because the value of sales from Indonesia is based on over $[4]00,000 in sales while the Bangladeshi value is based on total sales value of $75, the Department finds it to be the best information on the record. Moreover, the data source from which we derive the broken fillets surrogate value is an updated value of the same source used in the last review. The source value was from 2007, updating the value used in the *Fish 3rdAR Results* which was from 2003. Petitioners' effort to discredit the reliability of the 2007 value in favor of returning to the same source, but with values from 2003, is undermined by the fact that the value comes from the same source; it is simply a more contemporaneous value. Therefore, we will continue to use the Indonesian import statistics value used in the *Preliminary Results*.

Decision Memorandum at 11–12.

In their briefs before the court, Catfish Farmers raise two brand new arguments challenging Commerce's surrogate value selection. First, Catfish Farmers invoke the antidumping statute's requirement that Commerce "utilize, to the extent possible," surrogate values from countries that are not only (1) economically comparable to Vietnam, but that are also (2) "significant producers of comparable merchandise." 19 U.S.C. § 1677b(c)(4). Catfish Farmers contend for the first time that Commerce never determined Indonesia was a "significant producer of comparable merchandise," and therefore, Commerce could not use any Indonesian data. Catfish Farmers' Reply Br. at 1; Catfish Farmers' Mem. In Supp. of R. 56.2 Mot. for J. on Agency Rec. at 17, 18 ("Catfish Farmers' Br."). This is a curious argument from a party that advocated using Indonesian data in the administrative proceeding. *See* Catfish Farmers' Admin. Case Br. at 32 ("Alternative [sic], the Department should use the Indonesian import price . . . ."). Catfish Farmers' other new argument is that Commerce violated an alleged administrative practice of using secondary surrogate country information only when primary surrogate country data is "unavailable," a condition Catfish Farmers allege was not satisfied here. Catfish Farmers' Br. at 17; Catfish Farmers' Reply Br. at 2–3.

Problematically, Catfish Farmers failed to include these arguments in its administrative case brief. As noted above, Catfish Farmers focused on a factual argument about the reliability between the Bangladeshi and Indonesian data sets. Catfish Farmers did not cite, mention, or discuss 19 U.S.C. § 1677b(c)(4) (which governs surrogate values and countries), nor did Catfish Farmers cite, mention, or discuss Commerce's own rules (19 C.F.R. § 351.408(c)(2)) or any administrative precedents addressing Commerce's use of information from a country other than the primary surrogate. Catfish Farmers' Admin. Case Br. at 31–32. The time to do so was in their administrative case brief because the issue of the lawfulness of utilizing Indonesian data as opposed to Bangladeshi data (as violative of the statute, regulation, or administrative practice) was squarely in play—Commerce used the Indonesian data in the *Preliminary Results*. The excerpt from Catfish Farmers' administrative case brief makes clear that Catfish Farmers failed to properly raise and argue those legal issues before Commerce. *See* 19 C.F.R. § 351.309(c)(2) ("The case brief must present all arguments that continue in the submitter's view to be relevant to the Secretary's final determination or final results . . . .").

When reviewing Commerce's antidumping determinations, the Court of International Trade requires litigants to exhaust adminis-

trative remedies "where appropriate." 28 U.S.C. § 2637(d). "This form of non-jurisdictional exhaustion is generally appropriate in the anti-dumping context because it allows the agency to apply its expertise, rectify administrative mistakes, and compile a record adequate for judicial review—advancing the twin purposes of protecting administrative agency authority and promoting judicial efficiency." *Carpenter Tech. Corp. v. United States*, 30 CIT 1373, 1374–75, 452 F. Supp. 2d 1344, 1346 (2006) (citing *Woodford v. Ngo ,* 548 U.S. 81, 89 (2006)). By failing to raise their arguments about the legal standards governing utilization of secondary surrogate country information at the administrative level, Catfish Farmers deprived Commerce of the opportunity to address those issues and make a "determination, finding, or conclusion." 19 U.S.C. § 1516a(b)(1). As a result, Commerce did not have the opportunity to "apply its expertise," potentially "rectify administrative mistakes," or "compile a record adequate for judicial review." *Carpenter*, 30 CIT at 1374–75, 452 F. Supp. 2d at 1346. Therefore, the court will not consider Catfish Farmers' new arguments regarding Commerce's surrogate value selection for broken fish fillets. Instead, the court will sustain Commerce's decision.

B. QVD's Freight Expense

In the *Final Results* Commerce acknowledged and corrected an error in its margin calculation for QVD. Catfish Farmers argued, and Commerce agreed, that adjusting QVD's constructed export price with a gross weight international movement expense, when all other adjustments were made upon a net weight basis, distorted the calculation. *Decision Memorandum* at 15–16.

Commerce offered the straightforward, common sense rationale "that there [was] an inconsistent unit of measure that would generate a distortion if [Commerce] deduct[ed] freight expenses from the unit price when these two components [were] not on the same basis." *Decision Memorandum* at 16, PD 136. Commerce further explained that "[t]o correctly calculate the freight costs, [it] should deduct the freight expenses based on a net-weight basis similar to the weight basis for the unit price and the other price adjustments and movement expenses." *Id.* Accordingly, Commerce adjusted QVD's international freight expenses to a consistent net-weight basis. *Id.*

QVD challenges Commerce's correction, arguing that Commerce's explanation is a conclusory statement. QVD Br. at 29. The court disagrees. Commerce's statement that it would use freight expenses calculated on the same unit basis is not, as QVD suggests, an unreasonable conclusory statement, but a simple, lucid, common sense explanation for what appeared to be a necessary correction. The onus

is on QVD to explain to the court why Commerce's correction fails to produce a more accurate dumping margin than the prior method. This QVD has failed to do. Commerce's adjustment to QVD's freight expenses must therefore be sustained.

C. Alleged Ministerial Errors

To compute the financial ratios for SG&A and overhead expenses for the factorsof-production, normal-value calculation, Commerce initially used the calculated average financial ratios from the 2006–2007 financial statements of Apex Foods Ltd. ("Apex") and Gemini ("Gemini"). Prel. Surr. Val. Mem. at 10, PD 106. In response both Catfish Farmers and QVD focused upon the issue of which financial statements should be used to calculate the surrogate financial ratios. *See* Catfish Farmers' Admin. Case Br. at 1831, PD 121; QVD Admin. Rebuttal Br. at 14–21, PD 122. Neither party argued that adjustments should be made to the financial ratio calculations. In the *Final Results* Commerce continued to use—as the surrogate values for the SG&A ratio and overhead—the averages of the calculated ratios from the 2006–2007 financial statements of Apex and Gemini. Final Surr. Val. Mem., Att. 1, PD 137.

After Commerce issued the *Final Results*, QVD for the first time claimed that Commerce had made a ministerial error by allegedly failing to adjust the SG&A and overhead financial ratios to exclude certain expenses—laboratory testing, sales promotion, sales commissions, and bank charges—from the SG&A financial ratio calculation, thereby allegedly double-counting them. QVD Minis. Error Alleg. at 4–7, PD 142. Commerce concluded that QVD's allegation was not ministerial and denied the claim. Analysis of Minis. Error Alleg. Mem. at 8, PD 145.

QVD challenges Commerce's denial of the ministerial error allegation. QVD Br. 39. A ministerial error is "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." 19 C.F.R. § 351.224(f). Importantly, Commerce included the disputed expenses in their respective ratios in the preliminary results and QVD raised no objections during the administrative proceeding to cause Commerce to reconsider its calculation of these ratios. *See* QVD's Case and Rebuttal Briefs, PD 119; PD 122.

Commerce properly concluded that QVD's claim regarding the surrogate financial ratios was a substantive challenge to Commerce's assignment of certain expenses to the surrogate ratio calculations. There was nothing unintentional or inadvertent about Commerce's

treatment of these expenses. A determination of whether such expenses should or should not be included in the financial ratio expenses is a complex issue and can involve, among other things, an analysis of whether there is sufficient record evidence to demonstrate that the surrogate producer's basis for the expense exactly correlates with the NME producer basis for the expenses. *See Shanghai Eswell Enter. Co. v. United States*, 31 CIT 1570, 1579–81 (2007), *opinion after remand*, 32 CIT ___, ___, (2008), 2008 WL 4921375, at *6 (Nov. 18, 2008), *aff'd without opinion*, 350 Fed. Appx. 473 (Fed. Cir. 2009). Thus, although QVD suggests that these alleged "errors" are ministerial, they are not. Accordingly, Commerce's denial of QVD's request for ministerial error corrections must be sustained.

III. Conclusion

For all of the foregoing reasons, the court will enter judgment sustaining the *Final Results*.

Dated: September 1, 2010
New York, New York

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