U.S. Customs and Border Protection

Slip Op. 11–110

ZHEJIANG NATIVE PRODUCE & ANIMAL BY-PRODUCTS IMPORT & EXPORT CORP., et al., Plaintiffs, v. UNITED STATES, Defendant, and THE AMERICAN HONEY PRODUCERS ASSOCIATION AND THE SIOUX HONEY ASSOCIATION, Def.-Ints.

Before: Richard K. Eaton, Judge
Court No. 02–00057

[The United States Department of Commerce's Results of Redetermination Pursuant to Remand are remanded.]

Dated: September 6, 2011

Grunfeld, Desiderio, Lebowitz, Silverman & Klestadt LLP (*Bruce M. Mitchell, Mark E. Pardo*, and *Ned H. Marshak*), for plaintiffs Zhejiang Native Produce & Animal By-Products Import & Export Corp., Kunshan Foreign Trade Co., China (Tushu) Super Food Import & Export Corp., High Hope International Group Jiangsu Foodstuffs Import & Export Corp., National Honey Packers & Dealers Association; Alfred L. Wolff, Inc.; C.M. Goettsche & Co., China Products North America, Inc., D.F. International (USA) Inc., Evergreen Coyle Group, Inc., Evergreen Produce, Inc., Pure Sweet Honey Farm, Inc., and Sunland International, Inc.

Tony West, Assistant Attorney General; *Jeanne E. Davidson*, Director, *Reginald T. Blades, Jr.*, Assistant Director, Commercial Litigation Branch, Civil Division, United States Department of Justice (*Jane C. Dempsey*); Office of the Chief Counsel for Import Administration, United States Department of Commerce (*Sapna Sharma*), of counsel, for defendant United States.

Kelley Drye & Warren, LLP (*Michael J. Coursey* and *R. Alan Luberda*), for defendant-intervenors the American Honey Producers Association and the Sioux Honey Association.

OPINION AND ORDER

Eaton, Judge:

Introduction

This case involves the Department of Commerce's (the "Department" or "Commerce") finding of critical circumstances in the final results of Honey From the People's Republic of China ("PRC"), 66 Fed. Reg. 50,608, 50,610 (Dep't of Commerce Oct. 4, 2001) (notice of final determination of sales at less than fair value), *as amended by* Honey from the PRC, 66 Fed. Reg. 63,670 (Dep't of Commerce Dec. 10, 2001) (notice of amended final determination of sales at less than fair value

and antidumping duty order) (the "Final Results"). It is now before the court following the most recent remand order directing the Department to reconsider its critical circumstances determination. *See Zhejiang Native Produce & Animal By-Products Imp. & Exp. Corp. v. United States,* 34 CIT __, Slip-Op. 10–30 (Mar. 24, 2010) (not reported in the Federal Supplement) ("*Zhejiang IV*"). In remanding the case, the court observed that "Commerce has the authority to exercise its discretion to apply any other reasonable method or look to any other reasonable time period in making its critical circumstances determination." *Id.* at __, Slip Op. 10–30 at 20.

On December 8, 2010, Commerce filed the Results of Redetermination Pursuant to Remand (the "Second Remand Results"), finding that critical circumstances existed for Zhejiang Native Produce & Animal By-Products Import & Export Corp. ("Zhejiang") because "record evidence demonstrates that importers knew or should have known that the exporter was selling the subject merchandise at less than its fair value. . . ." Second Remand Results at 42.

Plaintiffs[1] ask the court find that critical circumstances did not exist. The defendant-intervenors support the Second Remand Results in their entirety.[2] Commerce, in addition to seeking to have the Second Remand Results sustained, asks for a further remand so that it might use the same methodology, as employed here, for the other named plaintiffs.

The court has jurisdiction pursuant to 28 U.S.C. § 1581(c) (2006) and 19 U.S.C. §§ 1516a(a)(2)(A)(i)(II) and (B)(i) (2006). For the reasons set forth below, the Second Remand Results are not supported by substantial evidence and the matter is remanded to Commerce with instructions.

Background

In 1994, Commerce initiated an unfair trade investigation of honey from the PRC. Subsequently, the investigation was halted and the Department entered into a suspension agreement with the PRC. *See* Honey From the PRC, 60 Fed. Reg. 42,521 (Dep't of Commerce Aug. 16, 1995) (suspension of investigation) (the "Suspension Agreement"). The Suspension Agreement was in effect from August 16, 1995

[1] "Plaintiffs" refers collectively to Zhejiang Native Produce & Animal By-Products Import & Export Corp.; Kunshan Foreign Trade Co.,; China (Tushu) Super Food Import & Export Corp.; High Hope International Group Jiangsu Foodstuffs Import & Export Corp.; National Honey Packers & Dealers Association; Alfred L. Wolff, Inc.; C.M. Goettsche & Co.; China Products North America, Inc.; D.F. International (USA) Inc.; Evergreen Coyle Group, Inc.; Evergreen Produce, Inc.; Pure Sweet Honey Farm, Inc.; and Sunland International, Inc.

[2] Defendant-intervenors' arguments are substantially the same as the Department's. Thus, only Commerce's arguments are summarized herein.

through August 16, 2000. Honey From the PRC, 65 Fed. Reg. 46,426 (Dep't of Commerce July 28, 2000) (termination of suspended antidumping duty investigation).

In 2000, following the termination of the Suspension Agreement, and at the urging of the domestic industry, Commerce initiated a second investigation. Honey from Argentina and the PRC, 65 Fed. Reg. 65,831 (Dep't of Commerce Nov. 2, 2000) (initiation of antidumping duty investigations) (the "Second Investigation"). During the course of the Second Investigation, the petitioners alleged the existence of critical circumstances. *See* 19 U.S.C. § 1673b(e)(1). If the criteria for critical circumstances are met, then antidumping duties are made effective ninety days earlier than the effective date of antidumping duties in the absence of critical circumstances. 19 C.F.R. § 351.206(a) (2010).

Commerce identified the period of investigation (the "POI") as January 1, 2000, through June 30, 2000, a period during which the Suspension Agreement was in effect. Thus, during the course of its investigation the Department used the POI to determine both if respondents were dumping their merchandise, and for the purpose of determining if critical circumstances were present. *See* Honey From the PRC, 66 Fed. Reg. 24,101, 24,106 (Dep't of Commerce May 11, 2001) (notice of Preliminary Results of sales at less than fair value) ("Preliminary Results").

Following the investigation, Commerce's final determination contained an affirmative dumping finding. Honey From the PRC, 66 Fed. Reg. 50,608 (Dep't of Commerce Oct. 4, 2001) (notice of final determination of sales at less than fair value), *as amended by* Honey from the PRC, 66 Fed. Reg. 63,670 (Dep't of Commerce Dec. 10, 2001) (notice of amended final determination of sales at less than fair value and antidumping duty order). The final determination also contained an affirmative finding of critical circumstances, based upon Commerce's frequently employed 25% method for imputing knowledge of dumping to respondents. Final Results, 66 Fed. Reg. at 50,610. This imputation of knowledge of dumping was predicated on the Department's practice of considering

> margins of 25 percent or more for [export price] sales sufficient to impute knowledge of dumping . . . . In other words, in cases where, as here, export price is calculated by reference to sales made to unaffiliated purchasers in the United States, and Commerce determines that the antidumping duty margin with respect to those sales is 25% or more, Commerce "imputes" knowledge of dumping to the importer . . . .

Zhejiang Native Produce & Animal By-Products Import & Export Corp. v. United States, 27 CIT 1827, 1842–43 (2003) (not published in the Federal Supplement) (footnote omitted; first alteration in original) (*"Zhejiang I"*). Commerce found that, based on the 25% method, "there is evidence of the knowledge of dumping . . . [that was] demonstrated by the fact that Zhejiang, Kunshan, High Hope, and the PRC-wide entity all have dumping margins of over 25 percent." *Id.* at 1843 (citation omitted).

Plaintiffs sought judicial review of the Final Results in this Court and, among other things, objected to the use of Commerce's 25% methodology, arguing that compliance with the Suspension Agreement foreclosed the imputation of knowledge of dumping. The court found for the Department, and held that the Suspension Agreement did not prevent Commerce from imputing knowledge of dumping using its 25% method. *Id.* at 1849–50. Therefore, the court sustained Commerce's affirmative critical circumstances determination. *Id.* at 1851.

Plaintiffs appealed *Zhejiang I* to the Federal Circuit. On appeal, plaintiffs again argued that the existence of the Suspension Agreement prevented the imputation of knowledge of dumping using Commerce's 25% methodology. The Federal Circuit held that plaintiffs' compliance with the Suspension Agreement precluded a finding that knowledge of sales at less than fair value could be imputed using the Department's 25% methodology during the POI. *See Zhejiang Native Produce & Animal By-Products Imp. & Exp. Corp. v. United States*, 432 F.3d 1363, 1368 (Fed. Cir. 2005) (citation omitted) (*"Zhejiang II"*) ("As Zhejiang states, 'it strains credibility to suggest that Commerce could establish minimum prices for honey designed to "prevent the suppression or undercutting of price levels of the United States honey products" and then determine that U.S. importers purchasing honey in accordance with these pricing guidelines should have known these sales would be found to be at less than fair value.' When all factors are considered, there is not substantial evidence to support the finding of critical circumstances."). Therefore, the Federal Circuit reversed the court's critical circumstances holding, and remanded the case "for appropriate further proceedings." *Id.*

The court then remanded the matter to Commerce for reconsideration of the critical circumstances issue. *Zhejiang Native Produce & Animal By-Products Imp. & Exp. Corp. v. United States*, 30 CIT 715, 725–26 (2006) (not published in the Federal Supplement) (*"Zhejiang III")*. Pursuant to the Federal Circuit ruling, in its remand instructions the court directed Commerce to further consider "its critical

circumstances finding, provided that in no event shall Commerce impute to plaintiffs any knowledge prohibited by the [Federal Circuit]'s decision . . . ." *Id.*

Following remand, Commerce filed its Remand Redetermination, finding that critical circumstances did not exist.[3] The court remanded again, explaining that the Federal Circuit's decision in *Zhejiang II* did not prevent the Department from considering analyses other than the 25% methodology or time periods other than the POI, in making its critical circumstances determination. *Zhejiang IV,* 34 CIT at __, Slip Op. 10–30 at 20 ("Commerce has the authority to exercise its discretion to apply any other reasonable method or look to any other reasonable time period in making its critical circumstances determination.").

For the following reasons, the court finds that the Second Remand Results are not supported by substantial evidence and remands this matter to Commerce.

Standard of Review

The court must uphold a final determination by the Department in an antidumping proceeding unless it is "unsupported by substantial evidence on the record, or otherwise not in accordance with law." 19 U.S.C. § 1516a(b)(1)(B)(i).

Discussion

I. Critical Circumstances

Pursuant to 19 U.S.C. § 1673d(a)(3), critical circumstances can be found when:

> (A) (ii) the person by whom, or for whose account, the merchandise was imported *knew or should have known that the exporter was selling the subject merchandise at less than its fair value* and that there would be material injury by reason of such sales, and

[3] Plaintiffs also moved under USCIT Rule 60(b) "purporting to seek relief from the . . . court's previous final judgment in 2004" in which the court held that compliance with a suspension agreement did not preclude the Department from finding a respondent to have made sales at less than fair value, *i.e.*, that it had dumped its merchandise during the POI. *Zhejiang Native Produce & Animal By-Products Imp. & Exp. Corp. v. United States,* 339 F. App'x 992, 993 (Fed. Cir. 2009). The court denied this motion by order on September 26, 2007, and the Federal Circuit dismissed the appeal, finding that it was interlocutory and, therefore, was "simply an effort to obtain review of anissue in a pending trial court proceeding without waiting for the trial court to enter a final judgment in the case." *Id.* at 994.

> (B) there have been massive imports of the subject merchandise over a relatively short period.

(emphasis added).

> If these criteria are met,
>
> then *antidumping duties are made effective ninety days earlier than the effective date of antidumping duties in the absence of critical circumstances*. The foundation of this enlarged imposition of antidumping duties is, as the statute states, that the importer "knew or should have known" that the price was below fair value and would materially injure domestic industry, and that there were "massive imports" at dumping prices.
>
> The statute does not state how "knew or should have known" is determined. Commerce has adopted the general practice of imputing such knowledge whenever the dumping margin is greater than 25 percent, without requiring evidence of actual knowledge.

Zhejiang II, 432 F.3d at 1366 (emphasis added) (citation omitted).

II. Parties' Positions on Critical Circumstances Finding

In the Second Remand Results, the Department summed up its critical circumstances findings as follows:

> [T]he Department finds that there is a reasonable basis to believe or suspect that the importers of honey from the PRC, sold by Zhejiang, during the [less than fair value] investigation, knew, or should have known, that the exporter was selling the subject merchandise at less than its fair value. The Department's analysis indicates that the average values for imports of honey from the PRC sold by Zhejiang after the termination of the suspension agreement, and during the 190-day period between the initiation of the investigation and the Preliminary Results, were on average greater than 25 percent below the normal values calculated during the [less than fair value] investigation. Therefore, we find a reasonable basis to impute knowledge of dumping by importers of honey from the PRC, sold by Zhejiang, during the [less than fair value] investigation, and that such importers knew, or should have known, that the exporter was selling the subject merchandise at less than its fair value.

Second Remand Results at 62—63.

The fundamental difference between the Second Remand Results and the critical circumstances determination found in the Final Results resulting from the investigation and first Remand Determination is that, here, Commerce based its finding on the period between the initiation of the dumping investigation (October 26, 2000) and the Preliminary Results (May 11, 2001), rather than during the POI.[4] As has been noted, the Suspension Agreement had terminated on August 16, 2000.

Plaintiffs make a number of arguments by which they insist that Commerce's 25% methodology is not lawful when used in an investigation of an NME respondent. Pls.' Comm. Rem. Red. ("Pls.' Comm.") 9–21. Because the court considered these arguments, and found them without merit in *Zhejiang I*, it will not address them again. *See Zhejiang I,* 27 CIT 1827. In addition, plaintiffs contend that the Suspension Agreement eliminated the possibility of finding that plaintiffs had dumped their merchandise during the POI. Pls.'s Comments, pages 22–25. The court has also considered this argument and found it wanting *See* Order, *Zhejiang Native Produce & Animal By-Products Imp. & Exp. Corp., et al., v. United States*, Court No. 02–00057 (Sept. 26, 2011).

As to the new issues raised by the Second Remand Results, plaintiffs raise two main points. First, they assert the initiation of the less than fair value investigation cannot be found to have alerted them that prices roughly equal to those set by the Suspension Agreement were dumped prices. Pls.' Comm. 25 ("Contrary to the Department's suggestion, the fact that an [antidumping] investigation is initiated does not constitute evidence that dumping is taking place. The allegation of dumping in a Petition is nothing more than an allegation by an adversary. Respondents do not have the right to file comments opposing Petitioners' claims or to otherwise participate in the initiation process. Thus, the fact that the Department has decided to initiate an [unfair trade] investigation does not constitute evidence that the unfair act, in fact, has taken place, let alone evidence that importers should believe that Petitioners [sic] allegations have merit.").

In addition, plaintiffs point out that the allegations of dumping (but not critical circumstances) related to the period that the Suspension Agreement was in effect. Plaintiffs point out that this was a period during which the Federal Circuit has found that the respondents could not be charged with knowledge of dumping. Pls.' Comm. 26

[4] Commerce also used "the average values for imports of honey from the PRC sold by Zhejiang . . . during the 190-day period between the initiation of the investigation and the Preliminary Results" rather than the export price, calculated during the POI, when making the comparison to normal value. Second Remand Results at 62–63.

(“Moreover, Petitioners allegations which led to the Department’s decision to initiate its investigation related to prices paid for honey imports during the period of time in which the Suspension Agreement was in effect. . . . Thus, the Department’s decision that ‘there is reason to believe that imports of honey from . . . China are being, or are likely to be, sold at less than fair value’ was expressly rejected by the Federal Circuit’s decision in [*Zhejiang II*] that Chinese honey was not being dumped during this period in view of the fact that Chinese prices conformed to the Suspension Agreement. Accordingly, the Department’s belief that its Notice of Initiation rendered Suspension Agreement prices unreliable has been rejected by the Federal Circuit in [*Zhejiang II*] and, accordingly, must be rejected by the Court at this time.”)

Second, plaintiffs argue that the 25% method of imputing knowledge of dumping to respondents cannot be found to constitute substantial evidence under the “known or should have known” standard, when the prices used to calculate the margin were essentially the same as those established under the Suspension Agreement. Pls.’ Comm. 28 (“Record evidence in the instant case reveals that from October 26, 2000 [the initiation of the investigation] – May 11, 2001 [publication of the Preliminary Results] the prices which importers paid for honey exported by Zhejiang were “broadly the same as, or slightly higher than, the prices for shipments of honey exported by Zhejiang during the last six months of the Suspension Agreement.”)

The Suspension Agreement terminated on April 16, 2000 and the investigation was initiated on October 26, 2000. Thus, plaintiffs assert that, if knowledge of dumping could not be imputed to the importers based on prices established by the Suspension Agreement during the POI, then knowledge of dumping could not be imputed with respect to virtually the same prices for a period following soon thereafter. Pls.’ Comm. 26 (“[I]f importers could not be charged with knowledge of dumping with respect to prices paid during the time period which was the focus of the Petition, it strains credibility to suggest that they should be charged with knowledge of dumping when they were paying the same or slightly higher prices shortly thereafter.”).

III. The Department Defends Critical Circumstances Finding

The Department first argues that “[b]y examining honey sales in the 190-day period following the expiration of the [S]uspension [A]greement, Commerce complied with the court’s specific instructions.” Def.’s Rep. to Pls.’ Comm. Upon the Second Remand Redetermination (“Def.’s Rep.”) 8. In other words, the Department asserts

that the use of the time period between the initiation of the investigation and the Preliminary Results was specifically authorized by the court in *Zhejiang IV*.

Next, Commerce asserts that its determination was legally justified because (1) the initiation of the investigation alerted plaintiff that the prices formally established by the Suspension Agreement might be dumped prices, and (2) use of the 25% methodology, in the period after the Suspension Agreement had terminated, was valid.

According to Commerce, the basis of the 25% test is that when the antidumping duty margins are 25% or above, Commerce "'expects importers knew or should have known that the prices are too good to be true, whereby a product noticeably undersells its fairly traded competition.'" Def.'s Rep. 10 (quoting Second Remand Results at 51). Commerce emphasizes that it did not impute knowledge of sales at less than fair value to importers during the time when the Suspension Agreement was in effect, but rather during the period immediately after the Suspension Agreement expired. The Department thus argues that it reasonably cited its initiation of the antidumping investigation as a factor in finding critical circumstances, because the commencement of the investigation itself served to put plaintiffs on notice that they could not rely on prices set under the Suspension Agreement as a means to avoid the imputation of knowledge. *See* Def.'s Rep. 13 (. . . once [Commerce] had publicly announced that it had "reason to believe the imports of honey from . . . China are being, or are likely to be sold at less than fair value," importers could no longer reasonably rely on prices issued pursuant to an expired suspension agreement, and assume that imports were not being dumped. . . . Indeed, plaintiffs do not, nor can they, justify importer reliance upon prices from a suspension agreement that had been expressly terminated.").

With respect to the 25% methodology itself, the Department does not directly address plaintiffs' argument that knowledge of dumping could not be imputed to the importers when the import prices were "broadly the same" as those determined by the Suspension Agreement. Rather, the Department states:

> In making its critical circumstances determination, however, Commerce is not required to compare prices provided in a suspension agreement to the prices during the time period it examined in making a critical circumstances finding. As previously discussed, Commerce normally considers the requirements of the statute to be satisfied and will impute knowledge of sales at

> less than fair value during the period of investigation if it calculates dumping margins that are greater than 25 percent for any respondent.

Def.'s Rep. 15.

IV. The Department's Critical Circumstances Determination is Not Supported by Substantial Evidence

In *Zhejiang IV*, the court held that Commerce was not restricted to the POI when applying the 25% methodology, nor was it required to use that methodology or any particular time period when making a critical circumstances determination. 34 CIT at __, Slip Op. 10–30 at 20. As the court explained,

> The 25 percent method, however, is not the only way in which Commerce has imputed knowledge in past investigations. Nor for that matter, has the Department restricted itself to the period of investigation in making critical circumstances determinations. Prior to its adoption of the 25 percent method, Commerce found that, with respect to respondents from non-market economies, it would use a case by case determination "using all available information and drawing upon market conditions of the industry subject to the investigation" when imputing knowledge of less-than-fair value sales. Potassium Permanganate From the PRC, 48 Fed. Reg. 57,347, 57,349 (Dep't of Commerce, Dec. 29, 1983) (final determination of sales at less than fair value) ("*Potassium Permanganate*").
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> For instance, in *Potassium Permanganate*, Commerce made a number of findings that it deemed relevant to its determination that critical circumstances existed. First, that United States importers were aware that the merchandise purchased at "competitive prices" in the European market and subsequently imported into the United States originated from the PRC, and therefore were aware of the price of PRC-sourced potassium permanganate being sold in both United States and European markets. *Id*. Second, Commerce noted that importers were aware of the pricing of potassium permanganate from non-PRC sources and were therefore aware of the entire range of pricing in a marketplace where pricing was a major factor in determining sales. *Id.* Third, because other foreign producers operated in non-state-controlled countries, importers should have known, at least generally, what the value of the product was in market economy countries, and thus the minimum fair value of the PRC

merchandise. *Id.* Fourth, that during the period between the initiation of the investigation and the Preliminary Results, the unit price of the merchandise imported from the PRC was 22 percent less than the price imported from the only other foreign nation exporting the product to the United States. Potassium Permanganate From the PRC, 48 Fed. Reg. at 57,349. Lastly, because importers knew that the merchandise from the PRC was priced significantly below that sold for export by the only other non-United States market economy producer, importers should have known that the PRC exports were at less than fair value. *Id.* Commerce's critical circumstances determination was upheld by both this Court and the Federal Circuit in *ICC Industries, Inc. v. United States*, 10 CIT 181, 632 F. Supp. 36 (1986), *aff'd* 812 F.2d 694 (Fed. Cir. 1987) ("*ICC Industries*").

Other Court of International Trade cases shed more light on practices, other than the 25 percent method, that can be used in making a critical circumstances determination. *See, e.g., Nippon Steel Corp. v. United States,* 24 CIT 1158, 118 F. Supp. 2d 1366 (2000). Specifically, the *Nippon* court listed "numerous press reports, . . . falling domestic prices resulting from rising imports, and domestic buyers shifting to foreign suppliers" as evidence that could support such a determination. *Id*. at 1168, 118 F. Supp. 2d at 1376 (internal quotation omitted).

In addition to demonstrating that the 25 percent method is not the only approach that Commerce has used to impute knowledge of sales at less than fair value, *ICC Industries* also reveals that Commerce has used at least one time period other than the period of investigation as the temporal measure for making a critical circumstances determination. In *ICC Industries*, the period used was "from [i]nitiation of this investigation to [the] Preliminary Results." *ICC Industries*, 10 CIT at 184, 632 F. Supp. at 38.

Indeed, the *ICC Industries* time period appears to be the period that Congress anticipated would be used in determining critical circumstances when it stated that the purpose of the critical circumstances statute was "to provide prompt relief to domestic industries suffering from large volumes of, or a surge over a short period of, imports and to deter exporters whose merchandise is subject to an investigation from circumventing the intent of the law by increasing their exports to the United States during the period between initiation of an investigation and a

> Preliminary [Results] by [Commerce].” H.R. Rep. 96–317, 96th Cong., 1st Sess. at 63 (1979) . . . .
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> In addition, Commerce, in its regulations, is directed to look at a period “beginning on the date the proceeding begins [*i.e.*, the filing of the investigation] and ending at least three months later.” 19 C.F.R. § 351.206(i). Thus, it is clear that Commerce has the authority to evaluate time periods other than the period of investigation when making critical circumstances determinations.

Zhejiang IV, 34 CIT at __, Slip Op. 10–30 at 12—15 (emphsis removed).

In its Second Remand Results, the Department used a time period different from the POI; and relied on evidence of sales prices into the U.S. that was different from that used in its standard 25% methodology. Otherwise the Department relied on its standard 25% methodology to impute knowledge of dumping. As has been discussed, Commerce cited two factors in reaching its finding: (1) that the initiation of the antidumping investigation of honey from the PRC put the honey importers on notice that they no longer could rely upon prices issued under the terminated Suspension Agreement to presume that the imports were not dumped; and (2) the average values for imports of honey produced by Zhejiang after the termination of the Suspension Agreement and during the 190-day period between the initiation of the investigation and Commerce's publication of the Preliminary Results were, on average, greater than 25% below the normal values calculated during the original investigation. Second Remand Results at 56, 63.

As an initial matter, the court finds Commerce's application of the 25% methodology to the 190-day period beginning at the initiation of the less than fair value investigation through the Department's Preliminary Results is clearly authorized by *Zhejiang IV*. *See Zhejiang IV*, 34 CIT at __, Slip Op. 10–30 at 20. Nonetheless, the critical circumstances determination itself lacks the support of substantial evidence because (1) the initiation of the antidumping investigation cannot be said to have put plaintiff on notice that the prices set by the Suspension Agreement were dumped prices, and (2) the prices importers paid did not materially change from the period when the Suspension Agreement was in effect.

The Department's notice argument exaggerates the gravity of Commerce's notice stating that an investigation has been initiated. According to Commerce, once it “announced that it had 'reason to believe that imports of honey from Argentina and China are being, or

are likely to be sold at less than fair value,' importers could no longer reasonably rely on prices issued pursuant to an expired suspension agreement, and assume that imports were not being dumped." Def.'s Rep. 13 (quoting Second Remand Results at 54).

As is generally the case, here, the less than fair value investigation was initiated as a result of a petition filed by domestic producers. The petition, however, constitutes an allegation of dumping, not a determination of dumping. Prior to initiating an investigation, the Department makes no determination with respect to unfair trade practices. Rather, it merely decides if the petitioners have provided a sufficient basis for initiating an investigation, *i.e.*, whether they allege the elements necessary for the imposition of an antidumping duty. MANUAL FOR THE PRACTICE OF U.S. INTERNATIONAL TRADE LAW 595 (Willam K. Ince & Leslie A. Glick, eds. 2001) ("Generally, the Department will refuse to initiate only when the petition is clearly defective – *e.g.*, if the petitioning party has no standing under the statute, or the petition does not contain basic information required by the regulations."); *see* 19 U.S.C. § 1673a(c)(1)(A)(i) ("[Commerce] shall . . . determine whether the petition alleges the elements necessary for the imposition [of unfair trade duties] . . . ."); *see also Republic Steel Co. v. United States*, 4 C.I.T. 33, 41, 544 F. Supp. 901, 908 (1982) (finding that "petitions should not be dismissed except for notable deficiencies . . ."); S. Rep. No. 96–249, at 47 (1979), *reprinted in* 1979 U.S.C.A.N.N. 381, 449 ("The committee intends section 702(c)(1) to result in investigations unless the authority is convinced that the petition and supporting information fail to state a claim upon which relief can be granted under section 701 or the petition does not provide information supporting the allegations which is reasonably available to him.").

As plaintiffs note, "the fact that the Department has decided to initiate an [antidumping] investigation does not constitute evidence that the unfair act, in fact, has taken place, let alone evidence that importers should believe that [p]etitioners [sic] allegations have merit." Pls.' Comm. 25. In addition, in this case, the allegation of dumping was for the period that the Suspension Agreement was in effect, a period during which the Federal Circuit has found that importers could not be imputed with knowledge of dumping.

As to the use of prices that were essentially unchanged from those established by the Suspension Agreement, the Federal Circuit in *Zhejiang II* quoted approvingly plaintiffs' assertion that "it strains credibility to suggest that Commerce could establish minimum prices for honey designed to 'prevent the suppression or undercutting of price levels of the United States honey products' and then determine

that U.S. importers purchasing honey in accordance with these pricing guidelines should have known these sales would be found to be at less than fair value." *Zhejiang II*, 432 F.3d at 1368 (citation omitted).

The Suspension Agreement terminated on August 16, 2000 and the Department initiated its investigation on October 26, 2000. The Preliminary Results were issued on May 11, 2001. The Department itself described the prices paid in the months after the expiration of the Suspension Agreement as "broadly the same, or slightly higher" than the prices paid in the last six months of the Suspension Agreement. Preliminary Results of Second Remand Results at 2 (Dep't of Commerce Sept. 24, 2010).

In *Zhejiang II*, the Federal Circuit found that substantial evidence did not support the proposition that importers knew or should have known the prices during the Suspension Agreement were being sold at less than fair value. In accordance with this holding, the court further finds that a critical circumstances determination based solely on prices that are "broadly the same" as those established under the Suspension Agreement, even if taken from the period following the Suspension Agreement's termination, cannot be supported by substantial evidence either. Put another way, the mere termination of the Suspension Agreement, without more, does not erase the ability of plaintiffs to rely on these prices as not being the prices of goods sold at less than fair value.

Finally, the court notes that, as was shown in *Zhejiang IV*, Commerce had other evidentiary tools that it might have used to produce the substantial evidence needed to make its case. For instance, in Potassium Permanganate From the PRC, 48 Fed. Reg. 57,347 (Dec. 29, 1983) (final determination of sales at less than fair value) ("*Potassium Permanganate*"), Commerce found that the importers were *actually aware* of the pricing of the merchandise for non-Chinese sources, and were, therefore, "aware of the entire range of pricing in a marketplace where pricing was a major factor in determining sales." In *Nippon Steel Corp. v. United States*, 24 CIT 1158, 118 F. Supp. 2d 1366 (2000), this Court listed "numerous press reports, . . . falling domestic prices resulting from rising imports" to support its determination. 24 CIT at 1168, 118 F. Supp. 2d at 1376 (internal citation and quotations omitted).

Here, Commerce has made no effort to demonstrate that the importers had the actual knowledge of honey prices that was important in *Potassium Permanganate* and *Nippon*. Rather than demonstrating actual knowledge of less than fair value pricing by the importers, the Department has chosen to impute knowledge based on the idea that "margins of 25 percent or above 'are of such a magnitude that the

importer should have reasonably known that dumping exists with regard to the subject merchandise.'" Second Remand Results at 51 (citation omitted). While nothing prevents the Department from using a modified version of its 25% methodology to identify critical circumstances, in doing so it must support its determination with substantial evidence. Commerce has failed to present sufficient evidence to do so here.

Conclusion

Because the court has found that Commerce's critical circumstances determination is not supported by substantial evidence, the case is remanded. On remand, the Department may use any analysis permitted by *Zhejiang IV* to complete its critical circumstances review, provided that it not use evidence prohibited by this opinion. In addition, Commerce may, in its discretion, reopen the record. Further, Commerce's request for a remand to apply the methodology used in the Second Remand Results for the other named plaintiffs is denied. Remand results are due on or before January 6, 2012. Comments to the remand results are due on or before February 6, 2012. Replies to such comments are due on or before February 21, 2012.

Dated: September 6, 2011
New York, New York

/s/ Richard K. Eaton
RICHARD K. EATON

Slip Op. 11–111

ATAR S.R.L., Plaintiff, v. UNITED STATES, Defendant, and AMERICAN ITALIAN PASTA COMPANY, DAKOTA GROWERS PASTA COMPANY, AND NEW WORLD PASTA COMPANY, Defendant-Intervenors.

Before: Timothy C. Stanceu, Judge
Court No. 07–00086

[Rejecting a redetermination submitted by the U.S. Department of Commerce in litigation contesting the final results of an administrative review of an antidumping duty order on certain pasta from Italy]

Dated: September 7, 2011

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Kelley Drye & Warren LLP (*David C. Smith*) for defendant-intervenors.

OPINION AND ORDER

Stanceu, Judge:

I. Introduction

Plaintiff Atar S.r.l. ("Atar"), an Italian pasta producer, brought this action to contest the final determination ("Final Results") of the International Trade Administration, United States Department of Commerce ("Commerce" or the "Department") concluding the ninth administrative review of an antidumping duty order on certain pasta from Italy (the "subject merchandise").[1] *See Notice of Final Results of the Ninth Admin. Review of the Antidumping Duty Order on Certain Pasta from Italy*, 72 Fed. Reg. 7,011 (Feb. 14, 2007). The ninth administrative review covered entries of subject merchandise made during the period of July 1, 2004 through June 30, 2005 (the "period of review" or "POR"). *Id.*

In its first decision in this case, the court sustained Atar's challenge in part, remanding the Final Results for reconsideration, and redetermination as necessary, of the indirect selling expense ("ISE") and profit components Commerce calculated when determining the constructed value ("CV") of Atar's subject merchandise. *Atar, S.r.l. v. United States*, 33 CIT __, __, 637 F. Supp. 2d 1068, 1092–93 (2009) ("*Atar I*"). The court ordered a remand because the Department's decision to use only data from home-market sales made in the ordinary course of trade (specifically, above-cost sales) by the six respondents in the previous (eighth) review in performing the profit and ISE calculations was not grounded in findings of fact, supported by substantial record evidence, that were pertinent to Atar's specific situation. *Id.* at __, 637 F. Supp. 2d at 1088.

In its second decision in this case, the court found unlawful the redetermination Commerce submitted in response to *Atar I* (the "First Remand Redetermination") because Commerce did not determine a "profit cap" when determining its CV profit amount and gave no indication that it had attempted to comply with the profit cap provision in the statute. *Atar, S.r.l. v. United States*, 34 CIT __, __, 703

[1] The scope of the antidumping duty order is defined as

> [S]hipments of certain non-egg dry pasta in packages of five pounds four ounces or less, whether or not enriched or fortified or containing milk or other optional ingredients such as chopped vegetables, vegetable purees, milk, gluten, diastasis, vitamins, coloring and flavorings, and up to two percent egg white. The pasta covered by this scope is typically sold in the retail market, in fiberboard or cardboard cartons, or polyethylene or polypropylene bags of varying dimensions.

Notice of Final Results of the Ninth Admin. Review of the Antidumping Duty Order on Certain Pasta from Italy, 72 Fed. Reg. 7,011, 7,012 (Feb. 14, 2007).

F. Supp. 2d 1359, 1364 (2010) ("*Atar II*"); *see Results of Remand Determination Pursuant to Ct. Remand Order* (Sept. 3, 2009) ("*First Remand Redetermination*"). In the First Remand Redetermination, Commerce calculated CV profit and ISE using the data of the home-market sales of only two of the six respondents in the previous (eighth) review of the order, including data on sales made outside the ordinary course of trade. *Atar II*, 34 CIT at __, 703 F. Supp. 2d at 1362. Commerce chose those two respondents because they were the only respondents that realized an overall profit on sales of pasta in the home market of Italy for the period of the eighth review. *Id.* at __, 703 F. Supp. 2d at 1362. The CV profit and ISE as recalculated in the First Remand Redetermination lowered Atar's margin from the 18.18% determined in the Final Results to 14.45%. *Id.* at __, 703 F. Supp. 2d at 1361–62.

Before the court is the redetermination ("Second Remand Redetermination") Commerce issued in response to *Atar II*, in which Commerce made no change to its CV profit and ISE determinations but concluded that its method of calculating CV profit, which it considered to satisfy the "reasonable method" requirement of the relevant statutory provision, also satisfied the profit cap requirement. *Results of Redetermination Pursuant to Ct. Remand Order* (Jul. 19, 2010) ("*Second Remand Redetermination*"). Also before the court is defendant's motion to vacate the court's orders in *Atar I* and *Atar II* based on the decision of the United States Court of Appeals for the Federal Circuit ("Court of Appeals") in *Thai I-Mei Frozen Foods Co. v. United States*, 616 F.3d 1300 (Fed. Cir. 2010). Def.'s Consol. Mot. for Relief from this Ct.'s Remand Orders & Reply to Pl.'s Cmts. upon the Second Remand Redetermination 1–8 ("Def.'s Consol. Mot."). That decision, according to defendant, "directly supports" the determinations of CV ISE and profit the court previously held unlawful. *Id.* at 1–2.

The court concludes that the Second Remand Redetermination does not satisfy the profit cap provision in the statute, which requires Commerce to set the profit cap at the "amount [of profit] normally realized" by home-market exporters/producers in sales "of merchandise that is in the same general category of products as the subject merchandise." Tariff Act of 1930 ("Tariff Act"), § 773, 19 U.S.C. § 1677b(e)(2)(B)(iii) (2006). The court also concludes that the holding in *Thai I-Mei* does not require the court to vacate its previous orders. However, the remand the court is ordering does not preclude Commerce from redetermining CV profit by a method that relies only on above-cost sales, provided Commerce subjects its result to a lawful profit cap.

II. Background

The background of this litigation is discussed in the court's opinions in *Atar I*, 33 CIT at __, 637 F. Supp. 2d at 1072–73, and *Atar II*, 34 CIT at __, 703 F. Supp. 2d at 1361–62. Additional background is presented below as a summary and to address events that have occurred since *Atar II* was decided.

On June 9, 2010, Commerce requested comments on a draft version of the Second Remand Redetermination from Atar and defendant-intervenors American Italian Pasta Company, Dakota Growers Pasta Company, and New World Pasta Company. *Letter from Program Manager, AD/CVD Operations to Atar* (June 9, 2010) (Admin. R. Doc. No. 6543); *Letter from Program Manager, AD/CVD Operations to Defendant-Intervenors* (June 9, 2010) (Admin. R. Doc. No. 6544). Atar filed comments on the draft results on June 17, 2010. *Letter from Atar to the Sec'y of Commerce* (June 17, 2010) (Admin. R. Doc. No. 6530). The Second Remand Redetermination is essentially identical to the draft version, with the addition of a section addressing comments submitted by Atar. *Draft Results of Redetermination* (June 9, 2010) (Admin. R. Doc. No. 6542).

On July 19, 2010, Commerce filed the Second Remand Redetermination, which assigned Atar the same weighted-average dumping margin, 14.45%, as did the First Remand Redetermination. *Second Remand Redetermination* 12; *First Remand Redetermination* 15. On August 18, 2010, Atar filed comments in opposition to the Second Remand Redetermination. Cmts. on Remand Determination.

On August 12, 2010, the Court of Appeals issued its opinion in *Thai I-Mei*, which overturned a decision of the United States Court of International Trade ("Court of International Trade") and upheld the Department's determination of CV profit by a method that excluded non-ordinary-course sales made in a third-country comparison market. *Thai-I-Mei*, 616 F.3d at 1308–09. On September 27, 2010, defendant filed a consolidated motion requesting relief from the court's orders in *Atar I* and *Atar II* pursuant to USCIT Rule 60(b) or in the alternative that the court affirm the Second Remand Redetermination. Def.'s Consol. Mot. Plaintiff opposes defendant's motion. Resp. to Def.'s Consol. Mot. for Relief from this Ct.'s Remand Orders & Reply to Pl.'s Cmts. upon the Second Remand Redetermination. Defendant-intervenors responded neither to the Second Remand Redetermination nor to defendant's motion for relief.

III. Discussion

The court exercises jurisdiction under section 201 of the Customs Courts Act of 1980, 28 U.S.C. § 1581(c) (2006), which pertains to

actions commenced under section 516A of the Tariff Act, 19 U.S.C. § 1516a, including those contesting the final results of an administrative review issued under section 751 of the Tariff Act, 19 U.S.C. § 1675(a). The court will sustain the Department's determination upon remand if it complies with the court's remand order, is supported by substantial evidence on the record, and is otherwise in accordance with law. *See* Tariff Act, § 516A, 19 U.S.C. § 1516a(b)(1)(B)(i).

Rejecting certain of plaintiff's claims, the court in *Atar I* upheld the Department's determination that Atar, which made no home-market sales during the POR, did not have a viable third-country comparison market. *Atar I*, 33 CIT at __, 637 F. Supp. 2d at 1074–81. *Atar I* did not uphold the Department's determinations of constructed value profit and ISE, which the Final Results calculated using profit and ISE data obtained from home-market sales made by the six Italian pasta producers (not including Atar) that were respondents in the previous (eighth) administrative review of the order. *Id.* at __, 637 F. Supp. 2d at 1081–82. In the Final Results, Commerce included in the constructed value ISE and profit calculations only the data on the six producers' home-market sales that Commerce determined to be "above cost" and therefore in the ordinary course of trade.[2] *Id.* at __, 637 F. Supp. 2d at 1085. *Atar I* held that Commerce did not explain adequately how constructed value ISE and profit were determined by a "reasonable method" as required by the third clause of subsection (e)(2)(B) of section 773 of the Tariff Act, 19 U.S.C. § 1677b(e)(2)(B)(iii) ("clause (iii)"). *Id.* at __, 637 F. Supp. 2d at 1088. The court concluded that Commerce did not ground its decision to base constructed value ISE and profit only on above-cost sales in findings of fact, supported by substantial record evidence, that were pertinent to Atar's situation. *Id.*

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[2] The statute defines "ordinary course of trade" as follows:

> The conditions and practices which, for a reasonable time prior to the exportation of the subject merchandise, have been normal in the trade under consideration with respect to merchandise of the same class or kind. The administering authority shall consider the following sales and transactions, among others, to be outside the ordinary course of trade:
>
> (A) Sales disregarded under section 1677b(b)(1) of this title.

Tariff Act of 1930, § 771, 19 U.S.C. § 1677(15) (2006). Section 1677b(b)(1) provides:

> If the administering authority determines that sales made at less than the cost of production—
>
> (A) have been made within an extended period of time in substantial quantities, and
>
> (B) were not at prices which permit recovery of all costs within a reasonable period of time,
>
> such sales may be disregarded in the determination of normal value.

Id. § 1677b(b)(1). Below cost sales were made in "substantial quantities" if "the weighted average per unit price of the sales under consideration for the determination of normal value is less than the weighted average per unit cost of production for such sales." *Id.* § 1677b(b)(2)(C)(ii).

In the First Remand Redetermination, Commerce determined constructed value profit using the data from the home-market sales (both within and outside of the ordinary course of trade) of the two of the six eighth-review respondents that realized an overall profit on sales subject to the eighth review, citing a practice of considering unprofitable companies unsuitable for determining constructed value profit. *First Remand Redetermination* 6–7. Commerce also used the data of those two companies to determine constructed value ISE, reasoning that a company's profit is a function of its indirect selling expenses. *Id.* at 10. In *Atar II*, the court concluded that Commerce acted contrary to law by failing to adhere to the profit cap requirement contained within clause (iii) when determining an amount for constructed value profit. *Atar II*, 34 CIT at __, 703 F. Supp. 2d at 1370. The court ordered a second remand, directing Commerce to reconsider its determination of constructed value profit and recalculate this amount in a way that satisfies both the profit cap and reasonable method requirements of the statutory provision. *Id.* at __, 703 F. Supp. 2d 1370. The remand order permitted Commerce "to redetermine the constructed value indirect selling expense at that time." *Id.* at __, 703 F. Supp. 2d at 1370.

In the Second Remand Redetermination, Commerce made no change in its determinations of constructed value profit and ISE for Atar, again using the data from the home-market sales of the two eighth-review respondents that realized an overall profit. *Second Remand Redetermination* 2. As the Second Remand Redetermination acknowledges, the First Remand Redetermination did not include a profit cap calculation. *Id.* at 2 n.2 ("[T]he Department only addressed the profit cap calculation in the *Preliminary Results* of this proceeding."). In response to the court's remand order in *Atar II*, Commerce determined a profit cap, stating in the Second Remand Redetermination that "the weighted-average profit rate of the two respondents that earned a profit in the *Eighth Administrative Review*, after including sales made both within and outside the ordinary course of trade, establishes a reasonable profit cap." *Id.* at 7.

A. The Department's Profit Cap Determination Cannot Be Sustained on Remand

Read in pertinent part and in context with clauses (i) and (ii), clause (iii) of 19 U.S.C. § 1677b(e)(2)(B) allows Commerce to determine the amount realized for profits based on any "other" reasonable method, i.e., any method other than the methods prescribed by clauses (i) and (ii), and expressly limits the Department's determination of CV profit, as follows:

> the amount allowed for profits may not exceed the amount normally realized by exporters or producers (other than the exporter or producer described in clause (i) [the specific exporter or producer being examined]) in connection with the sale, for consumption in the foreign country, of merchandise that is in the same general category of products as the subject merchandise . . . .

19 U.S.C. § 1677b(e)(2)(B)(iii).[3] As recognized by the Statement of Administrative Action ("SAA") accompanying passage of the Uruguay Round Agreements Act, which contained the provision in question, the express limitation is identified as the "profit cap." *Uruguay Round Agreements Act, Statement of Administrative Action*, H.R. Doc. No. 103–316, Vol. 1, at 840 (1994), *reprinted in* 1994 U.S.C.C.A.N. 4040, 4176 ("*SAA*").

The data of record from which a profit cap could be calculated, i.e., home-market profit data, consist of data from the home-market pasta sales of Corticella, which was the only respondent other than Atar in the ninth review, and data from the home-market pasta sales of the six respondents in the eighth review. From these data, Commerce chose profit data for the home-market sales of only two of the six eighth-review respondents. *Second Remand Redetermination* 6. Commerce decided against using the home-market profit data of the other four eighth-review respondents because those respondents did not realize an overall profit from their home-market sales in that review. *Id.*

The language of the Second Remand Redetermination, although not entirely clear, appears to base the Department's profit cap decision on a statutory construction of clause (iii) that required Commerce to consider only the sales data of the profitable home-market exporters and producers. Commerce reasoned that "the general usage of the term 'profit' explicitly refers to a positive figure," *id.* at 10 (citing Barron's Financial Guides: Dictionary of Finance and Investment Terms (New York 1987)), and cited the SAA for the proposition

[3] Clauses (i) and (ii) of 19 U.S.C. § 1677b(e)(2)(B) provide two methods of determining constructed value amounts:

> (i) the actual amounts incurred and realized by the specific exporter or producer being examined in the investigation or review for selling, general, and administrative expenses, and for profits, in connection with the production and sale, for consumption in the foreign country, of merchandise that is in the same general category of products as the subject merchandise,
>
> (ii) the weighted average of the actual amounts incurred and realized by exporters or producers that are subject to the investigation or review (other than the exporter or producer described in clause (i)) for selling, general, and administrative expenses, and for profits, in connection with the production and sale of a foreign like product, in the ordinary course of trade, for consumption in the foreign country . . . .

that "if a company has no home market profit or has incurred losses in the home market, the Department is not instructed to ignore the profit element, include a zero profit, or even consider the inclusion of the loss; rather, the Department is directed to find an alternative home market profit," *id.* (citing *SAA* at 840, *reprinted in* 1994 U.S-.C.C.A.N. at 4176). Commerce concluded that "a reasonable interpretation of the statute indicates that a positive amount for profit must be included in CV" and that "it reasonably follows that a 'profit cap' should include only positive amounts because Commerce reasonably interprets 'profit' to be a positive amount and in its profit cap calculation the Department is determining the 'profit' normally realized by other producers." *Id.* at 10–11. Rejecting Atar's argument that basing the profit cap on the sales of all six of the eighth-review respondents still would have produced a positive profit rate, Commerce further stated, without explanation, that "[t]he reasonableness of Commerce's interpretation of 'profit' and use of data from only profitable companies in its profit cap calculation is not negated by the fact that including data from companies that did not earn a profit could or does result in a positive profit figure." *Id.* at 11. Commerce claimed it is owed deference for its statutory construction. *Id.* at 10 ("In circumstances in which Congress has expressly delegated authority to the Department to interpret a provision in the statute, as is the case here, this court should accord such an interpretation a great deal of deference.") (citing *Pesquera Mares Australes Ltda. v. United States*, 266 F.3d 1372, 1380 (Fed. Cir. 2001)).

Elsewhere in the Second Remand Redetermination, Commerce appears to rely on grounds other than its statutory construction for its decision to determine a profit cap based on the data of only the two eighth-review respondents that realized an overall profit on home-market sales subject to the eighth review. Commerce stated as follows:

> Because we require that CV profit be a positive amount, where the Court is requiring the Department to include sales that are made both within and outside the ordinary course of trade in its CV profit calculations, it is reasonable to determine that rates from only profitable companies here should constitute the "amount [of profit] normally realized by exporters or producers . . . in connection with the sale, for consumption in the foreign country, of merchandise that is in the same general category of products as the subject merchandise."

Second Remand Redetermination 6–7 (quoting 19 U.S.C. § 1677b(e)(2)(B)(iii)) (alterations in original). Thus, the Second Remand

Redetermination appears to offer two justifications to support its decision to exclude the data of the four nonprofitable respondents: a justification based on a construction of the word "profit," as used in clause (iii), under which the Department must base a profit cap on "positive amounts," and a justification based on the Department's conclusion that, on this record, it is reasonable to base the profit cap on the sales of the two profitable eighth-review respondents. The former justification necessarily involves a question of law; the latter, a question of whether substantial record evidence supported the profit cap the Department determined on remand in this case. The court considers both justifications.

The court reviews the Department's statutory construction of clause (iii) according to the principles of *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842–44 (1984). In so doing, the court first considers "whether Congress has directly spoken to the precise question at issue," *id.* at 842; if so, the court "must give effect to the unambiguously expressed intent of Congress," *id.* at 843. If not, and "the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute." *Id.*

The statute does not speak directly to the question of how Commerce is to determine the "profit cap," i.e., "the amount [of profit] normally realized by exporters or producers . . . in connection with the sale, for consumption in the foreign country, of merchandise that is in the same general category of products as the subject merchandise." 19 U.S.C. § 1677b(e)(2)(B)(iii). It does not direct that this amount be based on data from administrative reviews–current or previous–nor does it direct that data on unprofitable sales be included or excluded. *Cf. Thai I-Mei*, 616 F.3d at 1306–07. Because the statute is silent on these points, the court considers the Department's apparent construction of clause (iii) according to the second step of the analysis prescribed by *Chevron*. Thus, the court considers whether Commerce reasonably interpreted the clause (iii) reference to "profit" such that Commerce was required to consider only the sales data of the profitable home-market exporters and producers.

The Department's construction of the statute is not reasonable. Only a strained reading of the broad language of clause (iii), which contains references to "the amount[] . . . realized for . . . profits," "the amount allowed for profit," and "the amount normally realized by exporters and producers," could require Commerce to limit its profit cap calculation to the data of those producers or exporters who realized a home-market profit over a significant time period (such as the one-year period of the eighth review). Any such construction, even if

considered plausible, would confine the Department's discretion drastically. Had Congress intended to limit the Department's discretion in so specific a way, it would have expressed that intent in the language of clause (iii). Further, the SAA does not support the Department's reading, stating that Commerce should choose the data for the profit cap "on a case-by-case basis" and that Commerce will not request from respondents data on which to analyze whether sales in the same general category as the subject merchandise, which form the statutory basis of the profit cap, are above-cost or below-cost sales. *SAA* at 841, *reprinted in* 1994 U.S.C.C.A.N. at 4176–77. The SAA goes on to instruct that "[l]ikewise, the Administration does not intend that Commerce would engage in an analysis of whether sales in the same general category are above-cost or otherwise in the ordinary course of trade." *Id.* at 841, *reprinted in* 1994 U.S.C.C.A.N. at 4177. Commerce, therefore, erred to whatever extent it based its exclusion of the data of the four non-profitable eighth-review respondents on a statutory construction under which it lacked the discretion to do otherwise.

The court next considers whether the Department's profit cap was permissible on the factual record of this case and concludes to the contrary. Substantial evidence does not support the Department's determination that the profit cap amount reflected the "amount normally realized by exporters or producers . . . in connection with the sale, for consumption in the foreign country, of merchandise that is in the same general category of products as the subject merchandise . . . ." 19 U.S.C. § 1677b(e)(2)(B)(iii).

As explained above, record data pertaining to the home-market profit experience consisted principally of data from the home-market pasta sales of the six respondents in the eighth review. Rather than calculate a profit cap based on all such data, Commerce determined a profit cap according to a weighted average of the profit rates of two of the six eighth-review respondents.[4] *Second Remand Redetermination* 6–7; *Mem. from Int'l Trade Compliance Analyst to the File* attachment 1 (Aug. 20, 2009) (Admin. R. Doc. No. 6309) ("*First Remand Analysis Mem.*"). This calculation method ignored home-market sales data that were material and probative of the general conditions in the home market of Italy affecting the profitability of domestic pasta producers operating there. Although this record data cannot fairly be

[4] Also on record were ninth-review data from the home-market pasta sales of Corticella, the only exporter or producer other than plaintiff Atar S.r.l. in the ninth review. The court does not reach the question of whether the International Trade Administration, United States Department of Commerce ("Commerce") erred in excluding from its calculation the Corticella data from the ninth review. Corticella was also a respondent in the eighth review. *Mem. from Int'l Trade Compliance Analyst to the File* attachment 1 (Aug. 20, 2009) (Admin. R. Doc. No. 6309).

seen as insignificant, by excluding it Commerce left itself with the data of only two eighth-review respondents for use in its profit cap determination.[5] One of those respondents was atypical in that it earned a substantial profit and accounted for practically all of the quantities in the home-market database obtained from that review. *First Remand Analysis Mem.* attachment 1. The data from the other eighth-review respondent represented a much lower quantity and a profit rate that was only a fraction of that realized by the larger respondent.[6] The calculated profit cap thus reflects, to a large extent, the profit experience of only one Italian exporter/producer and ignores entirely the eighth-review data of four home-market exporter/producers. Substantial record evidence, therefore, does not support the Department's determination that the profit cap in the Second Remand Redetermination is the "amount normally realized" by exporters and producers in Italy on sales for consumption in Italy of merchandise in the same general category of products as the subject merchandise.

Because substantial evidence does not support the profit cap determination, the court need not decide whether Commerce was correct in concluding that it was reasonable to ignore the sales of the other four respondents because "CV profit should be a positive amount." *Second Remand Redetermination* 6. The court observes, however, that the Department's conclusion that CV profit should be a positive amount is inconsistent with the holding of the Court of International Trade in *Floral Trade Council v. United States*, under which the profit cap was determined to be zero in a case in which the home-market producers of merchandise in the same general category of products as the subject merchandise did not realize a profit. 23 CIT 20, 30, 41 F. Supp. 2d 319, 329 (1999). Moreover, as the Court of International Trade has recognized, "the goal in calculating CV profit is to approximate the home market profit experience." *Geum Poong Corp. v. United States*, 26 CIT 322, 327, 193 F. Supp. 2d 1363, 1370 (2002). Here, Commerce determined a profit cap using an incomplete set of data that could not reflect the actual conditions affecting profitability in the home market.

[5] The court does not hold or imply that Commerce may never set aside home-market sales data in determining a profit cap. In some cases, Commerce might be able to justify excluding from the profit cap calculation data it found to be aberrational and thus not reflective of the amount of profit "normally realized." Commerce made no finding that any data it excluded were aberrational. Moreover, the record reveals that unprofitable home-market sales were so common that four of the six eighth-review respondents failed to earn an overall profit on home-market sales subject to the eighth review.

[6] Because Commerce used a weighted average rather than a simple average, the inclusion of home-market sales data from the smaller of the two eighth-review respondents had relatively little effect on the profit cap determination.

In conclusion, the Department's profit cap determination is unlawful to the extent that it was based on an impermissible construction of clause (iii), and it is also unlawful because it is not supported by substantial evidence on the record considered as a whole. On remand, Commerce must redetermine the profit cap according to a lawful method.

B. The Court Will Not Sustain the Final Results in Response to the Holding in Thai I-Mei

Defendant moves under USCIT Rule 60(b) for the court to vacate the orders in *Atar I* and *Atar II* and sustain the Final Results based on the intervening legal decision in *Thai I-Mei*, 616 F.3d 1300.[7] Def.'s Consol. Mot. 1–2. In its motion, defendant characterizes *Thai I-Mei* as "holding that, under 19 U.S.C. § 1677b(e)(2)(B)(iii), Commerce may exclude sales outside the ordinary course of trade in calculating constructed value profit rate." *Id.* at 1. According to defendant, "[t]he appellate court held that Commerce's statement of a general preference for exclusion of sales outside the ordinary course of trade when the data were for like products sold by other respondents, was reasonable." *Id.* at 5. Defendant argues that "[a]s it had done in *Thai I-Mei*, Commerce, in the final results in this case, limited the data it used to calculate Atar's constructed value profit to sales of pasta made within the ordinary course of trade" and that "*Thai I-Mei* establishes that this methodology is reasonable, and the Court should, therefore, vacate its First Remand Order." *Id.* at 6.

In *Thai I-Mei*, the Court of Appeals upheld the Department's determining the CV profit of plaintiff Thai I-Mei Frozen Foods Co., Ltd., a frozen shrimp producer in Thailand, based on data from sales of the foreign like product (i.e., frozen shrimp) that the other two mandatory respondents in the review had made in Canada, which Commerce used as the third-country comparison market for the sales of subject merchandise by those two respondents. *Thai I-Mei*, 616 F.3d at 1302. Commerce excluded from its CV profit determination data on the Canadian sales that were made outside the ordinary course of trade. *Id.* at 1302. The Court of Appeals concluded that Commerce reasonably interpreted the antidumping statute and permissibly excluded

[7] Defendant moved for reconsideration pursuant to USCIT Rule 60(b), which does not apply in the circumstances of this case because the remand orders in *Atar, S.r.l. v. United States*, 33 CIT __, __, 637 F. Supp. 2d 1068, 1092–93 (2009) and *Atar, S.r.l. v. United States*, 34 CIT __, __, 703 F. Supp. 2d 1359, 1364 (2010) were not final orders. As the advisory notes to the Federal Rules of Civil Procedure make clear, the analogous Fed. R. Civ. P. 60(b) applies only to final decisions. Fed. R. Civ. P. 60(b), advisory notes ("[I]nterlocutory judgments are not brought within the restrictions of the rule [i.e., 60(b)]"). The court, therefore, considers defendant's motion under its equitable power to modify its prior orders.

the non-ordinary-course sales in the circumstances of that case. *Id.* at 1309. The Court of Appeals accepted the Department's rationale that available data allowed Commerce to exclude those sales and that doing so achieved consistency with respect to the other two respondents, for which Commerce excluded non-ordinary-course sales in determining normal value based on the Canadian sales. *Id.* As the Court of Appeals stated, "Commerce's statement of a general preference for exclusion of sales outside the ordinary course of trade where, as here, the data are for like products sold by other respondents, is reasonable." *Id.*

This case presents a different factual circumstance than did *Thai I-Mei*. In *Atar I*, the court reviewed the Department's determination, as described in an issues and decision memorandum, to calculate Atar's constructed value profit and indirect selling expenses based on data from the previous administrative review of the antidumping duty order on pasta from Italy. *Atar I*, 33 CIT at __, 637 F. Supp. 2d at 1085–89; Issues & Decision Mem., A-475–818, ARP 6–05, at 21 (Feb. 14, 2007) (Admin. R. Doc. No. 5615). In this case, the availability of data is a factor as it was in *Thai I-Mei*, but Commerce did not exclude data on non-ordinary-course sales to achieve consistency with other respondents in the ninth review. Nor did Commerce ground its determination to exclude non-ordinary-course sales on specific circumstances other than the availability of data, as Commerce indicated it would do in the preamble to the antidumping regulations. *Atar I*, 33 CIT at __, 637 F. Supp. 2d at 1085; *see Antidumping Duties; Countervailing Duties*, 62 Fed. Reg. 27,296, 27,358–59 (May 19, 1997) ("[D]epending on the *circumstances and* the availability of data, there may be instances in which the Department would consider it necessary to exclude certain home market sales that are outside the ordinary course of trade . . . .") (emphasis added). Due to the differences in the two cases, the court does not agree with defendant that the holding in *Thai I-Mei* requires affirmance of the Final Results in this proceeding.

Also, this case, unlike *Thai I-Mei*, presents the issue of compliance with the profit cap requirement of clause (iii).[8] Although the court discussed the profit cap requirement in its opinion in *Atar I*, the court's holding in *Atar I* that the Department had failed to justify its CV profit determination under the "reasonable method" requirement of clause (iii) made it unnecessary at that time for the court to decide specifically whether the Department's profit calculation complied

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[8] The United States Court of Appeals for the Federal Circuit did not address the profit cap requirement in *Thai I-Mei Frozen Foods Co. v. United States* because the plaintiff failed to exhaust its administrative remedies on that issue. 616 F.3d 1300, 1302 n.1 (Fed. Cir. 2010).

with profit cap requirement in that provision. *See Atar I*, 33 CIT at __, 637 F. Supp. 2d at 1089. For purposes of explaining its remand order, the court reaches that question now.

In the Final Results, "Commerce used the same data set, and the same methodology, to calculate the profit cap that it used to calculate Atar's constructed value profit." *Id.* at __, 637 F. Supp. 2d at 1088. Thus, the Department's profit cap was the weighted average of the profit realized by respondents during the eighth administrative review on home-market sales in the ordinary course of trade. The reasoning by which the court is rejecting the profit cap in Second Remand Redetermination also applies to the profit cap Commerce incorporated into the Final Results. As demonstrated by the record evidence that four of the six respondents failed to realize an overall profit, below-cost sales were a significant feature of the home-market conditions affecting the marketing of pasta in Italy. As a result, substantial evidence does not support a determination that the profit cap incorporated into the Final Results reflected the "amount normally realized by exporters or producers . . . in connection with the sale, for consumption in the foreign country, of merchandise that is in the same general category of products as the subject merchandise . . . ." 19 U.S.C. § 1677b(e)(2)(B)(iii). As the court has emphasized, a profit cap determination must be supported by substantial evidence present on the administrative record considered as a whole. And as the court discussed previously, a determination is not supported by substantial evidence if it disregards record data that is probative of the general conditions in the home market affecting the profitability of domestic pasta producers who operate in that market. The profit cap determined for the Final Results, therefore, would not satisfy the remand order the court now issues in this case.

In sum, the court will not grant defendant's motion for relief from the court's prior orders in this case. However, based on the general principle of deference on which the Court of Appeals based its decision in *Thai I-Mei*, the court considers that Commerce, on remand, may be able to explain adequately why a CV profit amount that is redetermined by a method excluding non-ordinary-course sales satisfies the "reasonable method" requirement of clause (iii). As required by the statute, the result of any such redetermination still must be tested according to the profit cap requirement.

IV. Conclusion

The court concludes that the Second Remand Redetermination does not subject the determination of a CV profit amount to a lawful profit cap and therefore cannot be affirmed. The court also denies relief on

defendant's motion requesting that the court affirm the Final Results. The court will order Commerce to reconsider the constructed value profit as determined in the Second Remand Redetermination and to redetermine constructed value profit in a way that imposes a lawful profit cap. In preparing a remand redetermination, the Department may redetermine constructed value ISE.

Order

Upon review of the Results of Redetermination pursuant to Court Remand, as filed on July 19, 2010 ("Second Remand Redetermination"), the parties' comments, and all other papers and proceedings herein, and upon due deliberation, it is hereby

ORDERED that the Second Remand Redetermination be, and hereby is, set aside as contrary to law; it is further

ORDERED that Commerce will submit to the court a third remand redetermination that complies with 19 U.S.C. § 1677b(e)(2)(B)(iii) and related statutory provisions in all respects, that specifically incorporates a lawfully-determined profit cap, and that is in accordance with all directives and conclusions set forth in this Opinion and Order; it is further

ORDERED that Commerce shall submit its third remand redetermination within ninety (90) days of the date of this Opinion and Order; it is further

ORDERED that plaintiff may submit to the court comments on the third remand redetermination within thirty (30) days of the date on which the third remand redetermination is filed with the court; it is further

ORDERED that defendant and defendant-intevenor may submit comments on the third remand redetermination, and on plaintiff's comments thereon, within twenty (20) days of the date on which plaintiff files its comments with the court; and it is further

ORDERED that Defendant's Consolidated Motion for Relief from this Court's Remand Orders & Reply to Plaintiff's Comments upon the Second Remand Redetermination be, and hereby is, DENIED to the extent it seeks affirmance of the *Notice of Final Results of the Ninth Admin. Review of the Antidumping Duty Order on Certain Pasta from Italy*, 72 Fed. Reg. 7,011 (Feb. 14, 2007).

Dated: September 7, 2011
New York, New York

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

Slip Op. 11–112

JINXIANG HEJIA CO., LTD., Plaintiff, v. UNITED STATES, Defendant, and FRESH GARLIC PRODUCERS ASSOCIATION, CHRISTOPHER RANCH L.L.C., THE GARLIC COMPANY, VALLEY GARLIC, AND VESSEY AND COMPANY, INC., Defendant-Intervenors.

Before: Judith M. Barzilay, Senior Judge
Court No. 09–00471

[The court sustains in part and remands in part the redetermination of the U.S. Department of Commerce.]

Dated: September 7, 2011

deKieffer & Horgan (*John J. Kenkel*, *Gregory J. Menegaz*, and *J. Kevin Horgan*) for Plaintiff Jinxiang Hejia Co., Ltd.

Tony West, Assistant Attorney General; *Jeanne E. Davidson*, Director, *Reginald T. Blades, Jr.*, Assistant Director, *Richard P. Schroeder*, Trial Counsel, Commercial Litigation Branch, Civil Division, U.S. Department of Justice; *George Kivork*, Attorney, Office of the Chief Counsel for Import Administration, U.S. Department of Commerce, for Defendant.

Kelley Drye & Warren LLP (*Michael J. Coursey* and *John M. Herrmann*), for Defendant-Intervenors Fresh Garlic Producers Association, Christopher Ranch L.L.C., The Garlic Company, Valley Garlic, and Vessey and Company, Inc.

OPINION & ORDER

Barzilay, Senior Judge:

I. Introduction

Plaintiff Jinxiang Hejia Co., Ltd. ("Plaintiff" or "Hejia") contests the remand determination by the U.S. Department of Commerce ("Commerce" or "the Department") concerning a new shipper review for single-clove garlic from the People's Republic of China. *See Final Results of Redetermination Pursuant to Court Order*, J.A. Tab 8 (Dep't of Commerce Jan. 14, 2011) ("*Redetermination*"). Plaintiff argues that Commerce's calculation of normal value for the subject merchandise is not supported by substantial evidence. Plaintiff also argues that Commerce unreasonably converted the terms of one of the sales offers on record such that the offer did not reliably serve as surrogate value data and that Commerce relied on an unsupported weighted-average of surrogate value data. The court has jurisdiction over this action pursuant to 28 U.S.C. § 1581(c). For the reasons set forth below, the court sustains Commerce's determination with regard to the conversion of the sales offer, but remands for further consideration the particular weighted-average of surrogate value data.

II. Background

In July 2008, Commerce initiated new shipper reviews for six producers and exporters of fresh garlic from the People's Republic of China. *See Fresh Garlic from the People's Republic of China*, 73 Fed. Reg. 38,979 (Dep't of Commerce July 8, 2008) (initiation of new shipper reviews). Commerce included among these a review of Hejia's one-time sale of single-clove garlic made during the period of review spanning November 1, 2007, to June 9, 2008. *Redetermination* at 1. Based on information provided by Hejia, the Department determined that single-clove garlic differs significantly from the more common Grade A and Super Grade A multi-clove garlic exported by the other producers included in the new shipper reviews.[1] *New Shipper Review of Fresh Garlic from the People's Republic of China*, J.A. Tab 6 at 3 (Dep't of Commerce Apr. 27, 2009) ("*Preliminary Analysis Mem.*"). As a result, Commerce concluded that the factors of production data on record for multi-clove garlic, which Commerce used to calculate a surrogate value for multi-clove garlic from China, would not yield an accurate surrogate value for single-clove garlic. *See Fresh Garlic From the People's Republic of China*, 74 Fed. Reg. 20,452, 20,457 (Dep't of Commerce May 4, 2009) ("*Preliminary Results*").

To compensate for this deficiency in the record, Commerce initiated a search for surrogate value data for this distinct variety of garlic and selected India as an appropriate surrogate country. *Redetermination* at 2; *Preliminary Analysis Mem.* at 2. Commerce's search yielded limited data regarding the price of single-clove garlic in India. *See Redetermination* at 20 ("Despite extensive research during the administrative review, . . . we were able to find only limited surrogate value information for single-clove garlic."). In fact, Commerce found only a single price quote[2] for comparable garlic, posted by the Indian exporter Sundaram Overseas Operations ("SOO"), *Redetermination* at 2; *Preliminary Results*, 74 Fed. Reg. at 20,457, for Himalayan pearl garlic, which the Department determined was "physically similar to the product sold by Hejia," *Issues and Decision Memorandum for the Final Results of the New Shipper Reviews and Rescission, In Part, of the New Shipper Reviews*, J.A. Tab 2 at 17–18 (Dep't of Commerce

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[1] While single-clove garlic is physically dissimilar from the multi-clove variety, both types of garlic are properly entered under heading 0703.20.0010 of the Harmonized Tariff Schedule of the United States. *Issues and Decision Memorandum for the Final Results of the New Shipper Reviews and Rescission, In Part, of the New Shipper Reviews*, J.A. Tab 2 at 4 (Dep't of Commerce Sept. 24, 2009).

[2] Commerce uses the terms "sales offers" and "price quotes" to refer to Free on Board offers for single-clove garlic, not directed to a specified buyer and posted on publicly accessible websites. *See generally Redetermination*.

Sept. 24, 2009) ("*Issues and Decision Memorandum*"). Originally posted on January 17, 2009, on a third-party website, the SOO offer was for garlic at 20 cents per unit. *Preliminary Analysis Mem.* Ex. IV. The offer did not, however, specify the unit of sale. *See Preliminary Analysis Mem.* Ex. IV. On April 20, 2009, an official from the Department sent an email to SOO requesting additional information about its offer and product, seeking in particular to clarify the terms of the offer and obtain additional pricing information for Indian-grown garlic. *Preliminary Analysis Mem.* Ex. V. Commerce did not receive a reply. *Redetermination* at 3.

On May 4, 2009, Commerce issued the preliminary results of its administrative review. *See Preliminary Results*, 74 Fed. Reg. at 20,452. Because no interested party had submitted at that stage any data regarding the value of single-clove garlic, Commerce concluded that the SOO offer was the "best available information" from which to derive normal value. *Redetermination* at 2–3. It therefore endeavored to convert the terms of the SOO offer to a price per kilogram such that the offer could serve as a surrogate value for single-clove garlic. *Redetermination* at 3. Additionally, for purposes of the *Preliminary Results*, the Department assumed that SOO was a trading company, as opposed to a manufacturer, and adjusted the offer price by deducting profit, overhead, and general and administrative expenses. *Redetermination* at 3. In the *Preliminary Results*, Commerce found a weighted-average dumping margin for Hejia of 70.38 percent and requested that the parties to the administrative proceedings submit "factual information regarding the appropriate surrogate value to use in calculating [normal value] for Hejia for purposes of the final results of review." *Preliminary Results*, 74 Fed. Reg. at 20,457–58.

On May 19, 2009, Hejia timely submitted four publicly available sales offers from separate Indian[3] suppliers of single-clove garlic to serve as surrogate value information. *Redetermination* at 3–4. The four offers Hejia submitted price single-clove garlic at $1.15 per kilogram, $1.18 per kilogram, $1.18 per kilogram, and $1.20 per kilogram, respectively. *Redetermination* at 4, 11. Like the SOO offer Commerce placed on the record, these four sales offers are not con-

[3] Commerce contends that "there is some question as to whether [one of the Hejia-submitted sales offers for single-clove garlic] is from a company located in India or Nepal, and whether the garlic was actually of Indian or Nepalese origin." *Redetermination* at 4 n.1. While the record evidence supports Commerce's concern, J.A. Tab 4 Ex. 3; J.A. Conf. Tab 7 Ex. II, this issue does not impact the court's decision as Commerce did not rely on this issue in justifying its weighted-average methodology.

temporaneous with the period of review. *Issues and Decision Memorandum* at 18. The website on which three of the offers were posted labeled the offers as "New Arrivals" at the time of submission, while the fourth offer explicitly lists its posting date as May 18, 2009. *Redetermination* at 4. The four offers were also for Himalayan pearl garlic. *Issues and Decision Memorandum* at 18.

On October 2, 2009, Commerce issued its final results for the new shipper review. *See Fresh Garlic from the People's Republic of China*, 74 Fed. Reg. 50,952 (Dep't of Commerce Oct. 2, 2009) ("*Final Results*"). In the *Final Results*, Commerce amended its previous determination regarding the level of trade at which SOO operates based on a description of SOO on the company's website. *Issues and Decision Memorandum* at 9. Commerce concluded that SOO was a manufacturer and exporter of garlic, as opposed to a trading company, and determined that it would be inappropriate to deduct profit, overhead, and general and administrative expenses from the offer price. *Issues and Decision Memorandum* at 19. For reasons not discussed in the *Issues and Decision Memorandum*, Commerce resolved to treat the four offers as a single source of surrogate value data, as opposed to four sources, and determined that this single source and the SOO offer "are equally usable and equally represent the best available information on the record." *Issues and Decision Memorandum* at 18–19. In calculating normal value, therefore, Commerce took the simple average of (1) the SOO sales offer and (2) a simple average of the four sales offers Hejia placed on the record.[4] *Issues and Decision Memorandum* at 19. This calculation resulted in a revised weighted-average dumping margin of 15.37 percent. *Final Results*, 74 Fed. Reg. at 50,954.

Commerce also concluded in the *Final Results* that Hejia's one-time sale was a bona fide commercial transaction. *Id.* at 50,953–54. In defending the relatively high price of its sale, Hejia argued that prices for single-clove garlic are significantly higher than those for multi-clove garlic. *See Redetermination* at 11; *Issues and Decision Memorandum* at 5. To support its argument, Plaintiff placed on the record sales offers of single-clove garlic to Germany, Great Britain, and Japan, all for single-clove garlic at prices significantly higher than the multi-clove variety. *See Redetermination* at 11. Thus, the Department rejected the contention by Defendant-Intervenors Fresh Garlic Producers Association, Christopher Ranch L.L.C., The Garlic Company, Valley Garlic, and Vessey and Company, Inc. that Hejia's sale

[4] Differently worded, Commerce assigned each of the four Hejia-submitted offers 12.5 percent and assigned the SOO offer 50 percent in the final weighted-average.

was not reflective of future sales and determined that the agency "[did] not have a basis for concluding that [Hejia's] price is aberrationally high for single-clove garlic in the United States." *Issues and Decision Memorandum* at 5.

Plaintiff subsequently filed in this court a complaint and motion pursuant to Rule 56.2 challenging Commerce's determination in the *Final Results*. Responding to Plaintiff's motion, Commerce conceded that it did not adequately explain its surrogate value determination in the *Issues and Decision Memorandum*, and requested that the court issue a voluntary remand. On October 25, 2010, the court granted the Department's request, thereby allowing Commerce to reevaluate the evidence on record and issue a remand determination in accordance with its reevaluation.

In the *Redetermination*, Commerce continues to rely on the same weighted-average of the five sales offers on the record to calculate normal value, but expands its reasoning as to why the four offers Hejia submitted were each given less weight. *See generally Redetermination*. Commerce offers several reasons for concluding that the four Hejia-submitted offers are fundamentally flawed and consequently less probative of normal value than the SOO offer. Nevertheless, the Department continues to use them in its calculation of normal value because they represent "the only available surrogate value information for single-clove garlic on the record for which an explicit unit of measure was included in the sales offer." *Redetermination* at 12.

III. Standard of Review

The court will not disturb a determination by Commerce unless it is "unsupported by substantial evidence on the record" or "otherwise not in accordance with law." 19 U.S.C. § 1516a(b)(1)(B)(i).

Substantial evidence amounts to "more than a mere scintilla" and constitutes "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) (citations omitted); *accord Huvis Corp. v. United States*, 570 F.3d 1347, 1351 (Fed. Cir. 2009) (citation omitted). The court reviews the entire record when resolving whether a determination is sufficiently supported, including anything that "'fairly detracts from the substantiality of the evidence.'" *Micron Tech., Inc. v. United States*, 117 F.3d 1386, 1393 (Fed. Cir. 1997) (citation omitted). That the court may draw a separate and inconsistent conclusion from the record is immaterial to whether Commerce properly supported its findings. *See Thai Pineapple Pub. Co. v. United States*, 187 F.3d 1362, 1365 (Fed. Cir. 1999). Commerce must, how-

ever, thoroughly examine the record and "articulate a satisfactory explanation for its action including a rational connection between the facts found and the choice made." *Motor Vehicle Mfrs. Ass'n of the U.S., Inc. v. State Farm Mut. Ins. Co.*, 463 U.S. 29, 43 (1983) (citation & quotation marks omitted).

IV. Discussion

A. The Department's Compliance with the Court's Remand Order

As an initial matter, Hejia contends that the Department exceeded the court's remand order by reaching a new result in the *Redetermination*. Pl.'s Comments 11–12, 23–24; Pl.'s Reply 1–3. Plaintiff interprets the *Final Results* as indicating that the agency originally found all five sales offers to be equally probative of normal value, which, if true, would be inconsistent with the conclusion in the *Redetermination* that the Hejia-submitted offers are less reliable as surrogate value data. Pl.'s Comments 11, 19. Plaintiff argues that the remand order did not grant the Department the leeway to reverse itself in this manner, but rather limited Commerce merely to justifying the conclusions reached in the *Final Results*. Pl.'s Comments 12; Pl.'s Reply 1–3. Therefore, Plaintiff characterizes the *Redetermination* as an "impermissible *post hoc* rationalization." Pl.'s Comments 11, 12, 23–24. Plaintiff's arguments lack merit.

A *post hoc* rationalization is an impermissible justification for a determination supplied by counsel for the Department in judicial proceedings. *See Timken Co. v. United States*, 894 F.2d 385, 389 (1990) (citation omitted). The prohibition on such justifications does not apply to reasoning supplied by the agency in the determination under review. *See Bao Zhu Chen v. Chao*, 32 CIT __, ___, 587 F. Supp. 2d 1292, 1300 (2008). Plaintiff's reliance on *Hiep Thanh Seafood Joint Stock Co. v. United States*, 34 CIT __, 752 F. Supp. 2d 1330 (2010) ("*Hiep Thanh*") for this point is misplaced. In that case, the court clearly addressed the impermissible nature of later-in-time rationalizations for agency action supplied by Commerce's counsel from the Department of Justice. *See Hiep Thanh*, 34 CIT at __, 752 F. Supp. 2d at 1335–36 (refusing to affirm based on counsel's justification for Commerce's determination not articulated in final results).

Furthermore, Plaintiff misconstrues the Department's determination in the *Final Results*. The Department did not find the fives sales offers each to be equally probative of normal value. Instead, the Department relied on a weighted-average identical to the one Commerce uses on remand, assigning each of the offers Hejia submitted

12.5 percent and the SOO offer 50 percent. *Compare Redetermination* at 8 ("[T]he Department is continuing to calculate a surrogate value for single-clove garlic using a simple average of the [Free on Board ("FOB")] sales offer from SOO and the average of the four FOB sales offers submitted by Hejia."), *with Issues and Decision Memorandum* at 19 ("[W]e are using a simple average of the sales offer from SOO and a simple average of the sales offer information submitted by Hejia . . . ."). The *Issues and Decision Memorandum* demonstrates the Department's original decision to treat the four Hejia sales offers as a single source of information. *See Issues and Decision Memorandum* at 19 ("[An] average of sales offer information from these *two* sources better reflects a broader, more reliable price experience than would simply relying solely on one or the other option." (emphasis added)). The *Redetermination* is not a reversal of the *Final Results*, but merely augments the agency's justification for its methodology.

Plaintiff similarly misinterprets the court's order. In granting the Department's request for voluntary remand, the court instructed Commerce to "reevaluate the evidence in the record and issue a remand redetermination, consistent with its reevaluation, that fully explains the basis for Commerce's conclusions . . . ." *Jinxiang Hejia Co. v. United States*, No. 09–00471 (Oct. 25, 2010) (ordering remand and denying Rule 56.2 motion). Nothing in the plain language of the order restricts Commerce as to the methodology it uses or the conclusions it reaches. Moreover, the Court and the Federal Circuit disfavor such restrictions, *see Shakeproof Assembly Components Div. of Ill. Tool Works, Inc. v. United States*, 29 CIT 1516, 1526, 412 F. Supp. 2d 1330, 1339 (2005); *see also U.S. Steel Corp. v. United States*, Slip Op. 10–104, 2010 WL 3564705, at *3 n.9 (CIT Sept. 13, 2010) ("The Court generally affords the Department reasonable discretion to establish the breadth of its review of a particular issue on remand so that the agency may reach the most accurate results." (citing *Am. Silicon Techs. v. United States*, 334 F.3d 1033, 1038–39 (Fed. Cir. 2003)), and the court will not interpret the order as having limited Commerce's ability to reach an accurate determination on remand. The scope of the *Redetermination* is consistent with the court's remand order.

B. Calculation of Normal Value for Nonmarket Economies

Plaintiff next challenges the Department's methodology for determining the normal value of Hejia's merchandise. To determine the dumping margin, Commerce subtracts the export price of the subject merchandise from its normal value. *See* 19 U.S.C. § 1677(35)(A). The agency then divides the dumping margin by the company's export

price to reach the weighted-average dumping margin. *See* § 1677(35)(B). For goods exported from a nonmarket economy country, such as China, section 1677b(c) instructs Commerce to find normal value by calculating the factors of production of the subject merchandise based on the "best available information." 19 U.S.C. § 1677b(c)(1). If the Department finds that data regarding factors of production are inadequate, it must derive normal value from the price of "comparable . . . subject merchandise . . . produced in one or more market economy countries that are at a level of economic development comparable to that of the non-market economy country." § 1677b(c)(2). The Department prefers to rely on "data based on a broad range of actual transactions that are representative of commercial prices in the surrogate country over price quotes and sales offers." *Redetermination* at 13, 28; *see Bristol Metals L.P. v. United States*, 34 CIT __, ___, 703 F. Supp. 2d 1370, 1374 (2010). "However, where broad-based, public price data based on actual transactions are not available, as in this case, the Department may have no choice but to rely on sales offers, price quotes, price lists or other information." *Redetermination* at 13, 28; *accord Vinh Quang Fisheries Corp. v. United States*, 33 CIT __, ___, 637 F. Supp. 2d 1352, 1358 (2009) ("When there are no better alternatives, . . . Commerce may use price quotes."). Neither Plaintiff nor Defendant-Intervenors contest Commerce's reliance on sales offers from India to determine normal value.

1. The Department's Conversion of the SOO Offer

As noted, the SOO sales offer that Commerce placed on the record did not contain a price per weight. Prior to its inclusion in the dumping margin equation, therefore, this shortcoming forced Commerce to convert the offer terms to a price per kilogram so as to serve as surrogate value. The Department's conversion consisted of three steps. First, the Department assumed that the unspecified unit of sale for the offer was one clove of garlic, though this assumption goes unmentioned in the *Redetermination*. Def.'s Br. 12–13. Second, Commerce estimated that one kilogram of single-clove garlic contains 28 cloves by counting the number of cloves visible in a picture of a one-quarter kilogram container of single-clove garlic. *Redetermination* at 25 n.10. Third, and finally, Commerce concluded that SOO was a manufacturer and exporter of garlic, and not, as it had originally determined, a trading company. *Redetermination* at 31–32. The Department thereafter multiplied 28 cloves by a price of 20 cents per clove, discounted the price so as to be contemporaneous with the period of review, and concluded that it would not deduct profit, overhead, and general and administrative expenses from the price.

Plaintiff argues that Commerce's assumption that the SOO offer was for 20 cents per clove is based on speculation and mere "intuitive appeal." Pl.'s Comments 7–8, Pl.'s Reply 9–11. "Commerce cannot base its analysis on mere speculation, but may draw reasonable inferences from the record." *Lifestyle Enter., Inc. v. United States*, __ CIT __, ___, 768 F. Supp. 2d 1286, 1309 (2011) (citing *Hebei Metals & Minerals Imp. & Exp. Corp. v. United States*, 28 CIT 1185, 1203 (2004) (not reported in F. Supp.)). In this case, Commerce's assumption was reasonable in light of the record as a whole. The *Redetermination* clearly demonstrates that 20 cents is significantly lower than the per-kilogram price of any other sales offers on record, *see Redetermination* at 11 (enumerating prices per kilogram for single-clove garlic), and, in the complete absence of contradictory evidence, Commerce reasonably inferred from the plain language of the offer that the price was for a single garlic clove. Moreover, Plaintiff does not point to any record evidence that the price in the SOO offer appertains to a quantity other than a single garlic clove.

Plaintiff also argues that Commerce failed to offer any explanation for its assumption regarding the unit of sale in the SOO offer. Pl.'s Comments 7. Though, as Plaintiff correctly notes, the *Redetermination* contains no mention of Commerce's inference, this lapse is not fatal. "Where an agency has not made a particular determination explicitly, the agency's ruling nonetheless may be sustained as long as 'the path of the agency may be reasonably discerned.'" *Nucor Corp. v. United States*, 414 F.3d 1331, 1339 (Fed. Cir. 2005) (citing *Ceramica Regiomontana, S.A. v. United States*, 810 F.2d 113, 1139 (Fed. Cir. 1987)). Commerce's reasoning is readily apparent from its discussion of the conversion of the SOO sales offer terms, which clearly describes the agency's process of converting the offer terms by estimating the number of garlic cloves per kilogram. *See Redetermination* at 24–25, 25 n.10. Commerce's determination on this issue is reasonable and therefore supported by substantial evidence.

The Department's process of counting the number of cloves to determine a price per kilogram is also reasonable given the record as a whole. Plaintiff briefly challenges this methodology as "not persuasive," though devotes scant attention to the issue. Pl.'s Comments 8. The court finds that Commerce's estimate was based on substantial evidence in as much as the agency relied on a picture placed on the record by Hejia to count the number of cloves per kilogram. *Redetermination* at 25 n.10. While its methodology may not be exact, Commerce mitigated this imperfection by excluding from its count any cloves not visible in the picture (i.e., those obscured from view by other cloves), the inclusion of which would have raised the ultimate

price of the SOO garlic by 20 cents per clove. *Redetermination* at 25 n.10. In addition, Commerce confirmed that its count was conservative by comparing the 28-clove estimate to information obtained during verification that 51 cloves of Hejia's singe-clove garlic constitute a kilogram. *Redetermination* at 25 n.10. More to the point, that Commerce's method of calculating a particular piece of surrogate value data may not yield a precise calculation does not render its determination unsupported by substantial evidence. *See Ass'n of Am. Sch. Paper Suppliers v. United States*, 34 CIT __, ____, 716 F. Supp. 2d 1329, 1334 (2010) (citation omitted).[5]

Finally, Plaintiff argues that Commerce erred in concluding that SOO was a manufacturer of garlic and, therefore, that it was unreasonable to deduct profit, overhead, and general and administrative expenses from the SOO offer price. Commerce determined that "SOO was an [International Organization for Standardization ("ISO")] certified manufacturer and exporter of garlic products" based on representations the company made on its website. *Redetermination* at 31; *see also Redetermination* at 3 ("The SOO website, in at least three instances, identifies [the company] as a 'manufacturer.'" (citation omitted)). Plaintiff counters that SOO does not explicitly state it is a producer of garlic, but rather simply notes it is a producer of various products. Pl.'s Reply at 15. In reviewing Commerce's determinations, the court asks whether the determination is "supported by a reasonable reading of the record evidence as a whole." *Dorbest Ltd. v. United States*, __ CIT ___, ___, 755 F. Supp. 2d 1291, 1303 (2011). That the record conceivably could have supported a different conclusion is not sufficient to render the Department's determination unsupported by substantial evidence. *See, e.g.*, *Cleo Inc. v. United States*, 501 F.3d 1291, 1296 (Fed. Cir. 2007) (citations omitted). In this case, Commerce reasonably relied on representations SOO made on its website regarding the level of trade at which it operates after the company did not respond to Commerce's request for additional information.

2. The Department's Weighted-Average Methodology

Plaintiff also contends that Commerce failed to support with substantial evidence the differing weights it assigned the sales offers. Pl.'s Comments 6–21. In calculating a normal value based on the

[5] Plaintiff further argues that the weight of single-clove garlic varies such that, without knowing the precise weight of the SOO garlic, Commerce cannot accurately convert the per-clove terms of the SOO offer to a price per kilogram. Pl.'s Comments 3. The record evidence, however, belies Plaintiff's suggestion that the size of single-clove garlic generally varies significantly. J.A. Conf. Tab 11. In addition, as noted *supra*, Commerce's methodology for determining surrogate value need not be precise. *See Ass'n of Am. School Paper Suppliers*, 34 CIT at ___, 716 F. Supp. 2d at 1334 (process of determining surrogate value "difficult and necessarily imprecise" (citation omitted)).

sales offers on record, the Department averaged the four offers Hejia submitted at a weight of 12.5 percent each with the SOO offer at a weight of 50 percent. On remand, Commerce explains its methodology primarily by enumerating a series of purported flaws in Hejia's data and highlighting the Department's broad discretion in this process. *See Redetermination* at 8–15, 19–25.

Much of the Department's critique of the evidentiary value of Hejia's submissions rests on the argument that the four sales offers were posted only after Commerce issued the *Preliminary Results*.[6] *See Redetermination* at 9, 14–15, 20–21, 29. Plaintiff challenges this reasoning by noting that the Department fails to provide any explanation as to why this particular difference in timing would render the four offers less reflective of the normal value of single-clove garlic. Pl.'s Comments 9. Because an "agency must explain its action with sufficient clarity to permit 'effective judicial review,'" *see Timken U.S. Corp. v. United States*, 421 F.3d 1350, 1355 (Fed. Cir. 2005) (citation omitted), Commerce's rationale is insufficient to justify assigning the four offers less weight. At no point in the *Redetermination* does Commerce offer any semblance of explanation or authority to support its conclusory claim that sales offers posted after issuance of the *Preliminary Results* are *per se* less valuable as data. Defendant-Intervenors attempt to fill this gap in logic by suggesting that sales offers that are publically available prior to issuance of the *Preliminary Results* are more reliable because they, "by definition, could not have been prepared and posted in response to the *Preliminary Results* . . . ." Def.-Intervenors' Br. 7. The court rejects this argument. There is no evidence in the record that suggests the four sales offers Hejia submitted were influenced by the ongoing administrative review. Moreover, there is no dispute that Hejia complied with applicable statutory and regulatory restrictions in submitting its data.

In the *Redetermination* and in its pleadings, Commerce suggests that the Hejia submissions were less probative of normal value because they were not contemporaneous with the period of review. *See Redetermination* at 9–10; Def.'s Br. 15. In addition, Commerce notes

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[6] The parties disagree as to when three of the four offers were made. In the *Redetermination*, Commerce concludes that all four offers were posted subsequent to issuance of the *Preliminary Results*, *Redetermination* at 14, though elsewhere suggests that record evidence "support[s] a finding that at least three of the four [Hejia-submitted] quotes were posted on the website after the *Preliminary Results*," *Redetermination* at 29. Hejia argues that two of the four offers were placed on the record before issuance of the *Preliminary Results*, Pl.'s Comments 9, though fails to cite any record evidence in support of its contention. As Commerce does not justify the probative nature of the timing of the four sales offers in any case, this issue does not impact the court's holding.

that, in weighing the probative value of the four offers, it "was mindful of the fact that these were not actual transaction prices for the single-clove garlic bulb input . . . ." *Redetermination* at 13; Def.'s Br. 6 ("Significantly, Commerce found that the four Hejia sales offers were not for actual completed transactions . . . ."), 16 ("Certainly, given Commerce's legitimate concerns concerning price quotes, Commerce was reasonable in treating [the four offers Hejia submitted] with caution."). As Plaintiff highlights, however, the SOO offer itself was neither contemporaneous with the period of review nor representative of a price in a completed transaction. Pl.'s Comments 7; Pl.'s Reply 12. While Commerce generally may look to these factors to determine the probative weight of surrogate value data, such arbitrary distinctions cannot serve here to differentiate the Hejia submissions from the SOO offer.

Hejia challenges as equally unsupported Commerce's contention that the four sales offers are of lesser evidentiary weight because they were placed on the record by an interested party, while the SOO offer warrants a greater percentage in the averaging because Commerce found it. Pl.'s Comments 8–9, 13. Plaintiff is correct that Commerce fails to support this finding. In the *Redetermination*, Commerce summarily finds that the offers are less probative because an interested party submitted them and argues that the agency was reasonably concerned that Hejia could have "selected for submission surrogate values that were favorable to it, but were not reflective of the full spectrum of values or the extent to which transactions actually occur at those values in the market." *Redetermination* at 12–13. In supporting its justification, Commerce fails to point to any evidence in the record to suggest that Hejia in fact submitted only those price quotes that were favorable to it. To the contrary, the Department elsewhere suggests there is a limited body of data from which Hejia could have so chosen. *See Redetermination* at 20 ("Despite extensive research during the administrative review . . . [Commerce] [was] able to find only limited surrogate value information for single-clove garlic."), 21 ("Despite an extensive search prior to the *Preliminary Results*, the Department did not find the four sales offers submitted by Hejia; the Department only found the SOO sales offer."). The court will not sustain explanations for agency determinations that are not "anchored by substantial evidence in the administrative record." *See Taian Ziyan Food Co. v. United States*, Slip Op. 11–88, 2011 WL 3024720, at *28 (CIT July 22, 2011). In the absence of record support, this justification cannot support Commerce's finding that the four Hejia submissions are less probative of normal value.

Most persuasive in Commerce's reasoning is the comparison the agency makes between the four Hejia-submitted sales offers and other price quotes for single- and multi-clove garlic on record. Specifically, Commerce notes that the price quotes for the Hejia submissions are noticeably lower than prices on record for single-clove garlic sold in Great Britain, Germany, and Japan. *Redetermination* at 11. In addition, Commerce contrasts the low prices of the four offers with Hejia's contention, raised while proving the bona fide nature of its sale, that single-clove garlic "is a specialty product that commands a higher price than multi-clove garlic."[7] *Redetermination* at 11. Commerce then notes that the four single-clove garlic price quotes Hejia submitted are below the surrogate value the Department calculated for Super A multi-clove garlic for the other targets of the new shipper reviews. *Redetermination* at 11 (contrasting highest priced Hejia-submitted offer, at $1.20 per kilogram, with lowest end of price range for multi-clove garlic, at $1.28 per kilogram).

Plaintiff argues that Commerce is making "apples-to-oranges" comparisons. Pl.'s Comments 10–12. First, Plaintiff avers that a comparison of the Hejia submissions with other single-clove garlic prices on record is hollow as the market forces and conditions of supply and demand in Great Britain, Germany, and Japan are significantly different from those in India or China. Pl.'s Comments 10. Commerce does not address this valid contention in the *Redetermination*, and the court questions how prices from these markets can serve as probative contrasts. Should Commerce continue to rely upon this rationale on remand, it must justify the comparison of Hejia's price with prices that are subject to such disparate market forces.

Plaintiff further argues that Commerce cannot rationally compare prices for single-clove garlic with the surrogate value price on record for multi-clove garlic. Pl.'s Comments 12. As support, Hejia states that it did not contend in the underlying review that Indian single-clove garlic demands a higher price as compared to Indian multi-clove garlic, but rather that this price differential applies only to garlic from China. Pl.'s Comments 12. Additionally, Plaintiff argues that a comparison between prices for these varieties of Indian garlic is untenable because of the varying amounts of garlic offered for sale. Pl.'s Comments 12, 18. Plaintiff notes that the four sales offers for Himalayan pearl garlic that Hejia submitted are for a minimum order of one metric ton, J.A. Tab 4, while Commerce purportedly determined the Super A multi-clove garlic surrogate value for 40 kilogram

[7] Notably, Hejia maintained in a questionnaire response to the Department that the Chinese purchasing price of single-clove garlic is two to three times higher than that of the regular, multi-clove variety. *Redetermination* at 22 n.8.

bags "sold in the local market in New Delhi to grocery stores and restaurants . . . ." Pl.'s Comments 12. Plaintiff then speculates that the price for the four offers is necessarily lower than that for the multi-clove garlic due to the higher quantity of sale. Pl.'s Comments 12.

"Commerce has broad discretion to determine which criteria it will use to sort and prioritize the data it uses in making its determination," so long as its decisions are "reasonable and consistently applied." *Shandong Rongzin Imp. & Exp. Co. v. United States*, __ CIT __, ___, 774 F. Supp. 2d 1307, 1315 (2011). As noted, Commerce chose India as an appropriate surrogate country, a decision not contested here. Commerce reasonably assumed that the price differential Hejia noted in the review between Chinese single- and multi-clove garlic applied equally to similar garlic varieties in India. The court cannot, however, evaluate Plaintiff's argument that the varying amounts of garlic for sale invalidates the Department's comparison because the particular document Plaintiff cites for support is not before the court. Pl.'s Comments 12. It remains an open question whether evidence of a lower quantity of sale for the Super Grade A multi-clove garlic price would render Commerce's reasoning unsupported by substantial evidence. Nevertheless, the court is more concerned at this stage with the Department's failure to support the particular weighted-average it uses and will address the quantity of sale issue on remand if necessary.

Regardless of the varying justifications regarding the probative value of Hejia's submissions, the Department has failed to rationally connect its weighted-average methodology to the evidence on record. The court is mindful that section 1677b does not limit Commerce to a single method of arriving at surrogate value and affords the agency a great deal of discretion in this matter. *See Ningbo Dafa Chem. Fiber Co. v. United States*, 580 F.3d 1247, 1256 (Fed. Cir. 2009) (noting "wide discretion" § 1677b(c) grants Commerce); *Lasko Metal Prods., Inc. v. United States*, 43 F.3d 1442, 1446 (Fed. Cir. 1994). This discretion does not, however, absolve Commerce of its duty to determine dumping margins "'as accurately as possible,'" *Shakeproof Assembly Components, Div. Of Illinois Tool Works, Inc. v. United States*, 268 F.3d 1376, 1382 (Fed. Cir. 2001) (quoting *Lasko Metal Prods., Inc.*, 43 F.3d at 1446), and to calculate a surrogate value that is "as representative of the situation in the [nonmarket economy] country as is feasible . . . ," *Nat'l Ford Chem. Co. v. United States*, 166 F.3d 1373, 1377 (Fed. Cir. 1999) (citation & quotation marks omitted). In so doing, Commerce must rationally connect the weighted-average it uses with the record evidence regarding the normal value of single-

clove garlic. *See Motor Vehicle Mfrs. Ass'n of the U.S., Inc.*, 463 U.S. at 43; *accord Dorbest Ltd.*, __ CIT at ___, 755 F. Supp. 2d at 1296 ("At a minimum, in making its data choices, [Commerce] must explain the standards it applied and make a rational connection between the standards and the conclusion."). "A rational connection is a connection that is supported by justification or evidence." *Dorbest Ltd.*, __ CIT at ___, 755 F. Supp. 2d at 1296. In the *Redetermination*, Commerce fails to connect its reasoning regarding the probative nature of the four sales to the decision to assign them, collectively, 50 percent of the weighted-average. Nothing inherent in the justifications discussed above would warrant treating the four offers as one quarter as probative as the SOO offer. The court cannot sustain such an unsupported methodology.

The Department avers that assigning the four Hejia submissions the weight of a single offer in the averaging is consistent with its finding that the four offers represent a "single price point" in the market. *Redetermination* at 14, 21. As support for this finding, Commerce notes that the four offers were posted close in time to one another and are nearly identical in price, and that two of the four garlic suppliers ship from the same port in India. *Redetermination* at 14, 21. This reasoning again presents a leap in logic. While the sales offers are contemporaneous and close in price, the agency fails to provide a satisfactory explanation as to why these qualities justify treating the offers as a "single price point," and instead leaves it to the court to assume that they do. Commerce must provide some grounds – such as a factual basis, reference to agency precedent, or an elucidation of the "single price point" theory – from which the court can review its determination for substantial evidence.

Finally, Plaintiff contests the Department's rationale that "affording each of the four offers equal weight would encourage parties to submit endless sales offers and price quotes with a view to tilt the surrogate value calculation in their favor." *Redetermination* at 15. As noted above, the Department does not point to any evidence on the record that suggests Hejia engaged in such purposeful distortion in this case. Instead, in the instant review, the Department extended the period within which interested parties could submit surrogate value data. *Final Results* at 50,952. This belies the notion that Commerce was concerned about an excess of submissions in this review. Although Commerce may wish to limit the data interested parties submit to the agency so as not to overwhelm its resources or skew its determinations, it has other tools at its disposal for limiting such submissions, including specifying the time within which the parties

must submit data. *See* 19 C.F.R. § 351.301(c). This general concern, while valid, does not excuse Commerce from its duty to connect its methodology to substantial evidence.[8]

In Hejia's new shipper review, Commerce was faced with two sets of imperfect data: the SOO offer that lacked a unit of measure and the Hejia-submitted offers that were notably low priced. The "process of constructing foreign market value for a producer in a nonmarket economy is difficult and necessarily imprecise," *Longkou Haimeng Mach. Co. v. United States*, 33 CIT __, ___, 617 F. Supp. 2d 1363, 1372 (2009) (quoting *Nat'l Ford Chem. Co.*, 166 F.3d at 1377), and Commerce will often face a record replete with imperfect data, *see Jinan Yipin Corp. v. United States*, 33 CIT __, ___, 637 F. Supp. 2d 1183, 1196 (2009). However, "[e]ven in situations where all potential sources of data on the record have flaws (a not uncommon occurrence), the law requires Commerce to make a reasoned decision as to the source on which it chooses to rely, and to both adequately explain its rationale and support its decision by reference to substantial evidence in the record." *Taian Ziyang Food Co.*, 2011 WL 3024720, at *25 (footnote omitted). Such a reasoned basis and rational connection are not present in the *Redetermination*.

V. Conclusion

For the foregoing reasons, it is

ORDERED that the Department's *Redetermination* is SUSTAINED IN PART and REMANDED IN PART. More specifically, it is

ORDERED that the Department's conversion of the terms of the SOO sales offer that it placed on the record to a price per kilogram is SUSTAINED; it is further

ORDERED that the Department's weighted-average methodology to determine surrogate value for single-clove garlic is REMANDED for further consideration in accordance with this opinion; it is further

ORDERED that Defendant shall file its second remand results by October 24, 2011; and it is further

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[8] Plaintiff argues that the Department departs from its own set practice of using broad, country-wide data to determine surrogate value when it fails to give the four sales offers equal weight. Pl.'s Comments 19–20. As Commerce notes, Plaintiff mistakenly conflates a few sales offers "with published countrywide price data which represent broad market averages." *Redetermination* at 28. There is no basis to conclude that Hejia's submissions constitute the brand of data on which Commerce prefers to rely, namely "a broad range of actual transactions that are representative of commercial prices in the surrogate country." *Redetermination* at 28. Similarly, Plaintiff is mistaken when it argues that Commerce used a finished product price as an input to determine normal value. Pl.'s Comments 21–23. As Defendant notes, "the SOO offer price that was combined with the Hejia-submitted information[] was not used as an *input* price. Rather, the SOO offer price and Hejia-submitted offer information were used as the surrogate values for Hejia's *finished* garlic price." Def.'s Br. 20 (citing *Redetermination* at 32).

ORDERED that Plaintiff and Defendant-Intervenor shall file their comments by November 23, 2011.
Dated: September 7, 2011
New York, NY

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

Slip Op. 11–113

TOYOTA MOTOR SALES, U.S.A., INC. Plaintiff, v. UNITED STATES, Defendant,

Before: Richard K. Eaton, Judge
Court No. 04–00643

[Plaintiff's motion for summary judgment denied. Defendant's motion for summary judgment granted.]

Dated: September 8, 2011

Page Fura, P.C. (*Jeremy Page* and *Shannon Fura*), for plaintiff Toyota Motor Sales, U.S.A., Inc.

Tony West, Assistant Attorney General; *Barbara S. Williams*, Attorney in Charge, International Trade Field Office, Commercial Litigation Branch, Civil Division, United States Department ofJustice (*Saul Davis*); Office of Assistant Chief Counsel, International Trade Litigation, United States Customs and Border Protection (*Yelena Slepak*), of counsel, for defendant.

OPINION AND JUDGMENT

Eaton, Judge:

Introduction

Plaintiff Toyota Motor Sales, U.S.A., Inc. ("Toyota" or "plaintiff") commenced this action to challenge Customs and Border Protection's ("Customs" or "CBP") denial of Toyota's claims for duty drawbacks on entries of automobile service parts imported into the United States and later exported to Canada.[1] Now before the court are Toyota's and defendant the United States' cross-motions for summary judgment pursuant to USCIT R. 56. The court has jurisdiction under 28 U.S.C. § 1581(a) (2006). For the reasons stated below, Toyota's motion is denied, and defendant's motion is granted.

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[1] According to plaintiff, these imports involve "certain automotive service parts for distribution to Plaintiff's wholesale distributors and franchised dealers. The service parts are varied in nature, and include such items as hoses, gaskets, gears and gearing, fasteners, brackets, body stampings, mirrors, moldings, valves, pipes, filters, belts, injectors, and other vehicle-related assemblies." Compl. ¶ 37.

Background

Toyota is the U.S. based sales and service arm of the Toyota Motor Corporation. The company regularly imports service parts into the United States, and subsequently exports some of these parts to Canada for distribution to Canadian Toyota dealerships and customers. Toyota, therefore, routinely files drawback claims, seeking reimbursement of a substantial portion of the duties paid upon importation.

Plaintiff commenced this action to challenge Customs' denial of Protest No. 2704–03–100090 (the "Protest"), which sought reversal of Customs' denial of its drawback claims on forty-two entries of service parts exported from the United States to Canada between 1996 and 1999. At issue is Toyota's compliance with Customs' regulation 19 C.F.R. § 191.14 (2011), which governs the use of inventory accounting methods to identify drawback eligible merchandise, and Customs regulations 19 C.F.R. §§ 191.51 and 191.52, which govern the time for filing and amending drawback claims. *See* Compl. ¶¶ 38–60.

I. Drawback Under NAFTA

Under 19 U.S.C. § 1313(j)(1),[2] an importer can receive a refund of ninety-nine percent of the amount of the duty, tax, or fee paid on unused merchandise imported into the United States, if the merchandise is exported within three years from the date of importation. Because Toyota's drawback claims concern unused merchandise exported to Canada, its claims arise under 19 U.S.C. § 1313(j)(4), which governs drawbacks for merchandise exported from the United States to its co-signatory countries under the North American Free Trade Agreement ("NAFTA Drawbacks"). NAFTA Drawbacks are generally prohibited, unless the exported merchandise qualifies for an exception under 19 U.S.C. § 3333(a)(1)-(8). The parties do not dispute that the service parts could qualify for NAFTA Drawback under Section

[2] Pursuant to 19 U.S.C. § 1313(j)(1):

> If imported merchandise, on which was paid any duty, tax, or fee imposed under Federal law upon entry or importation –
>
> (A) is, before the close of the 3-year periodbeginning on the date of importation –
>
> (I) exported, or
>
> (ii) destroyed under customs supervision; and
>
> (B) is not used within the United States before such exportation or destruction;
>
> then upon such exportation or destruction 99 percent of the amount of each duty, tax, or fee so paid shall be refunded as drawback. The exporter (or destroyer) has the right to claim drawback under this paragraph, but may endorse such right to the importer or any intermediate party.

3333(a)(2),[3] which permits drawbacks on goods that were "exported to a NAFTA country in the same condition as when imported into the United States."

Because § 1313(j)(4) prohibits so-called substitution drawbacks[4] for exports to NAFTA countries, reimbursement may only be claimed if the merchandise itself is actually (1) imported, (2) dutiable, and (3) subsequently exported. *See Merck & Co., Inc. v. United States*, 499 F.3d 1348, 1357 (Fed. Cir. 2007).

Pursuant to § 3333(a)(2)(B), a drawback claimant may, however, identify drawback eligible merchandise using inventory accounting methods, as set forth by regulation, to establish that the merchandise has been imported into the United States, that duties were paid thereon, and that it was exported within the time limits for drawbacks provided for in § 1313(j)(1). In other words, in submitting claims for NAFTA Drawback, a claimant need not track merchandise on a unit-specific basis if it can identify those exports eligible for drawback through an approved accounting method.

II. The Use of Inventory Accounting Methods to Identify Drawback Eligible Merchandise

Section 3333(a)(2)(B) provides that, for imported goods that are "commingled with fungible goods[5] and exported in the same condition, the origin of the good may be determined on the basis of the inventory methods provided for in the regulations implementing this title." Pursuant to this statutory authority, Customs promulgated 19 C.F.R. § 191.14 to "provide[] for the identification of merchandise or

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[3] 19 U.S.C. § 3333(a) provides:

> "Good Subject to NAFTA drawback" defined. For purposes of this Act and the amendments made by subsection (b), the term "good subject to NAFTA drawback" means any imported good other than the following:
>
> * * *
>
> (2) A good exported to a NAFTA country in the same condition as when imported into the United States. For purposes of this paragraph - -
>
> (A) processes such as testing, cleaning, repacking, or inspecting a good, or preserving it in its same condition, shall not be considered to change the condition of the good, and
>
> (B) . . . if a good described in the first sentence of this paragraph is commingled with fungible goods and exported in the same condition, the origin of the good may be determined on the basis of the inventory methods provided for in the regulations implementing this title.

[4] U.S.C. § 1313(j)(2), which provides that a drawback is permitted on exported merchandise for which no duty has been paid if such merchandise is "commercially interchangeable" with other merchandise that the party claiming drawback has paid duties on.

[5] While Toyota now concedes that all of its service parts do not constitute a fungible whole, it continues to believe that it can take advantage of 19 C.F.R. § 191.14 because individual parts are fungible with each other.

articles for drawback purposes by the use of accounting methods." *See* 19 C.F.R. § 191.14(a).[6]

In accordance with § 191.14(a), if an importer maintains fungible inventories consisting of both drawback eligible and ineligible merchandise (e.g., domestically produced products), any merchandise subject to drawback may be identified by inventory accounting methods. Using these methods, a drawback claimant may establish that, based on its inventory records, dutiable merchandise must have been exported within three years of importation, as required by § 1313(j)(1). Because Toyota commingled imported service parts on which it paid import duties and subsequently exported to Canada unused ("drawback eligible merchandise") with other service parts for which no drawback was available (*e.g.*, domestically produced service parts or duty-free service parts), it sought to identify its drawback eligible merchandise using the inventory accounting methods set forth in § 191.14(c). It is Toyota's compliance with § 191.14 that is a significant issue in this action.

III. The Low-to-High Accounting Method

One of the permitted accounting methods for identifying drawback eligible merchandise under § 191.14(c) is the low-to high method. Toyota's claims raise issues with respect to two variations of the low-to-high method, as set forth in § 191.14(c) – first, the low-to-high blanket method (the "Blanket Method"); and second, the low-to-high method with established inventory turn-over period (the "Inventory Turnover Method"). In general, the low-to-high method attributes the lowest available drawback amount to merchandise withdrawn from the inventory during a specified period of time. Like the other accounting methods set forth in § 191.14(c), this method can only be applied to an inventory of fungible merchandise. *See* 19 C.F.R. § 191.14(b)(1) ("The lots of merchandise or articles to be so identified must be fungible. . . ."). A fungible inventory is one that consists solely of commercially interchangeable merchandise. *See* 19 C.F.R. § 191.2(o).[7] Thus, any variation of the low-to-high method may only be applied when an importer has commingled fungible drawback eligible and ineligible merchandise in a single inventory.

[6] The regulation specifically states that its provisions apply only "to situations . . . in which substitution is not allowed." 19 C.F.R. § 191.14(a). As noted, 19 U.S.C. §1313(j)(4) prohibits substitution drawbacks for exports to NAFTA countries.

[7] The Federal Circuit has explained that "commercial interchangeability" is determined by a "market-based consideration of the primary purposes of the goods in question. .. . [and] must be determined objectively from the perspective of a hypothetical reasonable competitor; if a reasonable competitor would accept either the imported or the exported good for its primary commercial purpose, then the goods are "commercially interchangeable' . . . ." *See Texport Oil Co. v. United States*,185 F.3d 1291, 1295 (Fed. Cir. 1999) (citations omitted).

When applying the Blanket Method variation of the low-to-high method:

> all receipts into and all withdrawals for export are recorded in the accounting record and accounted for so that each withdrawal is identified by record keeping on the basis of the lowest drawback amount per available unit of the merchandise or articles received into inventory in the period preceding the withdrawal equal to the statutory period for export under the kind of drawback involved (*e.g.*, . . . 3 years under 19 U.S.C.§ 1313(j) . . .). Drawback requirements are applicable to withdrawn merchandise or articles as identified (for example, if the merchandise or articles identified were attributable to an import more than . . . 3 years . . .before the claimed export, no drawback could be granted).

19 C.F.R. § 191.14(c)(iv)(A). Thus, under the Blanket Method, the low-to-high procedures are applied during the three year period preceding the drawback claim, which is equal to the statutory limitation period for drawback claims on unused merchandise. Because all of the merchandise identified through the use of accounting must also comply with the basic drawback requirements, the accounting is only applied to merchandise that is imported and exported during that three year period.

The Inventory Turnover Method variation of the low-to-high method is applied to commingled, fungible inventory over a period equal to the average turnover of the entire inventory. For example, if, on average, the entire inventory of a particular product were depleted every thirty days, the low-to-high method would be applied to units of that product taken into and withdrawn from inventory during a thirty day period. *See* 19 C.F.R. § 191.14(c)(3)(iii)(D). By applying this method to every thirty day period over the course of three years, a drawback claimant could demonstrate that all of the drawback eligible merchandise was both imported and exported within that period of time.

IV. Toyota's Drawback Claims

For some years, Toyota sought and received drawback using the Blanket Method. Beginning in April 1999, however, the company

pursued a new accounting method[8] -*i.e.*, the Inventory Turnover Method - to identify its drawback eligible merchandise, pursuant to § 191.14(c)(3)(iii). Pl.'s Rule 56.1 Statement ¶¶67; Def.'s Resp. to Pl.'s Rule 56.1 Statement ¶¶6–7. According to Toyota, it switched from the Blanket Method to the Inventory Turnover Method because the latter would "serv[e] to meet the system considerations and constraints" of the company's outside drawback specialist. *See* Protest at 2.

On April 5, 1999, Toyota filed an application with Customs for a Waiver of Prior Notice of Intent to Export[9] and for the privilege of Accelerated Payment[10] for drawback claims based on its use of the Inventory Turnover Method for the forty-two entries at issue here. Customs granted Toyota's application on June 11, 1999. The effect of Customs' approval was to permit Toyota to claim drawbacks on exports without first affording Customs an opportunity to inspect it. Accelerated Payment meant that Toyota would be able to receive payment of drawback amounts sought, even though Customs had yet to verify its compliance with applicable statutory and regulatory requirements. Def.'s Rule 56.1 Statement ¶¶8–9; Pl.'s Resp. to Def.'s Rule 56.1 Statement ¶¶8–9.

In its application, Toyota proposed to use a "days of supply" method[11] for calculating an inventory turnover period of forty-eight days to be used in applying the Inventory Turnover Method to its inventory records. In granting Toyota's application for Waiver of Prior

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[8] On March 5, 1998, part 191 of the Customs regulations was amended to include the Low-to-High Method with Established Inventory Turnover Period as among the acceptable inventory accounting methods for identifying drawback eligible merchandise. 63 Fed. Reg. 10,970, 11,013 (Dep't of Treasury March 5, 1998).

[9] Pursuant to 19 C.F.R. § 191.35, a party seeking to export merchandise that will be the subject of a drawback claim must provide Customs with notice of the intent to export, and an opportunity to inspect the merchandise prior to export. Under 19 C.F.R. § 191.91, however, a party may submit an application to Customs for a waiver of this notice requirement. After waiver of the notice requirement has been granted, "Customs may propose to revoke the approval of an application for waiver of prior notice of intent to export . . . for good cause (noncompliance with the drawback law and/or regulations)." 19 C.F.R. § 191.91(e).

[10] Pursuant to 19 C.F.R. § 191.92, a party seeking drawback may apply for accelerated payment, which allows it to receive, upon the filing of its drawback claims, the amount sought prior to Customs' verification of its drawback claims. While this expedites payment of drawbacks to the applicant, "[a]ccelerated payment of a drawback claim does not constitute liquidation of the drawback entry." 19 C.F.R. § 191.92(a). Accordingly, if Customs determines that the applicant was not entitled to drawback, accelerated payment amounts must be refunded to Customs.

[11] According to the affidavit testimony of Toyota's former Customs Manager, the "days of supply" method was a calculation "which reflected the average number of days required for the service parts inventory maintained by [Toyota] to undergo an inventory turn." Under this method, "it computed the inventory turn-over period based on *all service parts found in inventory*" because Toyota "considered all such service parts to be one type of merchandise for drawback identification, tracking and claim purposes." *See* Declaration of Marian Duntley ¶9, attached as Ex.1 to Pl.'s Mot. S.J. (emphasis added).

Notice and Accelerated Payment, Customs stated that "[i]n approving this request, the U.S. Customs Service expresses no opinion as to the entitlement of drawback and makes no assurances, rulings, or decisions that may be relied upon to anyone's detriment." Def.'s Rule 56.1 Statement ¶2; Pl.'s Resp. to Def.'s Rule 56.1 Statement ¶2.

On August 27, 1999, Toyota confirmed to Customs its intention to withdraw its earlier claims under the previously used Blanket Method for merchandise imported after October 1996, and its intention to resubmit its drawback claims, using the Inventory Turnover Method. Pl.'s Rule 56.1 Statement ¶11; Def.'s Resp. to Pl.'s Rule 56.1 Statement ¶11.

Around September of 1999, a Customs drawback specialist contacted Toyota to request additional information regarding Toyota's average inventory turnover period. In addition, the specialist told Toyota that Customs was unsure whether Toyota's accounting using the Inventory Turnover Method complied with the regulations. Beck Dep. 19:14–20:14 (July 21, 2009). On October 15, 1999, Toyota submitted a memorandum to Customs offering further explanation for why it believed that its proposed "days of supply" calculation of the average inventory turnover period met the requirements of § 191.14(c)(3)(iii)(C).[12] Pl.'s Rule 56.1 Statement ¶13; Def.'s Resp. to Pl.'s Rule 56.1 Statement ¶13.

On November 23, 1999, Customs' Drawback Office filed a request for internal advic[13] with Customs' Office of Regulations and Rulings ("OR&R") "to confirm the validity of the accounting methodology used by Toyota to identify its imported merchandise for drawback." Letter

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[12] 19 C.F.R. § 191.14(c)(3)(iii)(C) provides:

> *Establishment of inventory turn-over period*. For purposes of this section, average inventory turn-over period is based on the rate of withdrawal from inventory and represents the time in which all of the merchandise or articles in the inventory at a given time must have been withdrawn. To establish an average of this time, at least 1 year, or three (3) turn-over periods (if inventory turns over less than 3 times per year), must be averaged. The inventory turn-over period must be that for the merchandise or articles to be identified, except that if the person using the method has more than one kind of merchandise or articles with different inventory turn-over periods, the longest average turn-over period established under this section may be used (instead of using a different inventory turn-over period for each kind of merchandise or article).

[13] Pursuant to 19 C.F.R. § 177.11(a), "[a]dvice or guidance as to the interpretation or proper application of the Customs and related laws with respect to a specific Customs transaction may be requested by Customs Service field offices from the Headquarters Office at any time, whether the transaction is prospective, current, or completed. . . . Advice or guidance will be furnished by the Headquarters Office as a means of assisting Customs personnel in the orderly processing of Customs transactions under consideration by them and to insure the consistent application of the Customs and related laws in the several Customs districts."

from Customs (R. Andrejko) to Toyota (M. Duntley) (July 25, 2000) ("July 25, 2000 Letter"), attached as Ex. 6 to Pl.'s Mot. S. J. ("Pl.'s Mot.").

In addition to the October 15, 1999 memorandum, on January 5, 2000, Toyota provided Customs with additional information concerning its proposed inventory turnover period calculation. Pl.'s Rule 56.1 Statement ¶14; Def.'s Resp. to Pl.'s Rule 56.1 Statement ¶14. On July 25, 2000, Customs informed Toyota that "we have yet to receive a response from the [OR&R] on our internal advice request [of] November 23, 1999 concerning" Toyota's use of the Inventory Turnover Method. In the letter, Customs admonished Toyota that due to OR&R's "heavy workload . . . it may be some time before we receive a response to our request" and "[w]hile it is certainly possible that a favorable ruling may be issued, we would like to caution you that an adverse ruling by our Headquarters could affect Toyota's drawback eligibility for your claims currently on file." July 25, 2000 Letter. According to Toyota, this was the first time it was informed that Customs' drawback office had made a request for internal advice.

In accordance with the statute, Toyota had three years from the date of exportation in order to file a completed drawback claim for its exports. Thus, as of July 25, 2000, time remained for Toyota to amend its drawback claims for, at least, some of the entries -*i.e.*, those exported after July 25, 1997. From August 1999 and January 2000 there were numerous interactions between representatives of Customs and Toyota concerning Toyota's proposed inventory turnover period calculation, but

> at no time did [Customs] indicate that [Toyota's] selected "days of supply" approach for establishing inventory turn-over was improper or otherwise not in accordance with all applicable legal and regulatory requirements. Nor, for that matter, was any suggestion or recommendation made to [Toyota] to cease use of this approach. In fact, on several occasions, the Drawback Office stated to [Toyota] that [Toyota's] method was "probably okay."

Declaration of Marian Duntley ("Duntley Decl.") at ¶ 12, attached as Ex. 1 to Pl.'s Mot. S.J.

On August 30, 2001, Customs notified Toyota of its intention to revoke the company's drawback privileges because insufficient information had been provided to enable OR&R to rule on the request for internal advice. *See* Letter from Customs (R. Andrejko) to Toyota (M. Duntley), dated August 30, 2001, attached as Ex. 8 to Pl.'s S.J. Mot. (the "August 30 Letter"). Specifically, Customs informed Toyota that

> [w]e have received a response . . . from [OR&R] to our. . . November 23, 1999 inquiry as to whether or not the accounting methodology used by [Toyota] satisfies the [Inventory Turnover Methodology] requirements of 19 C.F.R. § 191.14(c)(3)(iii)(c). OR&R believes that the days-of-supply method, as described by [Toyota], does not meet the [Inventory Turnover Method]. OR&R, however, did not make a formal ruling because [Toyota] failed to provide adequate inventory records to support their position. . . . Based on the response from OR&R, it appears that the method for identifying imported merchandise for drawback employed by [Toyota] is most likely invalid. Accordingly, all the claims filed to date by [Toyota] would be ineligible for payment since they would have been based on a flawed methodology. Therefore, we are proposing to deny the drawback and rebill the accelerated payments for all the [Toyota] claims currently on file with this office.

August 30 Letter. Customs also provided Toyota with a copy of HQ 228671, which was a communication from Customs Headquarters ruling on the request for internal advice, dated July 24, 2001 (the "Internal Advice Ruling"). Plaintiff was granted time to submit additional information to Customs in response to the Internal Advice Ruling and the August 30 Letter. Pl.'s Rule 56.1 Statement ¶¶16–17; Def.'s Resp. to Pl.'s Rule 56.1 Statement ¶¶16–17.

On October 26, 2001, Toyota submitted a response to the August 30 letter and the Internal Advice Ruling, in which the company provided additional information to Customs in support of its "days of supply" calculation for establishing an average inventory turnover period. In addition, a meeting between Toyota and Customs' Drawback Office personnel was held on November 20, 2001 to further discuss Toyota's drawback claims. During this meeting, Customs informed Toyota that, after reviewing the additional information submitted, Toyota's "days of supply" method still did not appear to comply with Customs' regulations because it treated non-fungible service parts as one inventory in calculating the average inventory turnover period. Pl.'s Rule 56.1 Statement ¶¶18–19; Def.'s Resp. to Pl.'s Rule 56.1 Statement ¶¶18–19. It is important to note that, before the court, Toyota does not dispute that the "days of supply" method did not comply with the requirements for establishing an average inventory turnover period under § 191.14(c)(3)(iii)(C). *See* Tr. of Oral Argument, dated April 6, 2011 ("Oral Arg. Tr.") 12:5–13:8.

On November 29, 2001, Customs issued a letter revoking Toyota's drawback privileges on the grounds that the company's Inventory

Turnover Method claims, using the "days of supply" approach, were noncompliant with § 191.14(c)(3)(iii)(c). Pl.'s Rule 56.1 Statement ¶20; Def.'s Resp. to Pl.'s Rule 56.1 Statement ¶20. On December 21, 2001, Plaintiff appealed this decision to Customs' Office of Field Operations, Office of Trade Programs. On June 7, 2002, the Office of Trade Programs denied the appeal, agreeing that Toyota's inventory turnover calculation did not comply with § 191.14(c)(3)(iii)(c) because it considered several different kinds of service parts as part of a single inventory. On June 18 and 27, 2002, Toyota wrote the Office of Trade Programs to express its disagreement with this decision. Pl.'s Rule 56.1 Statement ¶¶21–23; Def.'s Resp. to Pl.'s Rule 56.1 Statement ¶¶21–23.

Toyota then asked that it be permitted to perfect[14] its drawback claim by using a different inventory accounting method provided for in § 191.14(c), *i.e.*, the Blanket Method that it had historically employed. Pl.'s Rule 56.1 Statement ¶¶21–23; Def.'s Resp. to Pl.'s Rule 56.1 Statement ¶¶21–23.

On July 29, 2002, the Office of Trade Programs informed Toyota that it would treat its request to perfect as a request to amend its drawback claim.[15] Accordingly, the Office of Trade Programs determined that the request was barred by the three-year time limit for amending drawback claims pursuant to 19 C.F.R. § 191.52(c). Pl.'s Rule 56.1 Statement ¶24; Def.'s Resp. to Pl.'s Rule 56.1 Statement ¶24. On October 11 and 25, 2002, Customs denied Toyota's drawback claims, and sought repayment of amounts previously paid pursuant to the accelerated payment mechanism. Pl.'s Rule 56.1 Statement ¶25; Def.'s Resp. to Pl.'s Rule 56.1 Statement ¶25. On January 8, 2003, Toyota timely filed its Protest and an application for further

[14] Perfection refers to the submission of additional information in support of an otherwise completed drawback claim, usually at the request of Customs. Thus, a party's submission of additional information to Customs is a "perfection" when it supplements a completed drawback claim. An "amendment" is made when information is submitted that is in addition to the information and materials required for a completed drawback claim under 19 C.F.R. § 191.51(a). Pursuant to § 191.52(b), a drawback claimant may perfect its claims "more than 3 years after the date of exportation or destruction of the articles which are the subject of the claim."

[15] Amendment, as distinct from perfection, occurs when a party seeks to make changes to information or submissions that are required in 19 C.F.R. § 191.51(a) as part of a completed drawback claim. "[A]ll documents necessary to complete a drawback claim, including those issued by the Customs Service, shall be filed or applied for, as applicable, within 3 years after the date of exportation or destruction of the articles on which drawback is claimed . . . . Claims not completed within the 3-year period shall be considered abandoned. No extension will be granted unless it is established that the Customs Service was responsible for the untimely filing." 19 U.S.C. §1313(r)(1); *see also* 19 C.F.R. § 191.52(c) ("Amendments to claims for which the drawback entries have not been liquidated must be made within three (3) years after the date of exportation or destruction of the articles which are the subject of the original drawback claim.").

review[16] challenging Customs denial of its drawback claims. Pl.'s Rule 56.1 Statement ¶26; Def.'s Resp. to Pl.'s Rule 56.1 Statement ¶26.

V. Custom's Protest Ruling

On June 3, 2004, Customs issued Headquarters Ruling 229938 (the "Protest Ruling") in response to Toyota's Protest and request for further review. The Protest Ruling addressed, what it identified as, three separate issues raised by the Protest (1) "whether [Toyota's] calculation of the [Inventory Turnover Method] to the 42 subject entries [was] consistent with 19 CFR 191.14(c)(3)(iii)(c)"; (2) "whether [Toyota] [could] perfect the 42 subject entries to apply the low-to-high blanket method in accordance with 19 CFR 191.52(b)"; and (3) "whether [Toyota's] application of the low-to-high blanket method [was] consistent with 19 CFR 191.14(c)(3)(iv)(A)." Protest Ruling at 3, attached as Ex. 2 to Pl.'s Mot. S.J.

With respect to issue (1), Customs denied the Protest, finding that Toyota's Inventory Turnover Method did not comply with Customs' regulations because, in using the forty-eight day inventory turnover period based on its "days of supply" calculation, Toyota "applied an average turn-over period for all service parts rather than an average turn-over for each distinct part." Protest Ruling at 5. In so finding, Customs rejected Toyota's argument that all of its service parts constituted "the same kind of merchandise." Customs explained its determination as follows:

> The establishment of the average inventory turn-over period "is based on the rate of withdrawal from inventory and represents the time in which all of the merchandise in the inventory at a given time must have been withdrawn." 19 CFR 191.14(c)(iii)(c). This is based on a single inventory where the goods have been identified. However, this same provision also provides an option for an inventory of more than one kind of good. The "except" clause in 19 CFR 191.14(c)(iii)(c) provides for this option which states that ' . . . if the person using the method has more than one kind of merchandise or articles with different inventory turnover periods, the longest average turn-over period estab-

[16] Pursuant to 19 C.F.R. § 174.23, a protestant may accompany a protest with an application for further review. If, upon review, the port director at the port of entry determines that the protest will be granted, no further review is deemed necessary. If, however, the port director determines that the protest should be denied, in whole or in part, further review of the protest is undertaken by Customs' Headquarters, rather than the applicable port director, so long as one of the criteria for further review, set forth in 19 C.F.R. § 174.24, are met. *See* 19 C.F.R. § 174.26. Customs Headquarters then instructs the port director as to the disposition of the protest. 19 C.F.R. § 174.27.

> lished under this section may be used . . . ." Therefore, instead of having different inventory periods for each good, the regulation permits the person to use the longest average turn-over period. However, [Toyota] did not apply the longest average turn-over period but chose to establish an average inventory period based on its entire inventory of service parts, treating them as one kind of merchandise.
>
> . . . .
>
> [A]pplication of an inventory management method to identify a particular good requires that the goods to be identified be fungible. The evidence of the different names, different part numbers and different prices convey that the parts covered by the term "service parts" are not interchangeable or identical in all situations. Consequently, the port's denial of [Toyota's] use of an average inventory turn-over period that would treat the category of service parts as one inventory was proper.

Protest at 4–5. In other words, Customs determined that Toyota's treatment of all of its various service parts (*e.g.*, brake hoses, door bezel, shift lock stopper) as part of the same inventory, rather than treating each type of service part separately, violated the regulation because only fungible goods, *i.e.*, parts of the same type, could be treated as part of a single inventory.

As to issue (2), Customs reversed the decision of the Office of Trade Programs, and found that changing inventory methods would constitute a perfection, rather than an amendment to Toyota's drawback claim. Thus, Toyota was permitted to "perfect" its drawback claims by substituting the Blanket Method for the Inventory Turnover Method. In reaching this decision, Customs found that, because Toyota's use of a different inventory accounting method would be applied to the same documentation it had originally submitted, it would perfect the drawback claims under 19 C.F.R. § 191.52(b):

> [d]emonstrating the identity of a particular imported good as being the good exported by a different inventory management method than by the method originally used, perfects, rather than amends a claim. That is, the new inventory management method is applied to identify the same good[s] in the claim as originally filed without any change of the import entries and export shipments. Perfection generally consists of the submission of additional information for what is already a complete claim.

Protest Ruling at 5. Put another way, Toyota could change from using the Inventory Turnover Method to using the Blanket Method, so long as its claim continued to relate to the same goods and it did not attempt to submit new information relating to different entries or different exported goods. Thus, although Toyota labeled its attempt to change accounting methods, while using the same previously submitted documentation, as an amendment, Customs found that Toyota was actually seeking to perfect its claims.

Having determined that the Office of Trade Programs' refusal to allow Toyota to substitute the Blanket Method for the Inventory Turnover Method was erroneous, Customs considered the merits of Toyota's claims under the Blanket Method. In resolving issue (3), however, Customs found that Toyota's drawback claims under the Blanket Method did not comply with 19 C.F.R. § 191.14(c)(3)(iv) and, thus, Toyota's drawback claims were denied. This conclusion was reached based on Customs' review of the inventory records submitted by Toyota in support of its drawback claims. On review, Customs found that:

> those records fail to show that [Toyota] properly identified the imported parts on which the claim was based on as having been the parts exported to Canada.. . . The application of the low-to-high blanket method using the 'Import Price History' provided by [Toyota] fails to demonstrate the export of the imported parts on which the claims was based in compliance with 19 U.S.C. § 1313(j)(1) and 19 U.S.C §3333(a)(1).

Protest Ruling at 6–7. Therefore, Customs found that the inventory records submitted by Toyota in support of its Blanket Method failed to demonstrate that the imported service parts, for which it sought drawback, were actually exported to Canada within the three year time period required for NAFTA Drawbacks. Thus, although Toyota was permitted to "perfect" its drawback claims pursuant to 19 C.F.R. § 191.52(b) by substituting the Blanket Method for the Inventory Turnover Method, the company's claims were ultimately denied because they did not comply with the substantive requirements of §§ 3333(a) and 1313(j).

VI. The Parties' Cross-Motions

Toyota does not dispute any of the three findings made by Customs in the Protest Ruling. Rather, plaintiff claims that it should have been permitted to perfect its drawback claims under the Inventory Turnover Method using a three-year inventory turnover period.

Compl. ¶¶38–52. According to Toyota, this argument was raised in its Protest, but was not addressed by Customs in the Protest Ruling. Pl.'s Mem. 13 (citations omitted).

In the alternative, Toyota insists that it should be permitted to amend its drawback claims to submit new documentation in support of its use of the Blanket Method. According to Toyota, this untimely amendment should be permitted pursuant to 19 C.F.R. § 191.51(e)(1), which allows out-of-time amendments to drawback claims when Customs is responsible for the delay in submitting an amended claim. Compl. ¶¶53–60. This precise issue was not raised by Toyota in the Protest.[17]

Defendant responds that Toyota's first claim fails because the governing statutes and regulations do not permit the use of a three year turnover period under the facts of this case. In addition, Defendant insists that Toyota's second claim fails as a matter of law because there is no evidence in the record to support a finding that Customs was responsible for Toyota's untimely amendment to its drawback claims.

The parties have cross-moved for summary judgment. Oral argument was held on April 6, 2011. *See generally* Oral Arg. Tr.

Standard of Review

The court reviews Customs' denial of a protest *de novo*. 28 U.S.C. § 2640(a)(1). "Under *de novo* review, the court does not examine the reasonableness of Customs' conduct but instead presumes that the factual determinations made by Customs are correct." *See Jazz Photo Corp. v. United States*, 502 F. Supp. 2d 1277, 1293, 31 C.I.T. 1101, 1118 (2007); 28 U.S.C. § 2639(a)(1). This presumption of correctness, however, does not apply to Customs' legal determinations, which the court reevaluates anew.[18] *Universal Elecs. v. United States*, 112 F.3d 488, 492 (Fed. Cir. 1997) ("[A]s a practical matter, the presumption carries no force as to questions of law."); *Rollerblade, Inc. v. United States*, 112 F.3d 481, 483–84 (Fed. Cir. 1997) ("[T]he statutory presumption of correctness under § 2639 is irrelevant where there is no factual dispute between the parties.").

[17] In the Protest, Toyota asserted that it was permitted to untimely amend its drawback claims by substituting the Blanket Method for the Inventory Turnover Method because Customs was responsible for Toyota's failure to amend within the time required by 19 U.S.C. § 1313(r) and 19 C.F.R. §§ 191.51 and 191.52. As noted, in the Protest Ruling Customs reversed its prior decision, and found that Toyota was permitted to substitute the Blanket Method because the substitution was a perfection, not an amendment and, therefore, not subject to the time limitations for amending drawback claims.

[18] It appears that Toyota's new arguments before the Court would constitute merely "new grounds" because they concern the same entries and the same administrative decision, and are, therefore, permissible under 28 U.S.C. § 2638.

"Summary judgment is appropriate if 'there is no genuine issue as to any material fact,' and 'the movant is entitled to judgment as a matter of law.'" *Citizen Watch Co. of Am., Inc. v. United States*, 34 CIT __, __, 724 F. Supp. 2d 1316, 1319 (2010) (quoting USCIT R. 56(c)). Here, there is no dispute between the parties as to any material fact and, thus, summary judgment is appropriate.

Discussion

I. Perfection of Drawback Claims Using a Three Year Average Inventory Turnover Period

Toyota's first claim, for which it seeks summary judgment, is that it should be permitted to perfect its drawback claims under the Inventory Turnover Method by using a three year average inventory turnover period. As noted, Toyota used a forty-eight day turnover period in its drawback claims, based on its "days of supply" calculation. Because Customs found that the calculation of this period did not comply with § 191.14(c), Toyota now seeks to perfect its claim by using a different inventory turnover period. As authority for its use of this three year period, Toyota relies on the following language in 19 C.F.R. § 191.14(c)(3)(iii)(C):

> The inventory turn-over period must be that for the merchandise or articles to be identified, *except that if the person using the method has more than one kind of merchandise or articles with different inventory turn-over periods, the longest average turn-over period established under this section may be used* (instead of using a different inventory turn-over period for each kind of merchandise or article).

(emphasis added). Toyota argues that this provision allows it to use a three-year inventory turn-over period because its inventory of one part, a starter switch repair kit, did not turnover for more than three years. According to Toyota:

> In the case of Plaintiff's service parts inventory, the sheer diversity of merchandise did not permit Plaintiff to practically track inventory turn-over on a part-specific basis. As a result, establishing inventory turn-over based on the "longest average turn-over period" for such merchandise presented the only viable option available to Plaintiff. At the same time, the duration of that time period is effectively constrained by the over arching limitation of the drawback statute which requires unused merchandise drawback claims to be made within three (3) years of the date of importation.

Pl.'s Mem. 12. Hence, Toyota maintains that it can use a three year turnover period because it may use the longest *single* inventory turnover period for any one service part as the average inventory turnover period for all parts when using the Inventory Turnover Method. In addition, Toyota insists that, if the inventory turnover period for the one part is longer than three years, using a three year inventory turnover period in applying the Inventory Turnover Method is the only way to "foster harmony" between § 191.14(c)(3)(iii)(c) and § 1313(j)(1)(A). Specifically, Toyota asserts:

> 19 C.F.R. § 191.14(c)(3)(iii)(c) establishes that "the longest average turn-over period" may be used when claimant has more than one kind of merchandise or articles with different inventory turn-over periods. At the same time, 19 C.F.R. § 191.31(b) implements the provisions of 19 U.S.C. § 1313(j)(1)(A) requiring merchandise encompassed within an unused merchandise drawback claim to be exported within three (3) years of its original importation ("three year import to export"). At their heart, these two regulatory provisions present the opportunity for conflict when - as in the case of Plaintiff's service parts inventory - a part found within an unused merchandise drawback claim retains an inventory turn-over period longer than the "three year import to export" time horizon established under Section 191.31(b).
>
> To foster regulatory harmony, therefore, the only means by which these two ostensibly conflicting provisions may be reconciled is to permit the "three year import to export" time horizon mandated under 19 U.S.C. § 1313(j)(1)(A) and 19 C.F.R. § 191.31(b) to dictate the "longest inventory turn-over period" applicable under 19 C.F.R. § 191.14(c)(3)(iii)(C).

Pl.'s Mem. 14. Thus, for plaintiff, if it can demonstrate that the inventory turnover period of a particular service part was in excess of three years then, "to foster regulatory harmony," it may use three years as the inventory turnover period for purposes of the Inventory Turnover Method.

Defendant responds that Toyota's proposed three year inventory turnover period does not comply with the statutory and regulatory provisions governing NAFTA Drawback. Defendant recognizes that "the origin of the goods as imported dutiable merchandise could be determined through inventory methods authorized by regulations." Def.'s Mem. 18 n.8. But, according to defendant, "Toyota relied on the inventory methods authorized by the Customs regulations, but did

not comply with the mandatory terms of those regulations." Def.'s Mem. 18. Defendant's primary argument is that Toyota has not established that the exports for which it seeks drawback were actually (1) dutiable, *i.e.*, a duty was paid upon import, and (2) exported within three years of import, as required for NAFTA Drawbacks.

The court agrees that Toyota's use of a three year inventory turnover period based on one part remaining in inventory for longer than three years is inconsistent with the statutory and regulatory requirements for NAFTA Drawbacks. "Drawbacks are a privilege, not a right." *Hartog Foods Int'l, Inc. v. United States*, 291 F.3d 789, 793 (Fed. Cir. 2002) (citing *United States v. Allen*, 163 U.S. 499, 504 (1896)). As a "statutory privilege," drawback is "due only when enumerated conditions are met." *GUESS?, Inc. v. United States*, 944 F.2d 855, 858 (Fed. Cir. 1991). In this case, entitlement to drawback benefits are expressly conditioned, by statute, on compliance with § 191.14. *See* 19 U.S.C. § 3333(a)(2)(B) ("[I]f a good described in the first sentence of this paragraph is commingled with fungible goods and exported in the same condition, the origin of the good may be determined on the basis of the inventory methods provided for in the regulations implementing this title."); *Id.* § 1313(l) ("Allowance of the privileges provided for in this section shall be subject to compliance with such rules and regulations as [Customs] shall prescribe . . . ."); *Graham Eng'g Corp. v. United States*, 510 F.3d 1385, 1389 (Fed. Cir. 2007) ("The rulemaking authority vested in the agency by subsection (l) explicitly conditions allowance of the benefits of section 1313 on compliance with regulations Customs has prescribed."). Accordingly, Toyota is entitled to duty drawback only to the extent that it complies with the applicable regulatory requirements.

Toyota's proposed use of a three year inventory turnover period is inconsistent with at least two requirements of § 191.14. First, the Inventory Turnover Method requires that a drawback claimant establish an *average* inventory turnover period for each specific type of merchandise or article for which it seeks duty drawback. Even where, as here, a claimant has several kinds of merchandise, and seeks to use the longest average inventory turnover period of any one product to identify the drawback eligible units of several different products, an average turnover period still must be calculated for each part in order to determine which is the longest. To establish this average inventory turnover period, § 191.14(c)(3)(iii)(C) requires that "at least 1 year, or three (3) turn-over periods (if inventory turns over less than 3 times per year), *must be averaged*." (Emphasis added).

Toyota's proposed average inventory turnover period, however, is not an average at all.[19] Rather, it is simply an assigned period based on its contention that 448 of its starter switch repair kits remained in inventory for more than the three year period for submitting drawback claims under § 1313(j). Thus, rather than averaging several turnover periods for its starter switch repair kits, Toyota merely observed that one turnover period was longer than three years. Accordingly, Toyota's proposed inventory turnover period is inconsistent with § 191.14(c)(3)(iii)(C).

Toyota's reliance on the exception for inventories consisting of "several kinds of merchandise" also misses the point. Section 191.14(c)(3)(iii)(C) would permit the use of the longest average inventory turn-over period, calculated on a part-specific basis, to be applied separately to its inventory of each kind of service part. In order to take advantage of this exception, however, Toyota must first calculate the longest *average* inventory turnover period for a particular part, and, second, apply this established inventory turnover period separately to each of its part-specific inventories. That is, had Toyota established an average inventory turn-over period for starter switch repair kits, and if that period were the longest average inventory turnover period for any of the company's service parts, then Toyota could have applied this period to front brake hoses, door bezels, shift lock stoppers, and other service parts. Thus, using this method, once the longest average inventory turnover period for any one service part was determined, Toyota could use that period as the inventory turnover period in applying the Inventory Turnover Method on a part-specific basis to identify the drawback eligible units of each kind of service part.

Toyota has failed to meet these regulatory requirements. As noted above, Toyota has not calculated the longest average inventory turnover period for any specific service part. Consequently, the company has not identified the longest average inventory turnover period for any particular service part, and, having failed to do so, it cannot apply this period to its other service parts. Accordingly, Toyota's claim that it should be permitted to perfect its claim by applying the Inventory

[19] In other words, Toyota did not take an average of the length of time it took for its inventory of starter kits, or any other service part, to be depleted. Rather, Toyota sought to use the period of time that it took its inventory of 57,900 starter kits to turnover. The purpose of requiring an average turnover period appears to be to prevent a drawback claimant from taking an aberrational or atypical turnover period, that might lead to-greater drawback than a claimant is entitled to, and using this turnover period to identify drawback eligible merchandise under the Inventory Turnover Method. Here, the average inventory turnover period might well have been less than three years for starter switch repair kits. However, there is no way to determine this because of Toyota's failure to calculate an average.

Turnover Method using a three year inventory turnover period is inconsistent with the averaging requirements of § 191.14(c)(3)(iii)(C), and with the requirement to calculate a turnover period for each type of part in order to determine which is the longest.

In addition, in using any variation of the low-to-high inventory accounting method to identify drawback eligible merchandise "if the merchandise or articles identified were attributable to an import more than . . . 3 years . . . before the claimed export, no drawback could be granted." 19 C.F.R. § 191.14(c)(3)(i). Consequently, drawback eligible merchandise may only be identified through inventory accounting when the chosen accounting method will definitively demonstrate that dutiable imports were actually withdrawn from inventory for exportation within the three year time limit for drawbacks set forth in 19 U.S.C. § 1313(j).

Toyota's proposed methodology would not demonstrate that its merchandise was exported within three years of importation. Using a three year turnover period based on the idea that the turnover period for a particular part was longer than three years could result in Toyota receiving drawback for merchandise actually imported more than three years prior to exportation. Therefore, the three-year inventory turn-over period proposed by Toyota would not "represent[] the time in which all of the merchandise or articles in the inventory at a given time must have been withdrawn." 19 C.F.R. § 191.14(c)(3)(iii)(C). Because Toyota's proposed inventory turnover period does not represent the length of time it takes for its inventory to actually turnover, using its proposed method would not establish the time in which all of the merchandise in a given inventory was imported and subsequently withdrawn for export. 19 C.F.R. § 191.14(c)(3)(iii)(C). Accordingly, since at least one of the service parts for which its seeks drawback was in inventory for nearly five years, under Toyota's proposed inventory turn-over period calculation, there is a strong likelihood that it would receive duty drawbacks for goods that were imported more than three years prior to export, in contravention of § 1313(j)(1)(A).

Thus, Toyota's attempt to perfect its drawback claim using the inventory Turnover Method fails because its proposed three year inventory turnover period does not comply with the requirements of § 191.14.

II. Untimely Amendment of Drawback Claims Using the Blanket Method

Toyota argues that, if it is not permitted to perfect its drawback claims under the Inventory Turnover Method, it should be allowed to

amend its drawback claims and submit new documentation in support of its claims under the Blanket Method. Toyota concedes that the time for amending its drawback claims has expired. *See* Pl.'s Mem. 15 ("Plaintiff should be permitted to untimely amend its drawback claims . . . ."). Nevertheless, the company insists that it should be permitted to make this untimely amendment pursuant to 19 C.F.R. § 191.51(e)(2), because Customs was responsible for its failure to timely amend its drawback claims. According to Toyota, "Plaintiff's inability to timely substitute the [Blanket Method] for the [Inventory Turnover Method] is proximately caused by [Custom's] failure to efficiently evaluate and administer Plaintiff's drawback claims." Pl.'s Mem. 16.

At bottom, Toyota argues that Customs was responsible for its failure to file new paperwork to further back up its drawback claims using the Blanket Method[20] by inducing Toyota to believe that its original Inventory Turnover Method claims would be allowed because "numerous exchanges between Plaintiff and [Customs], . . . resulted in Plaintiff's understanding (either through direct statements or otherwise) that its drawback claims were 'probably okay.'" Pl.'s Mem. 21. According to Toyota, Customs delay in processing and ruling on Toyota's claims meant that, by the time Toyota's claims were formally denied, the three-year window for amending its claims had closed. Therefore, Toyota maintains that Customs led it to believe that its drawback claims were proper as originally filed, which caused it to forego any opportunity to amend its claims to correct any deficiencies, and then delayed in ruling on Toyota's claim, which prevented it from amending its claims within the time frame afforded under § 191.52(c).

Pursuant to 19 U.S.C. § 1313(r) and 19 C.F.R. § 191.51(a), a completed drawback claim must be filed within three years from the date of exportation of the merchandise for which drawback is sought. A "complete drawback claim" generally must include the "drawback entry on Customs Form 7551, applicable certificate(s) of manufacture and delivery, applicable Notice(s) of Intent to Export, Destroy, or Return Merchandise for Purposes of Drawback, applicable import entry number(s), coding sheet unless the data is filed electronically, and evidence of exportation or destruction under subpart G of this part." 19 C.F.R. § 191.51(a); *see also Delphi Petroleum, Inc. v. United States*, 33 CIT __, __, 662 F. Supp. 2d 1348, 1351–52 (2009). In addition, a drawback claim must also include a correct calculation of

[20] As set forth *supra*, Customs did permit Toyota to perfect its claims by substituting the Blanket Method but found that the perfection failed to demonstrate that the merchandise was actually exported to Canada. Further, as noted, Toyota does not dispute this determination.

the amount of reimbursement sought. *See Aectra Ref. & Mktg., Inc. v. United States*, 565 F.3d 1364, 1371 (Fed. Cir. 2009). A party may amend an unliquidated drawback claim at any time within three years of the exportation of the merchandise for which drawback is sought. *See* 19 C.F.R. § 191.52(c). No amendment is permitted, however, for drawback claims after the expiration of this three year period "unless it is established that Customs was responsible for the untimely filing." 19 U.S.C. § 1313(r); 19 C.F.R. § 191.51(e). Accordingly, the dispositive issue is whether Customs was responsible for Toyota's failure to timely amend its claims.[21]

Customs has not promulgated any regulation defining what it means for "Customs to be responsible for the late filing," as set forth in § 191.51(e)(2). In addition, Customs has not had the opportunity to determine whether it is responsible for Toyota's untimely amendment, as this precise issue was not raised in Toyota's Protest.[22] Nevertheless, the court "shall make determinations upon the basis of the record made before the court . . . ." 28 U.S.C. § 2640(a).

The court holds that plaintiff has failed to produce sufficient evidence for it to find that Customs was responsible for Toyota's failure to file proper drawback claims in the first instance, or its failure to timely amend its drawback claims. That is, viewing the facts in the light most favorable to Toyota, the evidence is insufficient for the court to find that Toyota was induced by Customs to believe that its drawback claims would be allowed. *See Aegis Sec. Ins. Co. v. Fleming*, 33 CIT __, __, 593 F. Supp. 2d 1346, 1349–50 (2009). Rather, the evidence demonstrates that Customs notified Toyota early on in the process that it had doubts as to whether Toyota's drawback claims complied with the governing regulations. Def.'s Rule 56.1 Statement ¶5 ("During the period after plaintiff's August 27, 1999 letter to Customs and before plaintiff's October 15, 1999 memorandum to

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[21] It should be noted that Toyota has not placed before the court the documents it seeks to submit to Customs and so has provided no evidence that its amended claims would be compliant with the applicable statutes and regulations or, indeed, that they would be an amendment to its drawback claims. In this connection, the court will rely on plaintiff's representation that the documents would constitute an amendment.

[22] The court, nevertheless, has jurisdiction over Toyota's claim because it merely constitutes "new grounds" on which it challenges Customs' decision to deny its drawback claims. Under 28 U.S.C. § 2638, "[i]n any civil action . . . in which the denial, in whole or in part, of a protest is a precondition to the commencement of a civil action in the Court of International Trade, the court, by rule, may consider any new ground in support of the civil action if such new ground- (1) applies to the same merchandise that was the subject of the protest; and (2) is related to the same administrative decision listed in [19 USC §1514] that was contested in the protest." In this case, Toyota's second claim meets this criteria, as it seeks drawback for the same merchandise that was subject to its protest, which challenged the same administrative decision–the refusal to grant drawback under 19 U.S.C. § 1514(a)(6). *See Hanover Ins. Co. v. United States*, 25 C.I.T. 447, 451–51 (2001) (not reported in Federal Supplement).

Customs . . . [the agency] told Toyota that they were not sure if Toyota's 'accounting method was completely in accordance with the regulations.'"); Pl.'s Resp. to Def.'s Rule 56.1 Statement ¶5. Beck Dep. 19:14–20:14 ("Q. Did you contact [Toyota] at this time for additional information? A. We did contact them to get additional information. Q. At that time did you tell them the reason why that information was necessary? A. Yes. Q. And what was the reason that you told them? A. We were not sure if their accounting method was completely in accordance with the regulations."). Moreover, Toyota, as a sophisticated party with its own drawback specialists, was aware of its obligations as a drawback claimant. *See* Def.'s Rule 56.1 Statement ¶¶35–42; Pl.'s Resp. to Def.'s Rule 56.1 Statement ¶¶35–42; Dep. M. Duntley (July 22, 2009) 48:9–12 ("Q. Were importers required to be fully knowledgeable of the regulations . . . if they sought to make claims for [drawback]? A. Yes, they were.").

When Customs granted Toyota's application for a waiver of notice in June 1999, it expressly advised the company that the granting of those privileges was not to be taken as an indication of Customs' acceptance of Toyota's proposed Inventory Turnover Method calculation. Def.'s Rule 56.1 Statement ¶2 ("In approving this request, the U.S. Customs Service expresses no opinion as to the entitlement of drawback and makes no assurances, rulings, or decisions that may be relied upon to anyone's detriment."); Pl.'s Resp. to Def.'s Rule 56.1 Statement ¶2. Shortly after Toyota's filing of its original drawback claims under the Inventory Turnover Method, Customs informed Toyota that it had doubts as to the validity of Toyota's inventory turnover period calculations. Beck Dep. 19:14–20:14; Def.'s Rule 56.1 Statement ¶5 ("During the period after plaintiff's August 27, 1999 letter to Customs and before plaintiff's October 15, 1999 memorandum to Customs . . . [the agency] told Toyota that they were not sure if Toyota's 'accounting method was completely in accordance with the regulations."). Toyota was aware of these concerns, and, on several occasions, submitted additional information to Customs in an effort to support its proposed inventory turnover period calculation. Pl.'s Rule 56.1 Statement ¶¶13–14; Def.'s Resp. to Pl.'s Rule 56.1 Statement ¶¶13–14.

By July 25, 2000, at the latest, Customs had informed Toyota that it had sought internal advice regarding whether Toyota's use of the Inventory Turnover Method complied with applicable regulations, and admonished Toyota that an adverse ruling could result in the rejection of Toyota's drawback claims. July 25, 2000 Letter ("[W]e would like to caution you that an adverse ruling by our Headquarters could affect Toyota's drawback eligibility for your claims currently on

file."). At that time, Customs also informed Toyota that it might be some time before a ruling was issued from Customs Headquarters on the request for internal advice. *Id.* Under these facts, Toyota's knowledgeable staff should have recognized that, *at a minimum*, there was a possibility that its drawback claims would not be approved. At that point, Toyota still had time to amend its drawback claims covering merchandise that was exported after July 25, 1997. *See* 19 C.F.R. § 191.52(c) ("Amendments to claims for which the drawback entries have not been liquidated must be made within three (3) years after the date of exportation or destruction of the articles which are the subject of the original drawback claim.").

Importantly, up to that point, Customs had not given any indication as to the sufficiency of Toyota's claims, other than, according to Toyota, its failure to indicate that they were deficient, and the vague oral comment that the claims were "probably okay." Duntley Decl. at ¶12. Knowing that Customs had expressed doubt as to the validity of its Inventory Turnover Method claims, and the deadlines for amending those claims, Toyota could have reviewed its claims internally and determined whether to continue to pursue them as filed.

Despite having experienced personnel submitting drawback claims on its behalf, however, Toyota continued to pursue claims using the Inventory Turnover Method, rather than seeking an alternative course after being apprised of Customs' ambivalence as to the validity of its claims.

Toyota argues that it was unable to effectively evaluate its own claims because Customs failed to adequately inform the trade community as to the requirements for calculating an inventory turnover period. The regulation is clear, however, that the inventory turnover period must be calculated for an inventory of fungible goods. *See* 19 C.F.R. § 191.14(b)(1) ("The lots of merchandise or articles to be so identified must be fungible"). The meaning of "fungible" in this context is clearly set forth in 19 C.F.R. § 191.2(o). No additional explanation was necessary. As the Protest Ruling demonstrates, Toyota's calculation was noncompliant because, inter alia, it failed to meet the fungibility requirement set forth in § 191.14(b) because it used several kinds of service parts (*e.g.*, hoses, gaskets, valves, belts) - parts that were not commercially interchangeable - to calculate an average inventory turnover period. Toyota should have known that these service parts were not fungible. Accordingly, Toyota should have known that calculating an inventory turnover period based on the turnover of all of its service parts did not comply with the fungibility requirement. Indeed, Toyota now concedes that its original "days of supply" inventory turnover period calculation was at odds with the

requirements of § 191.14(b). *See* Oral Arg. Tr. 12:3–13:17. Nevertheless, the company did not seek to correct its claims (by amendment or perfection) until after November 2001, when Customs determined that its claims were noncompliant.

Based on the undisputed facts, it is clear that Toyota voluntarily chose to abandon the Blanket Method and pursue the Inventory Turnover Method, and that Customs did not cause it to believe that its claims complied with the applicable regulations, or induce Toyota to forego amending its claims to substitute the Blanket Method for the Inventory Turnover Method until after the expiration of the three year period for amending drawback claims. Indeed, Customs cautioned Toyota that its new methodology might not be allowed. In this respect this case is dramatically different from *Delphi Petroleum*, where the Court found that untimely drawback claims for certain harbor tariffs were the responsibility of Customs when a Customs officer directed the drawback claimant to wait until it filed its protest to assert these claims for the first time.

Indeed, *Delphi Petroleum* stands for the proposition that Customs' delay in ruling on Toyota's claims does not, by itself, render Customs responsible for plaintiff's filing of claims that did not comport with the applicable law. *See Delphi*, 33 CIT at __, 662 F. Supp. 2d at 1354 (finding that Customs' "delay in liquidating claims," without more, did not render Customs responsible for delay in amending drawback claims).

Having determined that Customs did not induce Toyota to believe that its Inventory Turnover Method claims would be allowed, the court finds no merit to Toyota's claim that Customs' delay in ruling on Toyota's drawback claims render it responsible for Toyota's failure to seek the timely amendment of those claims.

Conclusion

For the foregoing reasons, the court finds that there are no genuine issues as to any material facts and all of Toyota's claims lack merit as a matter of law. Therefore, plaintiff's motion for summary judgment is DENIED and defendant's motion for summary judgment is GRANTED. Accordingly, it is hereby

ORDERED that judgment is entered in favor of defendant, and this case is hereby dismissed.

Dated: September 8, 2011
New York, New York

/s/ Richard K. Eaton
RICHARD K. EATON

Slip Op. 11–114

Fuwei Films (Shangdong) Co., Plaintiff, v. Consol. United States, Defendant.

Before: Leo M. Gordon, Judge
Court No. 11–00061

[Motion to amend complaint denied.]

Dated: September 8, 2011

Riggle and Craven (*David J. Craven* and *David A. Riggle*) for Plaintiff Fuwei Films (Shandong) 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 (*David F. D'Alessandris*); and Office of the Chief Counsel for Import Administration, U.S. Department of Commerce (*Whitney Rolig*), of counsel, for Defendant United States for Defendant United States.

Wilmer, Cutler, Pickering, Hale & Dorr LLP (*Patrick J. McLain*, *David Moses Horn*, and *Ronald I. Meltzer*) for Defendant-Intervenors' DuPont Teijin Films, Mitsubishi Polyester Film, Inc., and SKC, Inc.

MEMORANDUM AND ORDER

Gordon, Judge:

Before the court is a motion by Plaintiff, Fuwei Films (Shandong) Co., Ltd. ("Fuwei"), to amend its complaint to add an additional claim challenging Commerce's zeroing methodology within administrative reviews, a request that Fuwei explains is motivated by two recent Federal Circuit decisions addressing Commerce's zeroing methodology, *Dongbu Steel Co. v. United States*, 635 F.3d 1363 (Fed. Cir. 2011) and *JTEKT Corp. v. United States*, 642 F.3d 1378, 1383–84 (Fed. Cir. 2011).

USCIT Rule 15(a) provides that "a party may amend the party's own pleading only by leave of court or by written consent of the adverse party; and leave shall be freely given when justice so requires." USCIT R. 15(a). It is within the court's discretion to determine whether to grant leave to amend. *Former Employees of Quality Fabricating, Inc. v. United States*, 28 CIT 1061, 1065, 353 F. Supp. 2d 1284, 1288–89 (2004). "In the absence of any apparent or declared reason-such as undue delay, bad faith or dilatory motive on the part of the movant, . . . the leave sought should, as the rules require, be 'freely given.'" *Foman v. Davis*, 371 U.S. 178, 182 (1962).

The issue presented by Fuwei's motion, however, is less about the appropriateness of an amended complaint, and more about the issue of exhaustion of administrative remedies. Fuwei acknowledges that it did not challenge Commerce's zeroing methodology during the admin-

istrative proceeding. When reviewing Commerce's antidumping determinations, the U.S. Court of International Trade requires litigants to exhaust administrative remedies "where appropriate." 28 U.S.C. § 2637(d) (2006). "This form of non-jurisdictional exhaustion is generally appropriate in the antidumping 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, 88–90 (2006)). The court "generally takes a 'strict view' of the requirement that parties exhaust their administrative remedies before the Department of Commerce in trade cases." *Corus Staal BV v. United States*, 502 F.3d 1370, 1379 (Fed. Cir. 2007).

An important corollary requirement to exhaustion of administrative remedies is Commerce's own regulatory requirement that parties raise all issues within their administrative case briefs. 19 C.F.R. § 351.309(c)(2) (2010) ("The case brief must present all arguments that continue in the submitter's view to be relevant to the final determination."); *Mittal Steel Point Lisas Ltd. v. United States*, 548 F.3d 1375, 1383 (Fed. Cir. 2008) (parties are "procedurally required to raise the{ir} issue before Commerce at the time Commerce {is} addressing the issue"); *see also* 19 U.S.C. § 1677f(i)(3)(A) (2006) ("the administering authority shall include . . . an explanation of the basis for its determination that addresses relevant arguments, made by interested parties"). This requirement works in tandem with the exhaustion requirement and promotes the same twin purposes of protecting administrative agency authority and promoting judicial efficiency.

As noted, Plaintiff concedes that it did not raise the zeroing issue before Commerce. Plaintiff nevertheless argues that at least one of two exceptions to the exhaustion requirement applies. Plaintiff posits that the zeroing issue involves a "pure question of law." That exception, however, only *might* apply for a clear statutory mandate that does not implicate Commerce's interpretation of the statute under the second step of *Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 842–45 (1984). *See, e.g.*, *Agro Dutch Indus. Ltd. v. United States*, 508 F.3d 1024, 1032 (Fed. Cir. 2007) (applying pure question of law exception to *Chevron* step 1 issue). Even when the statute is clear, however, it is always preferable to have the agency's interpretation of the statute it is entrusted to administer set forth on the administrative record. *See* 2 Richard J. Pierce, Jr., ADMINISTRATIVE LAW TREATISE § 14.3 (5th ed. 2010) (describing the

primary jurisdiction doctrine and its relationship to *Chevron*); *see also Agro Dutch*, 508 F.3d at 1029 n.4 (noting that Commerce had opportunity to, and did, put forth its interpretation on administrative record in two instances). In this case the statute does not speak to the precise question of zeroing, but instead requires some interpretation to fill this statutory gap. The court cannot on its own resolve the issue. It is a *Chevron* step 2 issue; it requires the input of Commerce. To address the problem, the court would first have to remand the issue to Commerce, an inefficiency occasioned solely by Plaintiff's inaction. The pure question of law exception, therefore, cannot apply in this instance because its application would undermine the very purposes the exhaustion requirement is designed to promote.

Fuwei also argues that the futility exception should apply. Fuwei, though, ignores Commerce's regulatory requirement that parties raise all issues within their administrative case briefs. 19 C.F.R. § 351.309(c)(2). That provision carries the force of law and the court cannot simply ignore it. "The mere fact that an adverse decision may have been likely does not excuse a party from satisfying statutory or regulatory requirements to exhaust administrative remedies." *Tianjin Magnesium Int'l Co. v. United States*, 34 CIT ____, ____, 722 F. Supp. 2d 1322, 1330 (2010) (citing *Commc'ns Workers of Am. v. Am. Tel. & Tel. Co.*, 40 F.3d 426, 433 (D.C. Cir. 1994)). Fuwei could have raised its arguments about potential unreasonable inconsistencies in Commerce's zeroing practice in its administrative case brief. There was nothing preventing Fuwei from asserting its rights at the administrative level.

Consider, for example, the plaintiff in *Dongbu*. Commerce introduced its zeroing methodology change after the time for the submission for case briefs had passed. Plaintiff nevertheless submitted a letter challenging Commerce's zeroing practice as an unreasonable interpretation of the dumping statute. Had Fuwei asserted its rights with equal vigor (as the regulations, and statute require), it would have created a record suitable for judicial review. Some form of perceived administrative obstinacy is no excuse. In fact, any intransigence on the agency's part would only aid the litigant in demonstrating to the court the unreasonableness of the agency's position.

Unfortunately, Fuwei's failure to challenge zeroing before Commerce has left the court without a record to review on this issue. The court is therefore not inclined to excuse the requirement that Fuwei have exhausted its administrative remedies in this instance.

Accordingly, it is hereby

ORDERED that Plaintiff's motion for leave to amend its complaint is denied.

Dated: September 8, 2011
New York, New York

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