U.S. Customs and Border Protection

Slip Op. 12–147

ADVANCED TECHNOLOGY & MATERIALS CO., LTD., BEIJING GANG YAN DIAMOND PRODUCTS COMPANY, and GANG YAN DIAMOND PRODUCTS, INC., Plaintiffs, BOSUN TOOLS GROUP CO. LTD, Plaintiff-Intervenor, v. UNITED STATES, Defendant, and DIAMOND SAWBLADES MANUFACTURERS COALITION, WEIHAI XIANGGUANG MECHANICAL INDUSTRIAL CO., LTD., and QINGDAO SHINHAN DIAMOND INDUSTRIAL. CO., LTD., Defendant-Intervenors.

Before: R. Kenton Musgrave, Senior Judge
Consol. Court No. 09–00511
PUBLIC VERSION

[Remanding first results of remand of antidumping duty investigation of sales at less than fair value of diamond sawblades and parts thereof from the People's Republic of China.]

Dated: November 30, 2012

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OPINION

Musgrave, Senior Judge:

This opinion considers the results of remand from the U.S. Department of Commerce, International Trade Administration ("Commerce" or "Department") on the investigation into sales from the People's Republic of China ("PRC") of diamond sawblades and parts thereof at

less than fair value ("LTFV").[1] *See* Slip Op. 11–122 (Oct. 12, 2011), familiarity with which is presumed. The petitioners, Diamond Sawblades Manufacturers Coalition ("DSMC"), argue for further remand while the defendant and the three respondents comprising the "AT&M entity," Advanced Technology & Materials, Co., Ltd. ("AT&M"), Beijing Gang Yan Diamond Products Company ("BGY") and Gang Yan Diamond Products, Inc., argue for sustenance.

The standard of review requires "substantial" evidence on the record, 19 U.S.C. § 1516a(b)(1)(B)(I), which assesses the reasonableness of the agency's determination. *E.g.*, *U.S. Steel Corp. v. United States,* 621 F.3d 1351, 1357 (Fed. Cir. 2010), citing *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 477 (1951). *See* Charles H. Koch, Jr., 3 *Admin. L. & Prac*. § 9:24 (3d ed.) (the standard requires the "court to assure that there is a relatively high probability that the agency is correct"). A determination "of less than ideal clarity" may be sustained "if the agency's path may reasonably be discerned," but the determination is examined on that basis. *Bowman Transp. Inc. v. Arkansas-Best Freight System*, *Inc.*, 419 U.S. 281, 286 (1974). In other words, it will not be sustained upon a "reasoned basis for the agency's action that the agency itself has not given[.]" *Id*. at 285–86, referencing *SEC v. Chenery Corp.*, 332 U.S. 194, 196 (1947). As explained below, the remand results will be remanded for further analysis.

"Separate Rate" Analysis of the AT&M Entity

I. Background

Previously discussed, Commerce employs a rebuttable presumption of governmental control over export operations in antidumping duty proceedings involving non-market economy ("NME") participants. *See*, *e.g.*, *Bicycles from the People's Republic of China*, 61 Fed. Reg. 19026 (Apr. 30, 1996) (final LTFV determination). To obtain a "separate" antidumping duty rate, a respondent must demonstrate that its export operations meet the three *de jure* and four *de facto* factors comprising the separate rate test announced in *Sparklers from the People's Republic of China*, 56 Fed. Reg. 20588 (May 6, 1991) (final LTFV determination), as modified by *Silicon Carbide From the People's Republic of China*, 59 Fed. Reg. 22585 (May 2, 1994) (final LTFV determination) ("*Silicon Carbide*"). *See* Import Administration Policy Bulletin 05.1 (Apr. 5, 2005). The *de jure* factors are (1) an absence of restrictive stipulations associated with an individual exporter's busi-

[1] *Diamond Sawblades and Parts Thereof From the People's Republic of China*, 71 Fed. Reg. 29303 (May 22, 2006) (final LTFV determination) (*"Final Determination"*), *as amended*, 71 Fed. Reg. 35864 (June 22, 2006). The period of investigation ("POI") is October 1, 2004, through March 31, 2005.

ness and export licenses, (2) any legislative enactments decentralizing control of companies, and (3) other formal measures by the government decentralizing control of companies. The *de facto* factors typically considered are (1) the ability to set export prices independently of the government and without the approval of a government authority, (2) the authority to negotiate and sign contracts and other agreements, (3) the possession of autonomy from the government regarding the "selection" of management, and (4) the ability to retain the proceeds from sales and make independent decisions regarding the disposition of profits or financing of losses.

In answer to the question of how BGY sets its export prices, for the preliminary determination Commerce outlined that BGY certified in its August 25, 2005 questionnaire response that those prices are neither set by nor subject to the approval of a government agency, and that BGY had provided emails between its general manager and unaffiliated U.S. customers regarding price negotiation on U.S. sales as well as documents "demonstrating independent negotiation of contracts for purchases of raw materials" in addition to "documentation that both BGY and AT&M select their own management and boards of directors[.]" *Diamond Sawblades and Parts Thereof from the People's Republic of China*, 70 Fed. Reg. 77121, 77127 (Dec. 29, 2005) (*inter alia*, preliminary LTFV determination). The petitioners DSMC challenged this, arguing that the AT&M entity, through shareholding, is controlled by the Central Iron and Steel Research Institute ("CISRI"), which is owned by one of the PRC's state-owned assets supervision and administration commissions ("SASAC"). Nevertheless, Commerce preliminarily granted a separate rate because, "[a]lthough Petitioner has stated that SASAC has the authority to hire and fire management and order asset sales and acquisitions at CISRI, it has provided no evidence on the record of this proceeding that SASAC had the ability to exercise such control over AT&M and BGY during the POI." *Id*.

For the final determination, the DSMC (re)iterated that Commerce's finding was contrary to "Decree of the State Council of the People's Republic of China No. 378: Interim Regulations on Supervision and Management of State-owned Assets of Enterprises (2003)" ("Interim Regulations" or "IR"), the PRC law governing state-owned enterprises, which DSMC contended *de jure* undermined BGY's independence under the Company Law. Commerce's essential response was that it "has consistently found an absence of *de jure* control when a company's operations were governed by the Company Law of the PRC, and when it supplied business licenses and export licenses, each of which have been found to demonstrate an absence of restrictive

stipulations and decentralization of control of the company." *Issues and Decision Memorandum for the Final Determination*, 71 ITADOC 29303 (May 15, 2006) (I&D Memo) (Comment 16). Further explanation followed:

> The information submitted by Petitioner addresses a theoretical control by SASAC over CISRI, rather than any control of the PRC [G]overnment at any level over the numerous individual export decisions of the AT&M single entity that took place during the POI. BGY placed numerous documents on the record that were examined for the *Preliminary Determination.* . . .
> * * *
> . . . With respect to Petitioner's argument that the Department found at verification that four members of AT&M's board of directors are PRC [G]overnment officials, the Department notes that this is a misreading of the report which states merely that four members of AT&M's board were representatives of CISRI. *See* BGY Verification Report, at 9. Further, we note that these four individuals are a minority on the board of directors, of which two other members are representatives of AT&M, and three additional members are independently appointed by the stock exchange committee. *See id*.

Id., referencing 70 Fed. Reg at 77126.

As part of this consolidated action, the DSCM's challenge to that determination was remanded to Commerce for clarification of the separate rate test in general and explanation of why Commerce essentially considered irrelevant the shareholder control over the AT&M entity that appeared traceable to the PRC Government, as argued by the DSMC.

II. Summary of Remand Results

On remand, Commerce continues to conclude that the government-owned status of AT&M's majority shareholder, CISRI, does not affect determining that the AT&M entity is eligible for a separate rate, and it offers three broad reasons therefor. First, Commerce declares CISRI free of PRC control in its own right, *de jure*, by virtue of its corporate form, an "owned by all the people" company,[2] of the type

[2] Remand Results ("RR") at 3. Specifically, Commerce relied on CISRI's articles of association to find CISRI able to conduct its own business operations "without any level of input from the PRC Government or the SASAC," able to control its own profits, losses, capital and assets despite being fully financed by SASAC, able to "elect" its president at the employee representatives meeting "without input or influence from the PRC Government or SASAC," and able to permit the employees to "democratically elect[ ]" CISRI's management, "actively participate in decisions" concerning business operations "through a democratic process,"

Commerce has previously declared "insulated" from governmental control and to which state control has been "devolved," and therefore CISRI cannot "pass on" any governmental control to the AT&M entity through shareholding.

Second, Commerce finds the existence of legal "barriers" between PRC companies and their majority shareholders, such that even if CISRI is AT&M's majority shareholder, the AT&M entity is also free, *de jure*, of government control in its own right. The legal matter relied upon for this conclusion includes AT&M's articles of association, the "Company Law of the People's Republic of China (1999 Amended)" ("Company Law" or "CL") and the "Code of Governance for Listed Companies." Commerce notes the latter are among the PRC laws it has previously accepted as evidence of the "absence" of *de jure* governmental control over a company's export operations. Commerce acknowledges that AT&M's board of directors is responsible for selecting the general management including management over export operations and that only shareholders owning a certain minimum percentage of shares (*i.e.*, CISRI) are permitted to nominate candidates for board and management positions, but Commerce found that candidates nominated to the board require the unanimous votes of the shareholders in order to gain appointment and reasoned that the power of veto means CISRI does not "control" AT&M's board, as does the fact that CISRI's representatives on the board are a minority in number.

Third, with respect to *de facto* control over the AT&M entity, Commerce concludes that its absence was established in the original investigation as well as by (re)analysis on remand of copies of certain board resolutions documenting the voting and appointment of certain managers as well as certain financial statements and board meeting minutes at which all board members discussed and voted upon profit distribution. RR at 8, referencing BGY's Sep. 20, 2005 Supp. Q. Resp., at Ex. SA-22. Commerce thereby reiterates that the AT&M entity has demonstrated the absence of both *de jure* and *de facto* control regarding the selection of managers and the distribution of profits, and that DSMC's information, in particular the Interim Regulations, is insufficient to undermine the AT&M entity's entitlement to a separate rate.

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and "retain[ ] control of its business operations." *Id*. at 3–4, referencing BGY's Sep. 20, 2005 Supp. Q. Resp. at Ex. 10–2 (CISRI's articles of incorporation).

III. Discussion

The court cannot sustain the remand results on the bases articulated by Commerce. In particular, the court remains concerned that Commerce has failed to consider important aspects of the problem and offered explanations that run counter to the evidence before it. *See Motor Vehicle Mfrs. Ass'n of United States, Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983). In other words, the thread of analysis pretty much begins where left off. *See* Slip Op. 11–022 at 26.

A. Commerce Policy re Ownership of Separate Rate Applicant; Form of Owner

The court requested explanation of why CISRI is considered irrelevant to the separate rate analysis. The stated answer is that "in keeping with precedent" CISRI was not required "to address the separate-rate criteria because the separate rates test applies only to exporters." That may be true, but it does not explain. There is no dispute that the focus of the separate rates test here is the AT&M entity's export operations, that Commerce's test applies only to exporters, and that CISRI is not an exporter, but CISRI is still an owner, and even the AT&M entity agrees consideration of that ownership is relevant. *See* AT&M Comments at 5.

Commerce did analyze CISRI to some degree nonetheless, and it concluded the corporeal form of CISRI effectively "insulated" CISRI from governmental control. As part of their argument concerning governmental control of AT&M, the DSMC pointed to the fact that CISRI defines itself as a "state-owned enterprise," however Commerce dismissed this point on remand as mere "designation that does not restructure or reformulate the corporate form," and because after promulgation of the Interim Regulations and the creation of the SASAC, CISRI did not file for a new business license or restructure or reformulate its articles of association. *See* RR at 18–19. The retort does not make sense. Commerce admits CISRI is a "state-owned enterprise," *see* RR at 20, and the advent of the Interim Regulations and the creation of SASAC would not have resulted in changes to CISRI's articles or license *unless* CISRI no longer intended to operate, *e.g.*, as state-owned.[3]

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[3] *See Global Economic and Technological Change: Former Soviet Union and Eastern Europe, and China*, S. Hrg. 102–586, Pt. 2, 129, 196 (Jun. 8 and Jul. 27, 1992) (*CIA Report on China's Economy*) ("'State-owned enterprise' is a short-hand term for the Chinese designator 'enterprise under the ownership of all the people'"); *see also Silicon Carbide* (relying on said report).

As to "insulation" from governmental control, Commerce essentially appeals to its "long standing" position with respect to "owned by all the people" companies, which is that the PRC Government has "devolved" control to them, which therefore "*demonstrat*[*es*] that CISRI is insulated from government control . . . and thus [is] not in a position to exercise government control over ATM as one of its shareholders[.]" RR at 5–6 (italics added). This is faulty logic. Appeal to tradition may simply indicate ossification, undeserving of deference,[4] and, to the court's knowledge, corporate form in and of itself has never been found to "demonstrate" insulation from governmental control, or further *de jure* proof of the absence thereof in accordance with the separate rate test would serve no purpose. Commerce here runs the risk of being interpreted as effectively disavowing its own test, when the prior opinion only observed that "government ownership by itself is not dispositive" of the issue of governmental control. Slip Op. 11–122 at 14–15, quoting *Qingdao Taifa Group Co. v. United States*, 33 CIT ___, ___, 637 F. Supp. 2d 1231, 1242 (2009). As stated in Import Policy Bulletin 05.1, "the test focuses on controls over the decision-making process on export-related investment, pricing, and output decisions at the individual firm level;" thus, the precise inquiry is governmental involvement in "decision-making." The second of the *de jure* factors is "legislative enactments decentralizing control of companies." And owners, of course, may be "companies" -- with obvious interests in the "decision-making process" to which their investments are being put -- which naturally leads to the following.

B. Further Analysis of the Interim Regulations and Governmental Control

The circa-2003 creation of the SASACs and the Interim Regulations that intervened since issuance of *Silicon Carbide* are of some import to the matter at bar. As with other PRC laws and regulations, the Interim Regulations evince corporeal identification of "ownership" and "management" for all companies covered thereby. Those include state-owned enterprises, such as CISRI, and enterprises with state-owned equity, such as AT&M. *See* IR, Art. 2. The remand results' analysis of the Interim Regulations, however, raises more questions than answers as to the relevant distinctions of those concepts in the context of "governmental control" and this case.

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[4] *See*, *e.g.*, *Butterbaugh v. Department of Justice*, 336 F.3d 1332 (Fed. Cir. 2003) (any deference to "traditional" administrative interpretation owed under *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944) does not outweigh contrary conclusions drawn from certain statutory text); *see also United States v. Mead Corp*., 533 U.S. 218, 247 (2001) (Scalia, J., dissenting). The court here could not previously discern Commerce's parent-subsidiary policy. *See* Slip Op. 11–122 at 24–26.

Commerce maintains that the Interim Regulations changed nothing of relevance and that SASAC/CISRI essentially continue to act merely as passive owner/investors with respect to the AT&M entity.[5] Thus, Commerce concludes that "the Interim Regulations do not automatically demonstrate *de jure* control of a state-owned enterprise[,]" *id*. at 20, and that the Interim Regulations "set[ ] aside particular protections for the autonomy of companies operating under SASAC, showing that SASAC *solely* provides oversight and is not intended to *direct* day-to-day business operations" and does not "interfere [in] or influence" the latter. RR at 21 (italics added). The court fails to discern from the record why that is the case, as various provisions among the Interim Regulations directly conflict with these observations. The latter reasoning also rests on a slippery slope.

The Interim Regulations provide that SASAC's "invested enterprises shall accept the supervision and administration conducted by the State-owned assets and administration authority according to law[.]" IR, Art. 11. This seems an obvious declaration of *re* -centralized *de jure* control, of "invested enterprises" including those that are wholly state-owned, such as CISRI, and those in which the state has an investment, such as AT&M. *See*, *e.g.*, IR, Art. 1. SASAC "is responsible for *directing* State-owned enterprises[,]" *id.*, Art. 20 (italics added). Further substantial evidence of record does not support the inference that SASAC's "management"[6] of its "state-owned

[5] *See*, *e.g.*, RR at 12–14 & 20–21, referencing IR at Arts. 3 & 4. Commerce notes that the Interim Regulations provide for "separation of ownership from management." *Id*. at 21 quoting IR, Art. 7. Commerce further observed that "those companies operating under SASAC 'enjoy autonomy in their operation,' and that SASAC 'shall support the independent operation of enterprises according to law, and shall not interfere in their production and operation activities . . ..'" *Id*., quoting IR, Art. 10. The DSMC justifiably criticize Commerce for omitting the remainder from Article 10: ". . . apart from performing the responsibilities of investor."

[6] By way of background, the Interim Regulations provides that SASAC "manages" the "state-owned assets of enterprises," and the "state-owned assets supervision and administration authority of the government at a higher level guides and supervises according to law the management work of state-owned assets supervision and administration of the government at a lower level." IR, Art. 12. The main responsibilities of a state-owned assets supervision and administration authority include performing "the responsibilities of investor for the invested enterprises" in accordance with the Company Law and other related laws and regulations and dispatching "supervisory panels to the invested enterprises," in addition to "appoint[ing] or remov[ing] the responsible persons of the invested enterprises[.]" IR, Art. 13. Article 14 states that SASAC shall "respect and safeguard the operational autonomy of State-owned enterprises and State-owned holding enterprises" but also obliges SASAC to more nebulous activity, such as "explore effective systems and ways for the management of State-owned assets of enterprises, enhance the work of supervision and management of State-owned assets of enterprises," "improve corporate governance, and advance the modernization of management," impel enterprises to "operate and manage according to law" *et cetera*. Article 15 states that SASAC "shall report to the government at the corresponding level about the supervision and management work of State-owned assets of enterprises." *Cf.* IR, Art. 12.

assets" is restricted to the kind of passive-investor *de jure* "separation" that Commerce concludes.

For example, the Interim Regulations confer upon SASAC the authority to appoint or remove (including proposals therefor) "the responsible persons of its invested enterprises" including the general manager, deputy general manager, and/or chief accountant of SASAC's state-owned enterprises "in accordance with the relevant provisions." *See* IR, Arts. 13, 17. CISRI's February 23, 2000 articles of association state that to the extent they conflict with any PRC laws the latter control. Thus, the DSMC were correct in pointing out that conflicting provisions in CISRI's articles of association were abrogated upon promulgation of the Interim Regulations, at which point SASAC had the right, *de jure*, to appoint/remove members of CISRI's board and management during the POI despite the "democratic" election of CISRI's president stated in its articles of association.

Further, "in accordance with the Company Law" SASAC has the authority to nominate candidates "for the director of the board or supervisor to be dispatched" to a company with state-owned equity such as AT&M[7] and instruct those directors/representatives to exercise votingrights in accordance with SASAC's instructions, *id*., Art. 22. "Voting rights" are made explicit with respect to "major matters" (*e.g.*, division, merger, bankruptcy), but the authority of a *director* who also happens to represent the state's interests is broader. As Commerce is aware, those duties explicitly encompass, *e.g,*, implementation of shareholder resolutions, deciding the company's operational and investment plans, formulating annual budgets and plans for profit distribution and recovery of losses, appointing or dismissing the company's general manager, *et cetera*. *Cf*. Company Law, Art. 46. Also, Commerce recognizes that the board of directors of AT&M "is in charge of overseeing . . . business matters[.]" RR at 19. That recognition is in direct contrast to Commerce's declared position, from its analysis of *de jure* "control" in the Interim Regulations, *supra*, that a director under SASAC/CISRI's dispatch is effectively absolved of responsibility for "directing." Further, the exclusion of "day to day operations" from "oversight" responsibility is a straw man.

Commerce's analytical assumptions are not based on common or business sense. They are particularly conspicuous when confronting

[7] *Cf*. IR, Arts. 11, 12, 17. Commerce regards Article 17 as "limited to those companies that are deemed 'invested enterprises" and thus "CISRI's majority ownership in ATM is not a vehicle by which SASAC or the PRC [G]overnment can exercise control over the ATM Entity's export activities," RR at 21, but that is a misreading. Commerce acknowledges CISRI is fully financed by SASAC, RR at 4–5, CISRI's investment in AT&M is an "asset" of a state-owned enterprise, IR, Art. 3, and as mentioned, SASAC/CISRI owns "state-owned equity" in AT&M. *See id*., Art. 4.

the *de jure* possibility of a general manager appointed by a board under SASAC's effective control, as permitted (or declared) by the Interim Regulations. Commerce acknowledges from CISRI's articles of association that CISRI's president is "responsible for" business operations including any investment-related export operations (*e.g.*, CISRI's investment in the AT&M entity) in addition to production, research and development, and "human resources," and Commerce is also aware that CISRI, or possibly SASAC, dispatched at least four individuals, *de facto*, to AT&M's board and management. The record further shows two members of AT&M's management on the board including its chief executive officer, which opens up the possibility of subjugation, as well as three "independent" board members who appear to be directly answerable to another PRC Government agency apart from SASAC. *See infra*. Commerce's interpretation of the Interim Regulations, however, prevented it from acknowledging a *de jure* prospect of "governmental control" of AT&M or determining the full *de facto* actuality of CISRI's and AT&M's management -- by whom and how selected, nominated, dispatched, to whom answerable, and so forth -- in addition to approval or confirmation by board resolution.[8]

Commerce's last references to the Interim Regulations are to Article 27, which provides that "state-owned enterprises are able to enjoy the rights of an investor in those companies in which they hold shares, consistent with the Company Law," and which Commerce concludes means "CISRI's independence from the government with regard to its decisions as an AT&M investor are protected by the Company Law from any government interference," and to Article 42, which provides that "organizational form, organizational structure, rights and obligations . . . shall be governed by the Company Law," and which Commerce declares it "has previously found to demonstrate the absence of *de jure* control." RR at 22. The court does not understand these points. Even if CISRI had obtained State Council approval as required by Article 27 to act as an investment company, holding company or investment institution, either in general or with specific respect to its state-owned equity in AT&M, *see* IR, Art. 27, *see also id.* at 12 & 20, it remains the case that SASAC is CISRI's sole owner and enjoys all of the rights over CISRI and over CISRI's investment in AT&M that inhere in shareholders under the Company Law -- which,

[8] *Cf.* Verification Report at 11 (providing cursory description(s) of management approval process). In that regard, it might not be unreasonable to deem such consideration unnecessary, *a fortiori*, if the only reasonable interpretation of the record on the issue of governmental control of AT&M's board is that only CISRI is relevant and only has "minority" power thereat and there is no other evidence of "governmental control," but those assumptions require re-examination. *See infra*.

in and of itself, is not demonstrative on the issue of *de jure* governmental control.

The Company Law rather appears neutral on that issue. As the DSMC point out, previous findings of the "absence" of *de jure* governmental control are mainly due to the significant rights the Company Law provides to *investors*, including the right to "enjoy the benefits of assets of the company, make major decisions, choose managers, *et cetera*, in accordance with the amount of capital they have invested in the company." *See* CL, Art. 4; *see*, *e.g.*, *Certain Cased Pencils From the People's Republic of China*, 59 Fed. Reg. 55625, 55628 (Nov. 8, 1994) (final LTFV determination) (finding significant the percentage of private individual shareholdings of respondent). In other words, where the government or its agency is the controlling investor, *de facto*, the Company Law does not *free* the investee from governmental control, it is being used to *subject* the investee to governmental control -- with or without (but especially given) the Interim Regulations. *See* DSMC Comments at 18. Indeed, Commerce admits as much, having in other instances looked to whether the government has exercised its *de jure* control *de facto*. *See Qingdao Taifa Group*, *supra*, 33 CIT at ___, 637 F. Supp. 2d at 1243 and determinations cited. That amounts to conflation of the *de jure* and *de facto* analyses, but here, at least, the court can agree Commerce's statement that the Company Law has been "found to demonstrate an absence of *de jure* control," *e.g.* RR at 22, is inadequate consideration of the DSMC's proposition, and it lacks, as above opined, common business sense.[9]

[9] Commerce appears to acknowledge much of the foregoing when it recast the DSMC's arguments in the original determination and on remand, *see*, *e.g.*, RR at 12–14, but Commerce's response seems based on numerous red herrings, such as the fact that minority shareholders have certain rights, *et cetera*. Rejecting all such fallacious argument, the court remains unclear as to what this all means in the larger context of Commerce's separate rate policy. For example, notwithstanding provisional reference in the Interim Regulations to corporeal "autonomy," *supra*, if SASAC is permitted to appoint and dispatch a "responsible person" pursuant to Articles 13 and 17 and directors pursuant to Article 22, then where is the bright-line "separation" of ownership and management that Commerce apparently perceives in such a circumstance? And what, if any, "interference" is there in action undertaken by such individual, once seated to such position, in the sense contemplated by Article 10 of the Interim Regulations, or Article 21 of the Corporate Governance Code to the same effect? Or, similarly, where is the "subordination relationship" ostensibly precluded by Article 26 of the Corporate Governance Code? *See also* note 10, *infra*. To the extent such person embodies SASAC's policies, objectives, and/or directives, how can the company's "independent" operation or interest be discerned, or has it rather been subsumed? As mentioned above, Commerce concluded that "SASAC *solely* provides oversight and is not intended to *direct* day-to-day business operation" (italics added), but how can that be the case if any SASAC-appointed/nominated "responsible person" or director or even manager within SASAC's "invested enterprises" (including "a company with State-owned equity," *i.e.*, AT&M) has had a hand or vote that results in "guiding" or "supervising" or "overseeing" any of such enterprise's operational activities including its export activities? That is, where does

C. Further Analysis of the Company Law

Commerce's analysis of the Company Law adds little to assuage the *de jure* issue of governmental control of a company through ownership. Commerce notes that Articles 16 and 20 of the Company Law allow state-owned enterprises to invest of their own accord in limited liability companies which, according to Commerce, ensures that the company will continue to operate under a "democratic management structure." RR at 23 (citation omitted). *See also* note 2. But, Article 20 simply provides in relevant part that "a state-authorized investment institution or a department authorized by the state may invest on its own to establish a wholly state-owned limited liability company." CL, Art. 20; *see also* RR at 23. On its face, this provision preserves state shareholding power by allocating state institutions, with appropriate governmental deputization, to create wholly state-owned companies in which the state's shareholding power is undiluted. It does not appear that this may reasonably be construed to "limit" the power of the state in the companies in which the state invests. Further, Commerce does not explain the significance of "ensure . . . a democratic management structure" or why such a "structure," *per se*, would be detached from governmental involvement. In the absence of clarity in the context of the separate rate test, this seems gratuitous.

Article 38 of the Company Law, which is implicated by the Interim Regulations, "delimits," according to Commerce, the exact powers that shareholders can hold. Commerce implies these are limited to "high level" powers only, such as the appointment of the board of directors, establishing the articles of association, and approving various financial decisions such as profit distribution and budget plans that are established by the board of directors. Commerce omits the ability "to decide on the company's operational policies and investment plans," but be that as it may, the court remains unclear why Commerce has concluded, in effect, that the Company Law restricts the PRC Government from implementation of its own Interim Regu-

"oversight" end and "day-to-day business operation" begin, or does the exception swallow the rule? And notwithstanding whether a controlling shareholder's board nominees are a minority of the board, based on whatever numerosity, if other board members also hold managerial offices within the company, then why does that not present a potential problem of subjugation that should be examined? To whom are such persons and controlling shareholder nominees answerable? And lest Commerce simply presume such persons to wear the kind of "separate hat" described in *United States v. Bestfoods*, 524 U.S. 51, 69 (1998), why would it be appropriate to project the operation of *U.S.* law onto the managerial operation of *PRC* companies, and how would that square with the presumption of state control that is supposed to be the context of the separate rate test in the first place? On the other hand, given the imprecise treatment of the issue thus far, and begging the parties' indulgence, at this point the court has little confidence these are even the right questions to ask in moving towards proper disposition of this matter.

lations and from becoming a company's controlling shareholder and acting in furtherance of such control of the company.

After analyzing various other provisions that basically support identification of limited liability companies as legal entities, Commerce concludes that "the Company Law *separates* the powers between the shareholders and the Board of Directors, where the primary purpose of the Board of Directors is to design plans related to business functions and to enact them as they are approved by the shareholders," and that Article 50 "provides for another degree of *separation*" by concentrating certain powers in the hands of a general manager. *Id*. (italics added). Once again, it is unclear what significance Commerce draws from this. The concern here is not over directorial liability,[10] and none of the points undermines or addresses the fact of CISRI as AT&M's controlling shareholder, or indicates that the operation of the board and general manager are "insulated" from the shareholders to the extent Commerce implies, or addresses in any way the fact that "shareholders representatives" may be, and often are, sitting as directors on the board itself.

Article 37 of the Company Law makes clear that the general meeting of all shareholders is the supreme organ of the company, as numerous legal commentators have noted. The boards of PRC limited liability companies are "responsible to the shareholders" pursuant to Articles 37 and 46. Shareholders have the ability to hire and fire each board member and decide their pay pursuant to Article 38, and each board member is thereby beholden. That amounts to delegation, as opposed to separation,[11] as does Article 50, since the general manager, in point of fact, is selected by the same board of directors "in charge of overall business planning and the selection of upper management" that is "responsible to the shareholders" and can readily be replaced at their whim. CL, Arts. 38, 50.

The point here is that "governmental control" in the context of the separate rate test appears to be a fuzzy concept, at least to this court, since a "degree" of it can obviously be traced from the controlling shareholder, to the board, to the general manager, and so on along the

[10] *But cf*. IR, Art. 38 ("Where, in violation of the relevant provisions, the State-owned assets supervision and administration authority . . . illegally interferes in the production and operation of the invested enterprises . . ." *et cetera*). Given that SASAC seems to have the authority to appoint or nominate a general manager in charge of operations, is the "illegal interference" of that provisional context rather with respect to any *SASAC* objective for production and operation?

[11] Taken as a whole, the PRC perspective of corporate ownership and management could be construed as rather in line with the general Anglo-Saxon jurisprudential view of corporations until the end of the 19th century, *i.e.*, that the board of directors is merely an agent of the company and its shareholders and serving at their pleasure. *See*, *e.g.*, *Isle of Wight Railway Co. v Tahourdin*, (1884) LR 25 Ch D 320.

chain to "day-to-day decisions of export operations," including terms, financing, and inputs into finished product for export. The other provisions of the Company Law generally cited by Commerce do not implicate shareholders in any clear way, or clarify why Commerce regards ownership and management as "separated" by the equivalent of a Great Wall, or what this all signifies, and its reading of general, hortatory language as limiting is perplexing. *See* RR at 22–23. For example, it is unclear why Commerce has determined that Article 6, which states that "a company implements an internal management structure," acts to "limit" the power of shareholders, in particular controlling shareholders, to influence that implementation or structure or what this implies. *See id*. at 23. To summarize: given that the separate rate test factors are not facially restricted to obvious "direct" control of export pricing, *e.g.*, via export licensing, the court, as mentioned, continues to be mystified as to why Commerce reflexively interprets the Company Law to *preclude* the PRC Government, *de jure*, from lawful control, *de facto*, through ownership of a company including its export operations. Repetition, to the point of mantra, that the Company Law "establishes an absence of *de jure* control," *et cetera* (*see* RR *passim*), does not transform incomplete analysis or *ipse dixit* conclusion.

D. Further Analysis of the Code of Corporate Governance

Commerce's analysis of the Code of Corporate Governance ("Code") also does not enlighten. The Code applies only to stock market listed companies such as AT&M, and Commerce cites it mainly for the proposition that majority shareholders' powers in the companies in which they invest are particularly limited. But, Commerce reading of certain provisions goes beyond their text and without explanation for broad interpretation. For example, a provision Commerce cites as protecting "the rights of all shareholders, including minority shareholders" contains the caveat that minority shareholders' rights and duties are "based on the shares that they hold." *Compare* RR at 24 *with* Code, Art. 2. And a provision Commerce cites as requiring complete separation between a listed company's personnel and its controlling shareholder in fact provides for listed company personnel to act as directors of the majority shareholder and *vice versa*. *Compare* RR at 24 *with* Code, Art. 23. The court fails to understand how Commerce interprets these provisions to curtail in any manner a controlling shareholder's *de jure* control of a company.

Commerce also relies on Article 20 of the Code for the proposition that "majority shareholders must consult with all shareholders to appoint senior management." RR at 24. Article 20 actually states that

"controlling shareholders are forbidden to appoint senior management by circumventing the shareholders' meetings or the board of directors." Apart from the fact that this provision conflicts with Commerce's reading of the Company Law and AT&M's articles of association, pursuant to which management is not appointed by the shareholders at all but by the directors, *compare* RR at 24 *with id.* at 23, it is unclear how Commerce reads Article 20 as effectively limiting the controlling shareholder's powers when, for example, the controlling shareholder could simply call[12] a shareholders meeting to comply with relevant provision(s).

Elsewhere, Commerce attempts to bolster its decision by citing Articles 22–27 of the Code as further confirming the independence of listed companies from their majority shareholders and further confirming AT&M's autonomy from CISRI. RR at 24–25. Articles 22 and 23, for example, state that a listed company (such as AT&M) shall be "separate" and "independent" from controlling shareholders in such aspects as personnel, assets, and financial affairs. But those concepts are not in a vacuum: when read as a whole, Articles 22–27 rather intend protections for minority shareholders by forbidding controlling shareholders from absconding with listed company assets, using listed company personnel to further the shareholders' own independent businesses, or engaging in business that competes with the listed companies' business, and such economic and fiduciary protections for minority shareholders do not appear to indicate why AT&M, *de jure*, is "independent" of its state-owned majority shareholder, which has the ability to nominate, hire or fire its directors, decide on profit allocations, *et cetera*. They thus reveal little to an inquiry into "governmental control" in the running of a company including its export operations.

E. Further Analysis of the AT&M Entity

The court also fails to understand from the evidence of record that AT&M's articles of association, the Code, and the Company Law create legal "barriers" separating AT&M and CISRI as concluded by Commerce. In addition to its analysis above, Commerce states that

[12] Moreover, it has been observed elsewhere that in practice the voting power of shareholders in PRC company shareholders' meetings is usually exercised by so-called "shareholders' representatives," who, for the controlling shareholder(s), is/are usually one or more of the directors of the company, so in such cases, when the board of directors signs its resolution and submits it to the shareholders' meeting for approval, the resolution has already been "approved" by the shareholders' meeting, since the controlling shareholder representatives/directors have already signed the resolution. *See*, *e.g.*, *Foreign Direct Investments in China -- Practical Problems of Complying with China's Company Law and Laws for Foreign-Invested Enterprises*, 20 NW. J. Int'l L. & Bus. 475, 486–87 (2000).

AT&M's articles require that nominees for the board of directors "may not be shareholders" and implies that shareholders are not permitted to be directors. *See* RR at 19. But, AT&M's articles of association only state that directors "need not be shareholders of the company."[13] That is not a barrier. Given CISRI's majority stake, this article rather appears to confirm CISRI's lawful control of AT&M's board. Commerce also finds significant that AT&M's "Board of Directors operates independently of the shareholders and is in charge of overseeing the business matters of the company," RR at 19, but, once again, even to the extent this *de jure* declaration is true, it is no indication of a controlling shareholder's *de jure* and *de facto* ability to "control" the board of directors and the company itself.

Ultimately, Commerce finds that AT&M is not "controlled" by CISRI because there are numerous other AT&M shareholders who all have "protected rights" as minority shareholders including voting rights. But facts drive the law, not *vice versa*. AT&M *itself* identifies its "controlling shareholder" as CISRI in its financial statements,[14] and the power to veto nomination does not equilibrate the power of control *over* nomination.[15] *See*, *e.g.*, *Metropolitan Washington Airports Authority v. Citizens for the Abatement of Aircraft Noise, Inc.*, 501 U.S. 252, 268–70 & n.15 (1991) (appointments under Transfer Act "*must*" be made be made from the lists submitted by the Speaker of the House; therefore, whether plaintiff has formal statutory power of appointment and removal over board of review is irrelevant) (italics in original); *Biloxi Regional Medical Center v. Bowen*, 835 F.2d 345, 352 (D.C. Cir. 1987) (any influence the "City" might exert through mayoral veto power "falls well short" of establishing "control" under 42 C.F.R. § 405.427(b)(3)).

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[13] BGY's Sep. 20, 2005 Supp. Q. Resp. at Ex. SA-10(1) (AT&M articles of association), Art. 96. *See also id*. at Art 29 (requiring directors to "regularly declare the number of shares he possesses"). And if the term had been "may not" instead of "need not," would that prohibit the appointment of "shareholder representatives" or other agents from becoming directors?

[14] *See*, *e.g.*, BGY Section A Comments at Ex. 7; Letter to Sec'y of Comm. from Greenberg, Traurig, re: *Diamond Sawblades and Parts Thereof from China: Supplemental Questionnaire Response* at Ex. 4, p. 19 (notes to 2004 financial reports, sec. VI) (Dec. 5, 2005).

[15] Furthermore, under Article 66 of AT&M's articles of association, only "eligible shareholders" -- whatever that means -- in addition to members of the board are permitted to "collect voting power." Given that the presumption is of state control, in the absence of proof to the contrary (and the court's review of the record did not reveal proof to the contrary) whoever is elected to the board will necessarily have received CISRI's approval for nomination. AT&M's board cannot "lawfully" act otherwise, *see* AT&M Art. of Assoc. 130, and this circumstance necessarily counters any inference of minority "control" that might otherwise be drawn from the requirement of unanimous voting, but if unanimity is still relevant, it may also be of some significance that voting is not anonymous at AT&M, *id*. Art. 83, although the remands results do not discuss this.

Curiously, Commerce acknowledges as part of its *de jure* analysis that "the Interim Regulations provide that SASAC may intervene in certain business operations" but then it "notes that there is no record evidence that SASAC acted upon this power and intervened in the selection of management and board members." RR at 21. Apart from this further conflation of *de facto* and *de jure* analysis and evisceration of the presumption of state control in "the selection of . . . management," *et cetera*, the administrative proceeding does not appear to have advanced to such a state that the onus had shifted to the DSMC on that burden.[16] *Cf.*, *e.g.*, *Certain Paper Clips From the People's Republic of China*, 59 Fed. Reg. 51168, 51170 (Oct. 7, 1994) (final LTFV determination) (management nomination meeting minutes, appointment announcements and correspondence between respondent and state established that state involvement in respondent's management appointment process "reflects nothing more than an administrative formality").

Apart from *de jure* control, the overriding question is whether there is *de facto* governmental control over export operations. As above indicated, Commerce recognizes that scrutiny of board and management is critical to that inquiry. In the original final results and on remand, Commerce found four of the nine AT&M directors representatives of CISRI. One of those is AT&M's chairman of the board. Commerce also found five directors not "involved in CISRI's business functions in any way" during the POI. The record excerpts provided by the parties, however, do not evince information that would permit construal to the extent of the latter.[17]

The verification report for AT&M notes that two of the "non-CISRI" directors consisted of AT&M management, including the company's chief executive officer. Verification Report at 9 (Mar. 26, 2006). The DSMC argue the verification report actually proves at least one of

[16] As argued by the DSMC, albeit in the context of the absence of record information showing how CISRI's board members or managers were actually selected during the POI: In a situation in which the burden of proof is upon respondent to show a lack of state control (or, in this case, upon the agency to demonstrate that its determination of no state control is reasonable) a lack of record information regarding control cannot logically be adduced to show that the presumption has been rebutted.
DSMC Comments at 16–17. At this point it would also seem appropriate to note the original determination's criticism, *supra*: "The information submitted by Petitioners addresses a theoretical control by SASAC over CISRI, rather than any control over the PRC Government at any level over the numerous individual export decisions of the AT&M entity that took place during the POI." I&D Memo at Comment 16(C). The statement's first part is precisely what *de jure* analysis is all about -*theory*, of *meaning* -- and the second part is precisely of which the DSMC complain -- burden-shifting.

[17] The remand results reference Exhibit SA-11 of BGY's supplemental questionnaire response dated September 20, 2005 as support for the assertion, which concerns "Ownership of AT&M" and reveals nothing of significance regarding board membership, although the record also contains the verification report for AT&M and BGY.

those is also connected to CISRI *See*, *e.g.,* DSMC Comments n.2. The report also notes that the three other "non-CISRI" directors are "independent," in that they are "subject to approval by the independent stock exchange committee which will establish their independence." The remand results, however, do not delve into detail and thus do not resolve whether any of such individuals embody "governmental control."

Commerce's analysis of AT&M's board focuses only on CISRI's ability to control it. *See* RR at 19. If the proper analysis concerns "governmental control" of AT&M's board, it is unclear from this last statement or from the report itself whether the three "independent" directors are free of such governmental control *in toto*. *Cf.* Verification Report at 8 ("companies' conduct is supervised by the independent China Stock Exchange Committee"). BGY declared that none of its board members are "employed by" the PRC Government and it further declared that none of the AT&M entity companies are affiliated, owned, or controlled by "individuals employed by" the PRC Government, BGY's Sep. 20, 2005 Supp. Q. Resp. at 2, 6, 8, but apart from this and the statements of company officials at verification, the court does not discern corroboration of "independence" from "governmental control" of the five "non-CISRI" directors. Their independence seems assumed.

Regarding the two directors who are also members of AT&M management, the DSMC also raise a second legitimate concern. In their managerial capacity, those AT&M members appear on the record, *de facto* as well as *de jure*, to be beholden to the board that controls their pay, in particular to the chairman of the board as the *de facto* company head under the PRC model. If board members are properly presumed subject to governmental control, directly or indirectly, then true independence and autonomy remain in doubt until proven otherwise. If they are not so presumed, then the presumption of state control is without purpose or application. Examination of subjugation, therefore, ought to have been a necessary extension of any inquiry into "governmental control," a question not to be conflated with any *de jure* directorial obligations. *Cf.*, *e.g.*, Code, Art. 23 ("[a] listed company shall be separated from its controlling shareholders in such aspects as personnel") *with* Art.33 ("[d]irectors shall faithfully, honestly and diligently perform their duties for the best interests of the company and all the shareholders").

It may well be the case that there is evidence of record from which these five directors true independence from governmental control may reasonably be concluded, but the remand results, arguments, and record excerpts provided by the parties do not appear conclusive

to this point. The court was tempted to revive and grant, *sua sponte*, DSMC's motion for oral argument, as the parties might be able to provide assistance, but in view of the resources this would have consumed and the fact that remand is required on other ground, the court considers that such questions are better left for Commerce and the parties to address on remand.

F. Further Defendant Commentary

The defendant would here disagree, with all of the foregoing, in arguing that the separate rate analysis is not simply a "litmus test for government influence in general" but is rather a "particularized analysis" of a company's export activities. The separate rate test purports to "focus[ ] on *controls* over the decision-making process on export-related investment, pricing, and output decisions at the individual firm level," Import Policy Bulletin 05.1 (italics added), and the defendant argues this means an examination of the "degree" to which those activities are "controlled" by a government or by the company itself. Def's Resp. at 6. The test "does not purport to ensure that no government interests are promoted through the exporter's business venture, but rather serves to ensure that the Government of China *itself* is not controlling the day-to-day export activities of the exporter in question." *Id.* at 6–7 (italics added).

Unfortunately, this does not clarify. The Interim Regulations, for example, provide for more than mere "influence in general." *See supra*. Nonetheless, the defendant argues that when all is said and done, the question is simply concerned with price variability: is the price of the diamond sawblades that AT&M exports to the United States "set by" the PRC Government or by AT&M; in other words, "does the price of AT&M's diamond sawblades exports to the United States by AT&M vary depending on world market conditions or is the price set and orchestrated by the PRC Government and only responds to changes ordered by the central government?" Def's Resp. at 11. But this too does not clarify, as those concepts are not mutually exclusive. The price of an arm's length transaction to a buyer in the market is always a "market" transaction by definition, and regardless of any "setting" of or involvement in price by the seller's government. *See*, *e.g.*, Case C-337/09, Judgment of the Court, ¶ 86 (Grand Chamber, European Court of Justice) (July 19, 2012).[18] For that matter, the actual setting of price is only one of the four *de facto* factors described in the Policy Bulletin, whereas governmental manipulation of the

[18] Available at http://curia.europa.eu/juris/document/document.jsf?text=&docid=125218&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=375494 (last visited this date).

cost of inputs, *see id.*, or rationalization of industry or output are among numerous other scenarios of concern that can affect seller pricing.

In the end, the defendant concludes: "[b]ecause there is no record evidence indicating that the [PRC] Government . . . sets the price of the diamond sawblades exported by AT&M, Commerce correctly assigned AT&M a separate rate." Given the presumption of state control, however, the reviewing standard requires record evidence that the PRC Government (including any agent thereof) did *not* "set" (however defined) the price of diamond sawblades exported by AT&M. That still remains in doubt. The obvious instance of governmental control of price setting would be direct regulatory approval of a particular export price, but to what extent does the inquiry also concern governmental "influence" in what might otherwise appear to be the company's decision? The court cannot agree that is irrelevant. The question to Commerce might thus be better phrased as follows: what is the agency's definition of the "degree"of "governmental control" in the "setting" of export prices that must *not* be shown in order for an applicant to receive a separate rate, and where is the line drawn to exclude or include implementation of governmental influence or policy? After all, personnel is policy: it is axiomatic that inert entities (*e.g.*, corporations, governments) can only *act* through agency,[19] concerning which "state" of affairs even socialistic European cousins recently expressed a certain misgiving (without irony):

> [I]n the context of a non-market economy country, the fact that a company established in that country is *de facto* controlled by State shareholders raises serious doubts as to whether the company's management is sufficiently independent of the State to be able to take decisions regarding prices, costs and inputs autonomously and in response to market signals.

Id.

For the above reasons, the court remains unclear as to the extent of "governmental control" that would preclude, or lack thereof permit, the grant of a separate rate, particularly with regard to the third and fourth *de facto* factors, as previously pondered. *See* Slip Op. 11–122 at 24. Specifically, it is unclear what the defendant means by "degree" or what Commerce means by "control," "separate," "autonomy," "independent," and so forth in the context of the separate rate policy, and one that lacks clarity in purpose or application borders on arbitrary and capricious. Whatever "degree" that is, Commerce's use of such terms to describe ownership and management in the context of this

[19] Louis XIV cut to the chase: "*l'Etat, c'est moi*."

matter leads to confusion,[20] but it is at least clear that apart from the camel's nose of "guidance" or "oversight," Commerce concludes there is *no* degree of "control" or influence whatsoever by SASAC over CISRI or AT&M or by CISRI over AT&M, and that appears to be based on flawed analysis. The court must therefore await Commerce's reasonable explanation and analysis of "controls over the decision-making process on export-related investment, pricing, and output decisions at the individual firm level," as previously requested. *See* Import Policy Bulletin 05.1.

G. Further Analysis of Governmental Control Over AT&M's Finances

The DSMC also argue the evidence in support of AT&M's right to distribute its profits without government interference is similarly lacking. RR at 8; *see also* BGY's Sep. 20, 2005 Supp. Q. Resp. at Ex. SA-5. The court agrees in part. The evidence includes the records of a board meeting at which all discussions of profit distribution were explicitly accompanied by the caveat: "This resolution should be approved by the Shareholder's Meeting." *Id*. AT&M's controlling shareholder was CISRI, and shareholders' voting power is in proportion to their shares. *See id* at Ex. SA-10(1), Art. 35 & Ex. SA-11; *see also* BGY Section A Comments at Ex. 7. The DSMC are correct in pointing out that CISRI had the power over any profit distribution regardless of what the board of directors decided. However, the defendant is also correct in pointing out that CISRI's portion of AT&M's allocated profits is consistent with CISRI's role as a shareholder entitled to a proportionate share of the profits.

On the other hand, the defendant argues too narrowly that this "does not suggest or establish government control upon AT&M's export activities, nor did Commerce's review of the board minutes from the relevant AT&M's board meeting suggest any government control over export activities. Remand Redetermination at 8. The DSMC's larger point here is that the financial statements to which Commerce cites are only balance sheets, without auditor's notes or other detail, *cf*. RR at 8 *with* BGY's Sep. 20, 2005 Supp. Q. Resp. at Ex. SA-22, and more complete versions that AT&M submitted in a later response clarify that CISRI had significant [[ ]]. *See* BGY's Dec. 5, 2005 Supp. Q. Resp. at Ex. 4, p.48 (Notes to Main Items of Parent Company Financial Report

[20] For example, in addition to the foregoing, the finding that shareholders *lack* control over the board concerning their decisions including selection of management and distribution of profits appears to conflict with the finding that shareholders *have* control over the board in the form of veto power over CISRI's nominations thereto. For that matter, the remand results also give no indication that any *de jure* provisions permitting boards that include "shareholders representatives" were considered. *Cf*. note 12, *supra*.

at Item 23); *see also id*. at Ex. 2 (Footnotes, Section V.27 and XI.3). The DSMC thus contend this indicates AT&M's [[

]]. *See id*. at Ex. 4, p.48; *id*. at Ex. 2 (Footnotes, Section V.27 and XI.3). *Cf*. Import Policy Bulletin 05.1 ("the test focuses on controls over the decision-making process on export-related *investment*" *et cetera*) (citations omitted; italics added). That, of course, implicates profits and losses, because money is fungible. Therefore, in addition to the foregoing, Commerce will consider (or reconsider) and address the DSMC's specific concerns on these points on remand, bearing in mind the presumption of state control.[21]

IV. Conclusion

The court appreciates that Commerce labors under constraints, administrative and other, wise or not, in reaching determinations entitled to a presumption of administrative regularity,[22] but at this point the results may not be sustained on the bases articulated by

[21] In passing, the court also notes that in response to Slip Op. 11–122, Commerce distinguished the separate rates test as "unlike" the affiliation/collapsing test on the ground that the latter is premised on shareholders' ability to control a respondent's *future* acts, whereas the separate rates test is focused on evidence of control being exercised on *current* acts during the period of investigation or review. RR at 17–18 (the separate rate test "then prospectively applies to the results of this analysis until the next review period"). The DSMC point out that Commerce in 1997 explained that the purpose of the separate rates test is to "prevent an NME government from *later* circumventing an antidumping order by controlling the flow of subject merchandise through exporters which have the lowest margin[,]" which is clearly an implication of future behavior. *See Certain Cut-to-Length Carbon Steel Plate From Ukraine*, 62 Fed. Reg. 61754, 61757–60 (Dep't Commerce Nov. 19, 1997) (final determination of sales at less than fair value) (italics added). Furthermore, the DSMC contend, if the current results are allowed to stand, there will be no future review period since the results are *de minimis*. AT&M comments that the policy bulletin "made even more apparent" that it is not the ability to shift sales among companies, as in the collapsing methodology, that is the basis of denying a separate rate, but is rather the independence from government control with regard to export activities. AT&M Comments at 4–5. At this point, the court regards the discussion as academic. Whatever their motivation, both tests obviously overlap on such matters as level(s) of ownership, the extent to which companies are directed by the same employees or board members, and interdependency of intertwined operations such as through involvement in production and pricing decisions or financing, *et cetera*. *Cf*. 19 C.F.R. § 351.401(f) *with Sparklers*, *supra*, 56 Fed. Reg. at 20589 (respondent's argument "that there is no evidence of *coordination* among the companies on such matters as price setting, market division, and production practices") (italics added). As to the DSMC's other concern, of whether there will be a future review period, they are, of course, aware that the court is bound to let the chips must fall where they must.

[22] Cool and deliberate, true judgment is tied to the mast and impervious to seductive song. *But cf*., *e.g.*, *An Analysis of State-owned Enterprises and State Capitalism in China* at 3, 92 (U.S.-China Economic and Security Review Comm., Oct. 26, 2011) (italics added):

> When it joined the WTO in 2001, China promised that the government would not influence, directly or indirectly, the commercial decisions of [state-owned enterprises

Commerce. Remand is therefore necessary for reconsideration and clarification in accordance with the foregoing. As to what that implies for purposes of remand, no opinion is here expressed, except that the court emphasizes it is not here substituting judgment for that of Commerce on these issues or insisting upon application of the separate rates test in a certain wayin contravention of *Arkansas v. Oklahoma*, 503 U.S. 91, 113 (1992). The court simply seeks to discern the reasonableness of a determination, and the wisdom to do so. If necessary, upon remand Commerce may re-open the administrative record to gather additional information.

Analysis of 30CrMo Steel Plate Valuation

I. Background

In the original final results, based upon certain verification report exhibit records Commerce calculated the surrogate values for the AT&M entity's 30CrMo steel plate inputs for the manufacture of diamond sawblade cores using Indian Harmonized Tariff Schedule provisions covering alloy steel plate both above and below 600mm wide, in a variety of thicknesses,. *See* RR at 11–12; *see also* I&D Memo at 74. This decision was voluntarily remanded.

("SOEs")]. China does not appear to be keeping this commitment. *The state does influence the commercial decisions of SOEs* and the most recent five-year guidance does not herald a change in this regard. If anything, China is doubling down and giving SOEs a more prominent role in achieving the state's most important economic goals.

* * *

The [PRC] government's prominent economic role, coming a decade after China joined the WTO, throws into doubt expectations that China's WTO membership would lead it to pull back from market interventions. The back-and-forth between China's representative and the Working Party [of the WTO] on China's accession [to the WTO] is memorialized in the Working Party Report. As the following text from the report demonstrates, China itself encouraged these expectations:

> The representative of China further confirmed that China would ensure that all state-owned and state-invested enterprises would make purchases and sales based solely on commercial considerations, *e.g.*, price, quality, marketability and availability, and that the enterprises of other WTO Members would have an adequate opportunity to compete for sales to and purchases from these enterprises on non-discriminatoryterms and conditions. In addition, the Government of China [promised it] would not influence, directly or indirectly, commercial decisions on the part of state-owned or state-invested enterprises, including on the quantity, value or country of origin of any goods purchased or sold, except in a manner consistent with the WTO Agreement.

The Working Party took note of these commitments. But given the strong state direction embodied in the 12th Five Year Plan, as well as the incentive structure facing the leaders of China's SOEs, it is clear that SOEs will continue to be driven by government policies. . . ."

II. Summary of Remand and Results

On remand, Commerce accepted the AT&M entity's arguments and recalculated the 30CrMo steel input based only upon Indian HTS categories covering steel plate of widths of 600mm-and-greater and rejected using the two categories for below-600mm. *See* RR at 11. Commerce justified this result on the ground that the "raw material purchase documentation for 30CrMo steel plate on the record only shows that the AT&M Entity purchased it in widths of either 1210mm or l050mm," and on the ground that it its verification team was provided a worksheet by company officials "demonstrating the total purchases of steel during the POI," from which the team noted "the purchases of 30CrMo were clearly for steel sheets with dimensions listed on the invoices." *Id*. at 2627, referencing Verification Report at 27 & Ex. 12, and BGY's Nov. 3, 2005 Supp. Q. Resp. at Ex. SD-4, 16–17. Commerce found that "the measurements in the column in the inventory-out log refer to the diameters of the finished product being produced from the 30CrMo steel which was withdrawn, as opposed to the widths of the 30CrMo steel plate input itself." *Id.* at 27.

III. Discussion

This decision is not fully explained, and the record evidence upon which Commerce relies does not fully support its conclusion. In large part, the analysis contradicts, without adequate explanation, Commerce's analysis of record documents for similar inputs. The record indicates that neither the invoices nor the other purchase documents on the record reflect all of the steel plate that the AT&M purchased during the POI, therefore the fact that the record does not contain invoices showing the purchase of 30CrMo steel less than 600 mm wide is not dispositive of whether such goods were purchased. The referenced Exhibit 12, *supra*, consists in part of two pages of a purchase subpedger memorializing purchases of steel plate in two non-consecutive months during the POI, plus an invoice for 30CrMo steel matching to the first entry on the first page of the subledger. No invoices are provided to match the entries on the second page of the subledger. The DSCM also pointed out that the 30CrMo steel purchase documents provided in AT&M's questionnaire response do not match, in either quantity or value, any of the entries on the purchase subledgers. Thus, it would appear that the subledger pages on the record do not reflect all of AT&M purchases of steel plate and that the invoices and other purchase documents on the record do not account for all such purchases. As such, the DSMC correctly argue that it is unreasonable for Commerce to rely on the above purchase record

evidence to find that "no" purchases of sheet under 600 mm wide occurred and remark that the record is "bereft" of any indication that BGY purchased 30CrMo steel in widths under 600mm, *see infra*, when other record evidence may be readily construed to indicate that such purchases were in fact made.

The DSMC argue it is "highly unlikely" that the dimensional values in AT&M's inventory out-logs represent finished diamond sawblade widths as found by Commerce, rather than the width of the input steel. The DSMC in particular point to the fourth line item of the raw material subledger referencing a particular quantity -- to the hundredth kilogram -- of 30CrMo steel and its amount in renminbi. *See* Ex. 12, *supra*, at 7. Because the inventory-out record, Ex. 12 at 11, records the removal of exactly those same amounts, it would seem clear, as the DSMC argue, "that the inventory-out record refers to the same 30CrMo steel as the raw material subledger." Commerce accepted AT&M's explanation that the dimensional values described in the inventory-out record reflect those not of the 30CrMo steel input but to the dimensions of the end product. The DSCM contend AT&M has not explained why it would record the dimensions of as-yet-unproduced finished goods in its raw material inventory records.

The DSMC also argue AT&M has conceded that the dimensional values recorded in its inventory logs reflect the dimensions of input steel, not output cores. Commerce confirmed that AT&M uses 65Mn steel plate in widths under 600 mm by comparing a subledger showing the purchase of a particular quantity of that steel in kilograms with an inventory-in log showing the placement of that quantity of steel into inventory. I&D Memo at 74; *see also* Ex. 12, *supra*, at 1, 4. The purchase subledger did not indicate the dimensions of the purchased steel. *See* Ex. 12 at 1. However, like the inventory-out log, Ex. 12 at 11, this inventory-in log contained a second column with dimensional values. *See id*. at 4, 11. On the basis of these, Commerce determined that the AT&M entity purchased 65Mn steel in dimensions less than 600mm wide. I&D Memo at 74. And in its motion brief for judgment, the AT&M entity relied on the "validity" of this determination to support its arguments, apparently since abandoned,[23] on

[23] In their Rule 56.2 brief, AT&M also assigned error on the Indian HTS categories used in the original determination as surrogate values for its 65Mn steel. In the preliminary determination, Commerce valued the AT&M entity's 65Mn steel using an average of Indian HTS categories 7209.16,20, 7209.16,30, and 7209.16,50. The DSMC argued in their rebuttal brief that the facts of record justified using only Indian HTS 7211.29.50. Commerce agreed in part. For the final determination, Commerce dropped using HTS 7209.16,20, 7209.16,30, and 7209.16,50, and instead used 7211.29.50 -- as well as 7209.25.20, 7209.25.30, 7209.26.20, 7209.27.20, and 7209.27.30. Commerce reasoned these changes because "there was no information on the record to support the continued use of HTS numbers 7209.16.20 and 7209.16.30, as all items in inventory for 65Mn steel listed in BGY Verification Report at Exhibit 12, as well as invoices provided in BGY's second supplemental response dated

the proper valuation of 65Mn steel. AT&M's Brief at 42. This, the DSMC contend, indicates AT&M's concession that the dimension values recorded in its inventory logs reflect the dimensions of input steel, not output cores.

Even apart from that, the DSMC contend, the original determination regarding 65Mn steel and the remand determination for the 30CrMo steel creates a logical contradiction that Commerce has not addressed. Commerce found that with respect to inventory-out records for 30CrMo steel, the second column reflects the dimensions of as yet unproduced finished goods. *See*, *e.g.*, RR at 11–12, 26–27. But, the record also contains inventory-out records for 65Mn steel plate, with dimensional values matching to those seen in the inventory-in records for the same type of steel. Verification Report, Ex. 12 at 4, 9–10.

Commerce dismissed the DSMC's argument with the following:

> [S]imply because some measurements overlap does not mean that any definitive conclusions can be drawn from such observation and then applied to the 30CrMo steel input. The inventory-in records for 65Mn steel clearly show purchases of less than 600mm in width, indicating BGY purchased this input in widths closer to the diameters of the finished product than it did for 30CrMo steel. In contrast, the record is absolutely bereft of any indication that BGY purchased 30 CrMo steel in widths under 600mm.

RR at 27.

At this point the court must ponder why the dimensions of input steel are recorded in both the inventory-in and inventory-out records for 65Mn steel but not for 30CrMo steel, but cannot speculate. The DSMC also point out that the fact that the dimensions recorded in the second column of the 65Mn inventory-in and inventory-out records *match exactly* tends to discount the argument that the inventory-out records show the dimensions of finished cores, because an exact match between the figures would seem to leave no room for scrap or error whatsoever in cutting cores from the input plates. The court

December 5, 2005, are coils in widths less than 600 mm." I&D Memo at 74. In its 56.2 brief, AT&M pointed out that HTS heading 7209 covers "flat-rolled products of iron and non-alloy steel, of a width of 600 mm or more, cold-rolled (cold-reduced), not clad, plated or coated" while HTS heading 7211 covers "flat-rolled products of iron and non-alloy steel, of a width less than 600 mm, not clad, plated or coated," and argued that Commerce's refusal to use HTS 7209.16.20 and 7209.16.30 on the ground that the categories were for steel of 600 mm and above but adoption of five other categories under HTS 7209 which were for 600 mm and above is contradictory and unsupported by substantial evidence or plain logic and therefore required reconsideration. As mentioned, AT&M appears to have since abandoned this argument. *Cf.* Pls' Reply to Def. and Def-Int's Opp. to Pls' Rule 56.2 Mot. for J. on the Agency Record at 5–8.

must therefore agree with the DSMC that this situation appears to be more than mere "overlap" -- after all, the -in and -out 65Mn steel records and the 30CrMo steel records are formatted nearly identically and record what appears to be the same kinds of information, including dimensional values. *See* Verification Report, Ex. 12 at 4, 6, 9–11.

IV. Conclusion

For the above reasons, the matter of the 30CrMo steel inputs valuation will also be remanded for further explanation or reconsideration.

A separate and confidential order of remand to the above effect will be issued herewith.

Dated: November 30, 2012
New York, New York

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

Slip Op. 12–148

UNITED STATES, Plaintiff, v. NJC INTERNATIONAL, INC., and DWAYNE HOARD, Defendants.

Before: Jane A. Restani, Judge
Court No. 09–00006

[Plaintiff's motion for summary judgment against Defendant Dwayne Hoard in Customs penalty action granted. Default judgment entered against Defendant NJC International, Inc.]

Dated: December 6, 2012

Delisa M. Sanchez, Trial Attorney, Commercial Litigation Branch, Civil Division, U.S. Department of Justice of Washington, DC for plaintiff. With her on the brief were *Stuart F. Delery*, Acting Assistant Attorney General, *Jeanne E. Davidson*, Director, and *Patricia M. McCarthy*, Assistant Director. Of counsel on the brief was *Suzanne N. Almetica*, Assistant Counsel, Office of the Associate Chief Counsel, U.S. Customs and Border Protection.

Dwayne Hoard, *Pro se*, of Monroe Township, NJ.

OPINION

Restani, Judge:

This is a 19 U.S.C. § 1592 penalty action over which the court has jurisdiction under 28 U.S.C. § 1582. Default was entered against Defendant NJC International, Inc. ("NJC") on September 16, 2011. Defendant Dwayne Hoard ("Hoard") answered the complaint but failed to respond to plaintiff's motion for summary judgment of Au-

gust 9, 2012. On October 23, 2012, the court ordered Hoard to show cause why judgment should not be entered against him. Hoard has failed to respond to the order.

The complaint alleges that NJC was the importer of record on six entries made between January 7, 2004, and March 24, 2004, with an entered value of $58,263.00. Following the requisite administrative proceedings, the U.S. Customs and Border Protection ("CBP") found gross negligence and demanded payment of $23,305.20 (40% of the entered value) from NJC and its principal officer, Dwayne Hoard, which sum remains unpaid. The entered goods are alleged to be textile products from China subject to quota requirements, which were falsely declared to be of Hong Kong origin. Plaintiff alleges further that Hoard knowingly participated in the falsehood.

Hoard's answer generally asserts no knowledge of the specifics of the entries and denies any wrongdoing. If the allegations of the complaint are accepted as true, however, plaintiff has established its claim against Hoard and NJC. Further, plaintiff has set forth in its motion for summary judgment the evidence it would submit to establish its claim against Hoard. Such uncontradicted evidence would warrant judgment against defendants.

The court finds that by failing to respond to the court's order to show cause Hoard has waived any right to further hearing, and NJC has previously been found to be in default. Accordingly, judgment will be entered jointly and severally against the two defendants for the sum certain claimed by plaintiff, together with post-judgment interest, as requested, and costs.

Dated: December 6, 2012.
New York, New York.

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

Slip Op. 12–149

FISCHER S.A. COMERCIO, INDUSTRIA AND AGRICULTURA AND CITROSUCO NORTH AMERICA, INC., Plaintiffs, v. UNITED STATES, Defendant, and FLORIDA CITRUS MUTUAL, AND CITRUS WORLD, INC., Defendant-Intervenors.

Before: Nicholas Tsoucalas, Senior Judge
Court No.: 11–00321
PUBLIC VERSION

Held: Plaintiffs' Motion for Judgment on the Agency Record is denied because the final results of the Antidumping Duty Administrative Review issued by the Department of Commerce were supported by substantial evidence and were otherwise in accordance with the law.

Dated: December 6, 2012

Kalik Lewin, (*Robert G. Kalik* and *Chelsea S. Severson*) for Fischer S.A. Comercio, Industria and Agricultura and Citrosuco North America, Inc., Plaintiffs.

Stuart F. Delery, Acting Assistant Attorney General; *Jeanne E. Davidson*, Director, *Patricia M. McCarthy*, Assistant Director, Commercial Litigation Branch, Civil Division, United States Department of Justice (*Joshua E. Kurland*); Office of Chief Counsel for Import Administration, United States Department of Commerce, *Mykhaylo Gryzklov*, Of Counsel, for the United States, Defendant.

Barnes, Richardson & Colburn, (*Matthew T. McGrath* and *Stephen W. Brophy*) for Florida Citrus Mutual and Citrus World, Inc., Defendant-Intervenors.

OPINION AND ORDER

TSOUCALAS, Senior Judge:

INTRODUCTION

This matter comes before the court upon the Motion for Judgment on the Agency Record filed by Fischer S.A. Comercio, Industria and Agricultura and Citrosuco North America, Inc. ("Fischer" and "Citrosuco," respectively, and "Plaintiffs" collectively). Plaintiffs contest certain determinations made by the United States Department of Commerce, International Trade Administration ("Commerce") in *Certain Orange Juice from Brazil: Final Results of Antidumping Duty Administrative Review, Determination Not To Revoke Antidumping Duty Order in Part, and Final No Shipment Determination*, 76 Fed. Reg. 50,176 (August 12, 2011) ("*Final Results*"). Commerce and defendant-intervenors, Florida Citrus Mutual and Citrus World, Inc., oppose this motion. For the reasons set forth below, the court finds that Commerce's determinations are supported by substantial evidence and are otherwise in accord with the law.

BACKGROUND

On March 9, 2006, Commerce issued an antidumping order on certain orange juice from Brazil. *See Antidumping Duty Order: Certain Orange Juice from Brazil*, 71 Fed. Reg. 12,183 (Mar. 9, 2006). At Fischer's request, Commerce initiated an administrative review of the order for the period beginning March 1, 2009 and ending February 28, 2010. *See Initiation of Antidumping and Countervailing Duty Administrative Reviews and Request for Revocation in Part*, 75 Fed. Reg. 22,107 (Apr. 27, 2010).

During the preliminary review, Commerce requested certain information from Fischer in order to calculate the normal value ("NV") [1] and export price ("EP") [2] of the subject merchandise. Commerce requested that Fischer report information on "all sales of the foreign like product during the three months preceding the earliest month of U.S sales, all months from the earliest to the latest month of U.S. sales, and the two months after the latest month of U.S. sales." Memo from Analyst/IA to File (Apr. 28, 2010), Public Rec. 14 at § B.II.A. [3] This request included information on sales occurring during the period of review ("POR") as well as sales from the so called "90/60-Day Window Period" ("Window Period"), as defined in 19 C.F.R. § 351.414(f) (2012). [4] P.R. 14 at § B.II.A. The Window Period stretches up to three months prior to and two months after a month without comparable home market sales. 19 C.F.R. § 351.414(f)(2), (3). Accordingly, Fischer provided information on home market sales that occurred during the POR as well as sales outside the POR during the Window Period. *See* P.R. 63 Ex. 4.

Additionally, Commerce requested information on Fischer's international freight expenses. Fischer reported that its affiliate, Citrosuco, paid $[[ ]]/MT for shipments to the U.S. during the POR, comprised of a base freight rate of $[[ ]]/MT and a bunker fuel

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[1] "Normal Value" refers to "the price at which the foreign like product is first sold (or, in the absence of a sale, offered for sale) for consumption in the exporting country, in the usual commercial quantities and in the ordinary course of trade and, to the extent practicable, at the same level of trade as the export price or constructed export price." 19 U.S.C. § 1677b(a)(1)(B)(i) (2006).

[2] "Export Price" refers to the "price at which the subject merchandise is first sold (or agreed to be sold) before the date of importation by the producer or exporter of the subject merchandise outside of the United States to an unaffiliated purchaser in the United States or to an unaffiliated purchaser for exportation to the United States." 19 U.S.C. § 1677a(a).

[3] Hereinafter all documents in the public record will be designated "P.R." and all documents in the confidential record designated "C.R." without further specification except where relevant. Additionally, the abbreviation "I.A." will refer to portions of the confidential and public records filed in Commerce's electronic filing system, I.A. Access.

[4] At the time Plaintiffs submitted their brief, this provision was located at 19 C.F.R. § 351.414(e)(2). As part of the amendments to the regulation effective April 16, 2012, the regulation was moved but the provisions remain unaltered.

surcharge of $[[ ]]/MT. *See* P.R. 71 Ex. 3. Fischer also reported that its affiliate [[ ]] operated most of the vessels that transported subject merchandise to the U.S. *See* P.R. 104 at 1. Per Commerce's request, Fischer provided a Sea Transport Service Agreement ("STS Agreement") between Fischer's affiliated shipper and a third party, [[ ]]. *See* P.R. 55 Ex. 9. Fischer also provided an invoice from that agreement dated within the POR indicating that [[ ]] charged [[ ]] $[[ ]]/MT, comprised of a base freight rate of $[[ ]]/MT and a bunker fuel surcharge of $[[ ]]/MT. *Id.* Ex. 8.

Commerce released the preliminary results of the administrative review on April 7, 2011. *See Certain Orange Juice from Brazil: Preliminary Results of Antidumping Duty Administrative Review and Notice of Intent Not To Revoke Antidumping Duty Order in Part*, 76 Fed. Reg. 19,315 (Apr. 7, 2011) ("*Preliminary Results*"). Commerce determined that Fischer's shipping arrangement was "not at arm's length," and selected the $[[ ]]/MT rate from the STS Agreement as a surrogate rate from which to calculate Fischer's international freight expenses. *Id.* at 19,318. Commerce used the resulting value to reduce EP of the subject merchandise pursuant to 19 U.S.C § 1677a(c)(2)(A). *See Preliminary Results*, 76 Fed. Reg. at 19,318. Additionally, for months of the POR with no comparable home-market sales, Commerce calculated a constructed value ("CV") as a substitute for NV pursuant to 19 U.S.C. § 1677b(a)(4). *Id.* at 19,317. Commerce determined the profit component of the CV calculation using information from the Window Period sales that occurred outside the POR. *Id.* 19,317; P.R. 103 at 17. Commerce determined Fischer's weighted-average dumping margin ("WADM") to be 3.96%. *Preliminary Results*, 76 Fed. Reg. at 19,321.

Following the *Preliminary Results*, Fischer submitted a case brief raising three issues: (1) the inclusion of the bunker fuel surcharge in the surrogate freight rate when calculating international freight expenses, (2) the use of zeroing to calculate WADM, and (3) the use of sample sales to calculate profit ratio for not-from-concentrate orange juice. *See* P.R. 116 at iii.

On August 12, 2011 Commerce issued the final results of the review. *See Final Results*, 76 Fed. Reg. 50,176. Commerce lowered Fischer's WADM to 3.97%, *id.* at 50,178, but specifically rejected Fischer's arguments concerning zeroing and the bunker fuel surcharge. *See Issues and Decision Memorandum for the Antidumping Duty Administrative Review on Certain Orange Juice from Brazil*, Inv. No. A-351–840 (Aug. 5, 2011) at 4–8, 23–24 ("*I&D Memo*").

After Commerce released the *Final Results*, Fischer filed ministerial error comments with Commerce. *See* I.A.P.R. 17. Fischer contended that Commerce "committed a ministerial error when it neglected to include specific programming language in its [Analysis of Comparison Market Sales] to exclude home market sales occurring outside the [POR]." *Id.* at 3. Concluding that Fischer's comments did not actually concern a ministerial error, Commerce did not amend its calculation. *See* I.A.P.R. 19 at 2.

Plaintiffs raise three issues on appeal: (1) whether Commerce's decision to include the bunker fuel surcharge in the surrogate freight rate was proper, (2) whether Commerce's use of Window Period sales outside the POR to calculate CV profit ratio was proper, and (3) whether Commerce's use of zeroing to calculate WADM was proper. *See* Pls.' Br. at 1–2.

JURISDICTION and STANDARD OF REVIEW

This Court has jurisdiction over this matter pursuant to 19 U.S.C. § 1516a(a)(2)(B)(iii) and 28 U.S.C. § 1581(c).

This Court will uphold Commerce's determination 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 is 'such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.'" *Huaiyin Foreign Trade Corp. (30) v. United States*, 322 F.3d 1369, 1374 (Fed. Cir. 2003) (quoting *Consol. Edison Co. v. NLRB*, 305 U.S. 197, 229 (1938).

DISCUSSION

I. Bunker Fuel Surcharge

Commerce calculated Fischer's international freight expenses using a surrogate rate from the STS Agreement, *see Preliminary Results*, 76 Fed. Reg. at 19,318; *I&D Memo* at 24, which included a bunker fuel surcharge of $[[ ]]/MT. P.R. 55 Ex. 8. Pursuant to 19 U.S.C. § 1677a(c)(2)(A), Commerce calculated a constructed EP for the subject merchandise using Fischer's international freight expenses as a deduction. *See Preliminary Results*, 76 Fed. Reg. at 19,318. The bunker fuel surcharge increased the international freight expenses, lowering the constructed EP even further and, therefore, its inclusion made a finding of dumping more likely. *See* 19 U.S.C. § 1677(35)(A); *Florida Citrus Mutual v. United States*, 550 F.3d 1105, 1110 (Fed. Cir. 2008). Plaintiffs argue that Commerce overstated Fischer's international freight expenses, and thus its dumping margin, by including the bunker fuel surcharge in the surrogate rate. *See* Pls.' Br. at 8. Plaintiffs insist the surrogate rate should be limited to

$[[ ]]/MT, reflecting the surrogate value for the base freight rate. *Id.* at 11. Plaintiffs offer two arguments in support of this claim: either (1) Fischer did not incur a bunker fuel surcharge during the POR, or, (2) if Fischer did incur a bunker fuel surcharge, it would have been reimbursed by its U.S. customers. *See id.* at 8–14.

When calculating EP, Commerce is permitted to reduce the value by "the amount, if any, included in such price, attributable to any additional costs, charges, or expenses, and United States import duties, which are incident to bringing the subject merchandise" to the U.S. 19 U.S.C. § 1677a(c)(2)(A). Commerce adjusts EP to create a "'fair, 'apples-to-apples' comparison' between U.S. price and foreign market value 'at a similar point in the chain of commerce.'" *Florida Citrus*, 550 F.3d at 1110 (quoting *Torrington Co. v. United States*, 68 F.3d 1347, 1352 (Fed. Cir. 1995)). The goal of the adjustments is to satisfy Commerce's mandate to calculate EP as accurately as possible. *See Florida Citrus* 550 F.3d at 1111.

Plaintiffs argue that Commerce unlawfully overstated Fischer's international freight expenses because Fischer did not incur a bunker fuel surcharge during the POR. Pls.' Br. at 9–12. According to Plaintiffs, Fischer does not incur a bunker fuel surcharge unless bunker fuel rates exceed a certain price. *Id.* at 10. Plaintiffs indicate that under Fischer's sales contracts a "bunker fuel surcharge is passed along to its U.S. customer via a bunker fuel adjustment." *Id.* at 10. Fischer reported that its U.S. customers did not pay a bunker fuel adjustment during the POR. *Id.* at 11. Because Fischer never assessed a bunker fuel adjustment on its customers, Plaintiffs assert that Fischer never incurred a bunker fuel surcharge. *Id.* Furthermore, Plaintiffs insist that the bunker fuel surcharge from the STS Agreement should not have been included in Fischer's surrogate rate because "the conditions triggering the additional bunker fuel surcharge specific to [[ ]] differ from those specific to Fischer's U.S. customers." *Id.* Accordingly, Plaintiffs conclude that the "inclusion of [[ ]] bunker fuel surcharge . . . is arbitrary and contrary to record evidence." *Id.* at 12.

Plaintiffs' argument is misleading and contrary to record evidence. Plaintiffs essentially argue that Fischer never incurred a bunker fuel surcharge because it never reported passing that charge to its U.S. customers. However, bunker fuel surcharges differ from bunker fuel adjustments – a shipper levies a bunker fuel surcharge on its customer under their transport agreement, whereas the shipping customer levies a bunker fuel adjustment upon its own customers under a separate agreement. *See* Pls.' Br. at 10–11. Accordingly, the bunker fuel surcharge in Fischer's shipping arrangements are distinct from

the bunker fuel adjustments in Fischer's U.S. sales contracts. The fact that Fischer did not report the receipt of a bunker fuel adjustment during the POR does not mean that Fischer or its affiliates did not pay a bunker fuel surcharge. Just as Commerce concluded during the review, here Plaintiffs "conflate[ ] the bunker fuel surcharge at issue here with the bunker fuel adjustments." *I&D Memo* at 24. Thus, Plaintiffs fail to identify any evidence demonstrating that Fischer did not incur a bunker fuel surcharge.

Moreover, record evidence clearly indicates that Fischer did in fact incur a bunker fuel surcharge during the POR. *See* P.R. 71 Ex. 3. As noted above, Fischer submitted an invoice from the POR indicating that [[ ]] charged Citrosuco, Fischer's affiliate, $[[ ]]/MT for shipments to the U.S., including a bunker fuel surcharge of $[[ ]]/MT. *Id.* The invoice indicates that the total cost of shipping was $[[ ]], including a bunker fuel surcharge of $[[ ]] for shipments to the U.S. *Id.* The record also contains a partial payment, *id.*, and an accompanying explanation indicating that Fischer still owed payment on the full outstanding balance. *See id.* at 3. Fischer neither challenged the $[[ ]] bunker fuel surcharge on the invoice nor indicated any intention to refuse payment. *See id.* Because record evidence indicates that Fischer incurred a bunker fuel surcharge, Commerce's decision to include that charge in the surrogate rate was supported by substantial evidence.

Alternatively, Plaintiffs argue that "Commerce could deduct [the bunker fuel surcharge] only if Fischer's U.S. customers did not reimburse the expense." Pls.' Br. at 12. Plaintiffs contend that the bunker fuel surcharge should not be included in the international freight expenses because Fischer would have been reimbursed by its U.S. customers, resulting in a net expense of zero. *Id.* at 13. Accordingly, they insist that the international freight expenses should only include the base freight rate from the STS Agreement. *Id.* Essentially, Plaintiffs argue that Commerce should have offset the bunker fuel surcharge with the bunker fuel adjustment that would have been paid as a reimbursement. *See id.*

When adjusting EP under 19 U.S.C. § 1677a(c)(2)(A), Commerce is permitted to offset expenses incurred with refunds or reimbursements for those expenses. *Florida Citrus*, 550 F.3d at 1111. The rationale for granting offsets is the same rationale for making any other adjustment to EP under the statute: "because the resulting amount accurately represents the importer's overall duty liability." *Id.*

Plaintiffs ask the court to apply the holding in *Florida Citrus* and remand the instant case so that Commerce may recalculate Fischer's international freight expenses with an offset for an unreported bunker fuel adjustment. Pls.' Br. at 13. However, Plaintiffs' reliance on *Florida Citrus* is flawed. In *Florida Citrus*, the plaintiffs, a domestic industry, challenged Commerce's decision to offset import duties with drawback duties[5] when adjusting EP under 19 U.S.C. § 1677a(c)(2)(A). *Florida Citrus*, 550 F.3d at 1108. The Court of Appeals for the Federal Circuit ("Federal Circuit") held that 19 U.S.C. § 1677a(c)(2)(A) is ambiguous as to whether "import duties" meant "gross import duties" or "net import duties." *Id.* at 1110. In light of this ambiguity, the Federal Circuit found that granting offsets for reimbursements "enable[d] a fair 'apples-to-apples' comparison" between EP and NV, resulting in a more accurate measurement of dumping margin. *Id.* at 1111. Accordingly, the Federal Circuit upheld Commerce's decision, concluding that the drawback duty refunds were "contingent upon and related to importing merchandise because they cannot be claimed without first importing the merchandise and paying the duties to Customs." *Id.*

Conversely, in the instant case, the interests of accuracy and fairness would not be served by offsetting the bunker fuel surcharges with the hypothetical reimbursement Plaintiffs claim. Here, the record indicates Fischer incurred a bunker fuel surcharge during the POR. *See* P.R. 71 Ex. 3. But, as Plaintiffs admit in their brief, Fischer did not receive a bunker fuel adjustment during the POR. Pls.' Br. at 12. Put simply, Plaintiffs are asking for a reduction in expenses for a reimbursement that did not occur. Granting an offset in the instant case would be contrary to the holding in *Florida Citrus*, as it would neither "enable a fair 'apples-to-apples' comparison" nor result in a more accurate dumping margin. *Cf. Florida Citrus*, 550 F.3d at 1111. Commerce's decision not to offset the bunker fuel surcharge with an unrealized reimbursement was reasonable. Thus, Commerce's decision to adjust the EP based upon the full rate from the STS Agreement, including the bunker fuel surcharge, was supported by substantial evidence and otherwise in accord with the law.

II. Window Period Sales

Commerce calculated Fischer's CV profit ratio using information from all of Fischer's reported home-market sales, including the Win-

[5] The drawback program "permits importers to claim reimbursement of 99 percent of U.S. duties paid on imports when 'commercially interchangeable' merchandise is either (1) exported from the United States, or (2) destroyed within three years of the date of importation." *Florida Citrus*, 550 F.3d at 1109 (citing 19 C.F.R § 191.32(a)).

dow Period sales that occurred outside the POR. *See Preliminary Results*, 76 Fed. Reg. at 19,317. Plaintiffs allege that Commerce's use of sales outside the POR to calculate CV profit ratio violated 19 C.F.R. § 351.414(f) and Commerce's own internal guidelines. [6] Pls.' Br. at 14. However, Fischer failed to raise this issue before Commerce in the proper manner, and thus Plaintiffs are precluded from raising it before the court. *See* 28 U.S.C. § 2637(d).

As a general rule, this Court "shall, where appropriate, require the exhaustion of administrative remedies." *Id.* The Court of International Trade ("CIT") "has 'generally take[n] a strict view of the need [for parties] to exhaust [their] remedies by raising all arguments' in a timely fashion so that they may be appropriately addressed by the agency." *Corus Staal BV v. United States*, 30 CIT 1040, 1048 (2006) (not published in the Federal Supplement), *aff'd* 502 F.3d 1370 (Fed. Cir. 2007), (quoting *Pohang Iron & Steel Co. v. United States*, 23 CIT 778, 792 (1999) (not reported in the Federal Supplement)) (alterations in *Corus Staal*). "In the antidumping context, Congress has prescribed a clear, step-by-step process for a claimant to follow, and the failure to do so precludes it from obtaining review of that issue in the [CIT]." *JCM, Ltd. v. United States*, 210 F.3d 1357, 1359 (Fed. Cir. 2000) (citing *Sandvik Steel Co. v. United States*, 164 F.3d 596, 599–600 (Fed. Cir. 1998)).

The exhaustion requirement is subject to limited exceptions, which include:

> (1) [P]laintiff raised a new argument that was purely legal and required no further agency involvement; (2) plaintiff did not have timely access to the confidential record; (3) a judicial interpretation intervened since the remand proceeding, changing the agency result; (4) it would have been futile for plaintiff to have raised its argument at the administrative level.

Corus Staal BV v. United States, 30 CIT at 1050 n.11 (citing *Budd Co., Wheel & Brake Div. v. United States*, 15 CIT 446, 452 n.2, 773 F.Supp. 1549, 1555 n.2 (1991)). Additionally, where a party properly challenges a ministerial error following the final results of an administrative review, that party will be deemed to have exhausted its

[6] Commerce's Antidumping Manual states:

> Where no sales of the like product are made in the exporting country in the month of the U.S. sale, [Commerce] will attempt to find a weighted-average monthly price one month prior, then two months prior, and then three months prior to the month of the U.S. sale. If unsuccessful, we will then look one month after and finally two months after the month of the U.S. sale.

Import Administration, *Antidumping Manual*, ch. 6, p. 7 (Oct. 13, 2009).

administrative remedies with regards to that error. *See* 19 U.S.C. § 1673d(e) ("The administering authority shall establish procedures for the correction of ministerial errors in final determinations within a reasonable time after the determinations are issued under this section.").

It is undisputed that Fischer did not challenge Commerce's use of Window Period sales outside the POR in its case brief before Commerce. *See* Pls.' Reply Supp. Mot. J. Agency R. at 4 ("Pls.' Reply") ("Fischer presented this to Commerce . . . in its ministerial error comments."); Def.'s Br. at 15. Further, none of the recognized exceptions to the exhaustion requirement apply. The timeliness of Plaintiffs' access to confidential records is not at issue. Commerce's determination was not altered by an intervening judicial opinion. The exception for purely legal questions does not apply because Plaintiffs do not challenge the legality of 19 C.F.R. § 351.414(f) or Commerce's internal guidelines in and of themselves. *See Fuwei Films (Shandong) Co. v. United States*, 35 CIT __, __, 791 F. Supp. 2d 1381, 1384 (2011) (The purely legal issue exception "only *might* apply for a clear statutory mandate that does not implicate Commerce's interpretation of [a] statute"). Finally, the futility exception does not apply because there is no indication that Fischer would have been "'required to go through obviously useless motions in order to preserve [its] rights.'" *See Corus Staal BV v. United States*, 502 F.3d at 1379 (quoting *Bendure v. United States*, 554 F.2d 427, 431 (Ct. Cl. 1977)). Fischer should have raised this issue in its case brief, even if Commerce was unlikely to accept it. *See id.* ("The mere fact that an adverse decision may have been likely does not excuse a party from a statutory or regulatory requirement that it exhaust administrative remedies.").

Instead, Plaintiffs argue that Fischer properly raised the Window Period sales issue as a ministerial error. *See* Pls.' Reply at 6–9. As noted above, Commerce rejected Fischer's ministerial error comments because they did not describe a ministerial error. I.A.P.R. 19 at 2. Plaintiffs make the same claim here, alleging that the inclusion of the Window Period sales, insofar as it violates 19 C.F.R. § 351.414(f) and Commerce's internal guidelines, must be a ministerial error. *See* Pls.' Reply at 8. Plaintiffs' argument must fail for two reasons: First, Commerce's decision to reject Fischer's ministerial error comments was reasonable, and second, allowing Plaintiffs to use the ministerial error procedure in order to avoid claim preclusion on a substantive issue would allow the ministerial error exception swallow the administrative exhaustion requirement.

By definition, "ministerial errors" are "errors in addition, subtraction, or other arithmetic function, clerical errors resulting from inac-

curate copying, duplication, or the like, and any other type of unintentional error the administering authority considers ministerial." 19 U.S.C. § 1673d(e). "Ministerial errors 'are by their nature not errors in judgment but merely inadvertencies.'" *SGL Carbon LLC v. United States*, 36 CIT __, __, 819 F. Supp. 2d 1352, 1363 (2012) (quoting *NTN Bearing Corp. v. United States*, 74 F.3d 1204, 1208 (Fed. Cir. 1995). This Court affords substantial deference to Commerce's determinations regarding ministerial error. *See Shangdong Huarong Gen. Corp. v. United States*, 25 CIT 834, 848, 159 F. Supp. 2d 714, 727–28 (2001) *aff'd* 60 Fed. App'x 797 (Fed. Cir. 2003) ("Statute, regulations, and case law largely leave the question of what constitutes a 'ministerial error' to Commerce's discretion.").

Commerce properly determined that Fischer's Window Period sales claim did not concern ministerial error. In its ministerial error comments, Fischer argued that Commerce "committed a ministerial error when it neglected to include specific programming language . . . to exclude home market sales occurring *outside* the [POR]." I.A.P.R. 17 at 3. Commerce concluded that "Fischer's allegation involve[d] a methodical issue," I.A.P.R. 19 at 2, and refused to alter the final results. *Id.* Indeed, Commerce's use of Window Period sales was not an inadvertent computer programming error, but rather a method for calculating CV profit ratio. *See id.*; *Certain Steel Wire Rod from France*, 63 Fed. Reg. 30,185, 30,187 (June 3, 1998) (using a respondent's Window Period sales to calculate CV profit ratio). Fischer mischaracterized the issue before Commerce — and again in its reply brief — as an inadvertent mistake so that it would fit within the definition of ministerial error. By questioning Commerce's intentional decision to measure CV profit ratio using sales outside the POR, Fischer actually challenged Commerce's interpretation of 19 C.F.R. § 351.414(f) and its own guidelines. *See SGL Carbon*, 36 CIT at __, 819 F. Supp. 2d at 1363. Because Fischer's argument did not concern clerical error, miscalculation, or other ministerial error, Commerce's decision to reject it was proper. *See* 19 U.S.C. § 1673d(e).

Furthermore, the court will not allow Plaintiffs to make an end run around the exhaustion requirement by entertaining an unexhausted substantive issue disguised as a ministerial error. Because ministerial errors concern clerical and mathematical mistakes, the ministerial error procedure is not the appropriate method for a party to raise a new, substantive legal argument. *See* 19 U.S.C. § 1673d(e); *Ta Chen Stainless Steel Pipe, Ltd. v. United States*, 28 CIT 627, 644, 342 F. Supp. 2d 1191, 1205 (2004) ("The prescribed remedy for challenging Preliminary Results issued by [Commerce] is to file a case brief with the agency setting forth objections."). Plaintiffs may have phrased

their argument in terms of inadvertent error, but they actually offer a substantive interpretation of 19 C.F.R § 351.414(f) and Commerce's Antidumping Manual to support that argument. *See* Pls.' Br. at 14–17. Allowing Plaintiffs to make this argument before the court betrays the purpose of the ministerial error procedure and undercuts the exhaustion requirement. This would enable a party to preserve a substantive legal challenge to Commerce's determination using the protection of the ministerial error process, thus depriving Commerce of its opportunity to defend its decision at the proper time. *See United States v. L.A. Tucker Truck Lines, Inc.*, 344 U.S. 33, 37 (1952) ("[O]rderly procedure and good administration require that objections to the proceedings of an administrative agency be made while it has opportunity for correction in order to raise issues reviewable by the courts."). Plaintiffs can challenge Commerce's ministerial error decision, but they cannot abuse that opportunity by introducing a new substantive legal claim before the court. *See* 19 U.S.C. § 1673d(e); *Ta Chen*, 28 CIT at 644, 342 F. Supp. 2d at 1205. Accordingly, Plaintiffs are precluded from arguing their Window Period sales claim.

III. Zeroing

Plaintiffs allege that Commerce's use of zeroing was wrongful because Commerce failed to provide an adequate explanation to justify its practice of zeroing to calculate WADM during reviews but not investigations. Pls.' Br. at 20. In response, Commerce argues that inherent differences between investigations and reviews, as explained in the I&D Memo, provide sufficient justification for its practice of zeroing during reviews while offsetting during investigations. Def.'s Br. at 20–31.[7]

A. Background

"Zeroing" refers to a method of calculating WADM by aggregating only the positive dumping margins from dumped transactions and assigning all non-dumped transactions a dumping margin of zero. *See Timken Co. v. United States*, 354 F.3d 1334, 1338 (Fed. Cir. 2004). Alternatively, Commerce also calculates WADM by offsetting positive

[7] In its brief, Commerce also raises two additional arguments which were already rejected by the Federal Circuit: (1) the Federal Circuit previously upheld zeroing as a reasonable interpretation of 19 U.S.C. § 1677(35); and (2) it only changed its zeroing policy in order to comply with an adverse WTO ruling. In *Dongbu Steel Co. v. United States*, the Federal Circuit held that Commerce's inconsistent interpretation of the statute was a novel issue so it was not bound by earlier decisions upholding zeroing as a reasonable interpretation of 19 U.S.C. § 1677(35). *See* 635 F.3d 1363, 1371 (Fed. Cir. 2011). The Federal Circuit also held that the adverse WTO determination, on its own, was insufficient to justify an inconsistent interpretation of 19 U.S.C. § 1677(35). See id. at 1372.

dumping margins from dumped transactions with negative dumping margins from non-dumped transactions at the aggregation stage.

At one point, Commerce calculated WADM using zeroing during both investigations, where it compares the average NV with the average EP of subject merchandise ("average-to-average comparisons"), as well as administrative reviews, where it compares the average NV with the EP of individual transactions ("average-totransaction comparisons"). *See Corus Staal BV v. Department of Commerce*, 395 F.3d 1343, 1347 (Fed. Cir. 2005) (holding that zeroing is permissible during investigations); *Timken Co.*, 354 F.3d at 1342 (holding that 19 U.S.C. § 1675(35) neither requires nor prohibits zeroing during administrative reviews). Recently, however, Commerce decided to abandon its practice of zeroing during investigations involving average-to-average comparisons following a determination by the World Trade Organization ("WTO") that this practice violated the U.S.'s international obligations. *See Antidumping Proceedings: Calculation of the Weighted-Average* Dumping Margin During an Antidumping Investigation; Final *Modification*, 71 Fed. Reg. 77,722 (Dec. 27, 2006). Commerce continues to use zeroing to calculate WADM during administrative reviews, Def.'s Br. at 29, resulting in an inconsistent application of 19 U.S.C § 1677(35)(A) as between administrative reviews and investigations.[8]

Following this policy shift, the Federal Circuit held that Commerce's inconsistent interpretation of 19 U.S.C § 1677(35) was arbitrary and required Commerce to either explain why its approach was reasonable or adopt a consistent approach. *See JTEKT Corp. v. United States*, 642 F.3d 1378, 1384–85 (Fed. Cir. 2011); *Dongbu*, 635 F.3d at 1373. In *JTEKT Corp.*, Commerce explained that it zeroes during reviews because they involve average-to-transaction comparisons, whereas during investigations it offsets because it is making average-to-average comparisons. *See JTEKT Corp.*, 642 F.3d at 1384. The Federal Circuit rejected Commerce's explanation, holding that "[i]t is not illuminating to the continued practice of zeroing to know that one phase uses average-to-average comparisons while the other uses average-to-transaction comparisons." *Id.*

Following *Dongbu* and *JTEKT*, this Court upheld Commerce's inconsistent interpretation of 19 U.S.C. § 1677(35) in *Union Steel v. United States*, 36 CIT __, 823 F. Supp. 2d 1346 (2012) (appeal pend-

[8] Although WADM is codified in 19 U.S.C § 1677(35)(B), the definition of an individual "dumping margin" in 19 U.S.C § 1677(35)(A) will control what dumping margins are being aggregated in the WADM calculation under 19 U.S.C § 1677(35)(B).

ing).[9] Accepting Commerce's argument that there were inherent differences in the way dumping margin is calculated as between reviews and investigations, respectively, this Court concluded that such differences were "sufficient to permit different approaches." *Id.* at __, 823 F. Supp. 2d at 1358. The issue before the court is whether Commerce adequately explained why differences between reviews and investigations justify calculating WADM differently in each stage — as it did in *Union Steel* — so as to satisfy the standard set out in *Dongbu* and *JTEKT*.

B. Analysis

Commerce argues that the use of zeroing to calculate dumping margin during reviews but not investigations is reasonable because inherent differences between the two processes permit it to treat non-dumped transactions differently. *See I&D Memo* at 4–8. During administrative reviews, Commerce interprets 19 U.S.C. § 1677(35)(A) in the following manner: "[A] dumping margin exists only where NV is greater than export price. . . . Because no dumping margins exist with respect to sales where NV is equal to or less than EP or [Constructed EP], [Commerce] will not permit these non-dumped sales to offset the amount of dumping found with respect to other sales." *I&D Memo* at 4–5. Commerce disregards non-dumped transactions at the aggregation stage so that it can detect and counteract the effects of masked dumping – selling at high prices to disguise other sales at less than fair value – which would otherwise be obscured by high priced sales. *Id.* at 5. Non-dumped sales still impact WADM as the aggregated dumping margin is divided by the total value of U.S. sales, which includes both dumped and non-dumped sales. *Id.*

During investigations, on the other hand, Commerce includes the non-dumped sales because it calculates dumping margin "at an 'on average' level" for all U.S. sales. *I&D Memo* at 6. Commerce explains that it "averages together high and low prices for directly comparable merchandise prior to making the comparison." *Id.* Commerce calculates a dumping margin for each group by comparing NV with an EP reflecting the average price of all sales in that group, *including*

[9] This Court also upheld Commerce's explanation for zeroing in *Grobest & I-Mei Indus. (Vietnam) Co., Ltd. v. United States*, 36 CIT __, 853 F. Supp. 2d 1352 (2012), which was decided after the defendant and defendant-intervenors' filed their briefs. Specifically, this Court found that during investigations offsetting is reasonable because "Commerce adopts a methodology intended to capture overall pricing behavior for the purpose of determining who should and should not fall within the purview of an antidumping order," *id.* at __, 853 F. Supp. 2d at 1361 while during reviews, Commerce zeroes because "a methodology that establishes the antidumping duty with greater accuracy is warranted both because the importer must actually pay the resulting antidumping duty and because it serves to uncover masked dumping." Id. at __,853 F. Supp. 2d at 1361.

non-dumped transactions. *Id.* Each group's dumping margin inherently includes non-dumped sales, *id.*, and therefore Commerce offsets positive margins with negative margins to determine the average extent of dumping activity. *Id.* Because dumping margin is calculated differently during an investigation than during a review, Commerce contends that its approach to 19 U.S.C. § 1677(35) is justified. *Id.* at 5.

Plaintiffs contend that Commerce's explanation was already rejected by the Federal Circuit in *JTEKT Corp.* and thus fails to justify the continued practice of zeroing during reviews but not investigations. Pls.' Br. at 20. When assessing Commerce's interpretation of 19 U.S.C. § 1677(35), this court undertakes the two-prong analysis from *Chevron U.S.A. v. NRDC*, 467 U.S. 837, 842–43 (1984). The first issue is "whether Congress has directly spoken to the precise question at issue." *Id.* at 842. If Congressional intent is clear, "the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress." *Id.* at 842–43. However, "if 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.* at 843. For the following reasons, this court accepts Commerce's explanation of its zeroing practice.

Congress has not spoken directly on the issue of zeroing. *See Dongbu*, 635 F.3d at 1366; *Timken Co.*, 354 F.3d at 1342. Therefore, the issue is whether Commerce's inconsistent interpretation of 19 U.S.C. § 1677(35) is reasonable. *See Nat'l Org. of Veterans' Advocates, Inc. v. Sec'y of Veterans' Affairs*, 260 F.3d 1365, 1379–80 (Fed. Cir. 2001) (where an agency offers inconsistent interpretations of the same term, it "must explain the rationale for the different interpretations"). While a term should not be given contradictory meanings throughout the statute, "terms may be interpreted differently in different contexts." *Union Steel*, 823 F. Supp. 2d at 1358 (citing *FAG Kugelfischer Georg Schafer Ag v. United States*, 332 F.3d 1370, 1373 (Fed. Cir. 2003)).

Here, Commerce provides a sufficient explanation justifying its policy of zeroing during reviews but not investigations. In *JTEKT Corp.*, Commerce merely pointed out that reviews involve average-to-transaction comparisons while investigations use average-to-average comparisons, *see JTEKT Corp.*, 642 F.3d at 1384, but, in the *I&D Memo*, Commerce demonstrated how these differences impact the WADM calculation. *See I&D Memo* at 4–6. During reviews, where Commerce is considering the sales of a respondent subject to an antidumping order, Commerce looks at the dumping activity at the

transactional level in order to uncover masked dumping. *Id.* at 5. It is reasonable for Commerce to disregard non-dumped transactions – that is, to zero – at this stage because it enables Commerce to determine the actual extent of dumping activity, without the obscuring effect of non-dumped transactions. This interpretation of 19 U.S.C. 1677(35)(A) is consistent with the goal of the antidumping statute, which seeks to remedy dumping and the resulting injury to domestic industries. *See Chaparral Steel Co. v. United States*, 901 F.2d 1097, 1103 (Fed. Cir. 1990) (citing *Imbert Imports, Inc. v. United States*, 331 F. Supp. 1400, 1406 (Cust. Ct. 1971), *aff'd* 475 F.2d 1189 (C.C.P.A. 1973). This Court accepted a similar justification for zeroing in *Union Steel*, concluding that "when it comes to reviews, which are intended to more accurately reflect commercial reality, Commerce is permitted to unmask dumping behavior is a way that is not necessary at the investigation stage." *Union Steel*, 36 CIT at __, 823 F. Supp. 2d at 1359. Zeroing during reviews is also justified because "it is not unreasonable for Commerce to counteract as much dumping behavior as possible." *Id.*, 823 F. Supp. 2d at 1359.

In the context of an investigation, Commerce looks to determine an average level of dumping activity rather than isolate dumping activity. *I&D Memo* at 6. Zeroing is not necessary because, unlike the individual dumping margins Commerce aggregates during reviews, the margins Commerce aggregates during investigations already include non-dumped transactions. *Id.* Offsetting is reasonable because the resulting WADM reflects the overall average level of dumping Commerce is looking for at this stage. This Court accepted this rationale for offsetting in *Union Steel*, recognizing that "[s]pecificity is less important in investigations" because Commerce was comparing "broad averages." *Union Steel*, 36 CIT at __, 823 F. Supp. 2d at 1359.

Given similarities between Commerce's explanations in *Union Steel* and in the instant case, the court finds that Commerce adequately explained its inconsistent interpretation of 19 U.S.C. § 1677(35)(A). Because it demonstrated that inherent differences between reviews and investigations justify interpreting 19 U.S.C. § 1677(35)(A) differently in each context, Commerce provided a reasonable explanation for the continued practice of calculating WADM using zeroing during reviews while offsetting during investigations. *See Nat'l Org. of Veterans' Advocates*, 260 F.3d at 1379–80.

CONCLUSION

For the foregoing reasons, the court concludes that the *Final Results* are supported by substantial evidence and are otherwise in accord with the law.

ORDER

In accordance with the above, it is hereby **ORDERED** that the determination of Commerce is **SUSTAINED**; and it is further

ORDERED that this action is dismissed

Dated: December 6, 2012
New York, New York

/*s*/ *NICHOLAS TSOUCALAS*
NICHOLAS TSOUCALAS SENIOR JUDGE

Slip Op. 12–150

HUSQVARNA CONSTRUCTION PRODUCTS NORTH AMERICA and HUSQVARNA (HEBEI) CO., LTD. (f/k/a HEBEI HUSQVARNA-JIKAI DIAMOND TOOLS CO., LTD.), Plaintiffs, v. UNITED STATES, Defendant.

Before: Richard K. Eaton, Judge
Court No. 12–00205

[Plaintiffs' petition for a writ of mandamus is denied.]

Dated: December 6, 2012

Cassidy Levy Kent (USA) LLP (*John D. Greenwald*, *Robert C. Cassidy Jr.*, and *Thomas M. Beline*), for plaintiffs.

Stuart F. Delery, Acting Assistant Attorney General; *Jeanne E. Davidson*, Director, *Franklin E. White, Jr.*, Assistant Director, Commercial Litigation Branch, Civil Division, United States Department of Justice (*David S. Silverbrand*); Office of the Chief Counsel for Import Administration, United States Department of Commerce (*Nathaniel Halvorson*), of counsel, for defendant.

OPINION AND ORDER

Eaton, Judge:

INTRODUCTION

Before the court is plaintiffs' Petition for a Writ of Mandamus (ECF Dkt. No. 8) ("Pls.' Pet."). By their petition, plaintiffs, Husqvarna Construction Products North America and Husqvarna (Hebei) Company, Ltd. (formerly known as Hebei Husqvarna-Jikai Diamond Tools Co., Ltd.) (collectively, "plaintiffs"), seek to compel the United States Department of Commerce ("Commerce" or "the Department") to set a "provisional cash deposit rate" for Husqvarna (Hebei) Company, Ltd. ("Hebei Husqvarna") and issue corresponding cash deposit instructions to U.S. Customs and Border Protection ("Customs").[1] Jurisdic-

[1] Plaintiffs' Petition also asks the court to direct Commerce to rescind the administrative review for Hebei Jikai Industrial Group Co., Ltd. ("Industrial") because the review request filed by the domestic industries was withdrawn. Pursuant to the court's oral request during a status teleconference on August 8, 2012, defendant submitted a copy of Diamond

tion is founded on 28 U.S.C. §§ 1581(i)(2) and (4) (2006). The court heard oral argument on the Petition on November 28, 2012 (ECF Dkt. No. 28).

Hebei Husqvarna is a separate rate respondent in the first administrative review of imports under the antidumping order on diamond sawblades and parts thereof from the People's Republic of China ("PRC") during the period of review ("POR") January 23, 2009 through October 31, 2010. On December 6, 2011, Commerce published its Preliminary Results, in which it assigned an 8.5% ad valorem antidumping duty margin to the separate rate respondents, including Hebei Husqvarna. *See* Diamond Sawblades and Parts Thereof From the PRC, 76 Fed. Reg. 76,135 (Dep't of Commerce Dec. 6, 2011) (preliminary results of antidumping duty administrative review and intent to rescind review in part).

Pursuant to 19 U.S.C. § 1675(a)(3)(A) (2006), Commerce "shall make" a final determination in an administrative review within 180 days [2] after the publication of the preliminary results of the review, which, in this case, would have been June 4, 2012. Thus, Hebei Husqvarna insists that Commerce was required to make its final determination and set a cash deposit rate for the company by June 4, 2012. Commerce, however, did not issue the final results by that date, nor has it yet issued them. According to plaintiffs, Commerce's reasons for not meeting the statutory deadline involve circumstances unrelated to Hebei Husqvarna, and, as a consequence of Commerce's failure to act, the company is required to post cash deposits on its entries at the PRC-wide cash deposit rate of 164.09% ad valorem for an indefinite period. Thus, plaintiffs seek a writ of mandamus to compel Commerce to set a provisional, and necessarily lower, cash deposit rate pending the issuance of the final results.

For the reasons set forth below, plaintiffs' petition is denied.

BACKGROUND

On November 4, 2009, Commerce issued antidumping duty orders covering diamond sawblades from the PRC and the Republic of Korea. Diamond Sawblades and Parts Thereof From the PRC and the Republic of Korea, 74 Fed. Reg. 57,145 (Dep't of Commerce Nov. 4,

Sawblades and Parts Thereof From the People's Republic of China, 77 Fed. Reg. 47,362 (Dep't of Commerce Aug. 8, 2012) (rescission of antidumping duty administrative review in part), which demonstrated that the administrative review had been rescinded as to Industrial. Therefore, plaintiffs' second request for relief is moot and only the first request, i.e., the issuance of a provisional cash deposit rate for Hebei Husqvarna, remains.

[2] In particular, the statute directs that Commerce "shall make . . . a final determination . . . within 120 days after the date on which the preliminary determination is published. If it is not practicable to complete the review within the foregoing time, [Commerce] . . . may extend that 120-day period to 180 days." 19 U.S.C. § 1675(a)(3)(A).

2009) (antidumping duty orders) ("PRC Order" and "Korea Order," respectively). Under the PRC Order, Commerce established three types of cash deposit rates: (1) the individually-examined respondents' rates; (2) the PRC-wide rate; and (3) a "separate rate," assigned to companies that were not individually examined, but could demonstrate their independence from government control.[3]

Under the final results of the underlying antidumping investigation for the PRC, the companies that received a separate rate in the underlying investigation were assigned a cash deposit rate of 21.43% ad valorem, which is the weighted average of the three mandatory respondents' calculated margins from the investigation. *See* Diamond Sawblades and Parts Thereof from the PRC, 71 Fed. Reg. 29,303 (Dep't of Commerce May 22, 2006) (final determination of sales at less than fair value and final partial affirmative determination of critical circumstances). Hebei Husqvarna, however, is a new entity that was not in existence during the underlying antidumping investigation that was conducted in 2005 and 2006. Therefore, Hebei Husqvarna is not entitled to the "separate rate," and its entries of sawblades are subject to the PRC-wide antidumping rate of 164.09% ad valorem until the issuance of updated rates upon completion of the first administrative review.[4]

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[3] Because the PRC is designated a non-market economy, there is a rebuttable presumption that all PRC companies are subject to government control and should be assigned a single antidumping duty margin—the PRC-wide rate. Thus, to establish a separate rate, Commerce requires PRC companies to provide evidence establishing that they are sufficiently independent from the government. *See Huaiyin Foreign Trade Corp. v. United States*, 322 F.3d 1369, 1372 (Fed. Cir. 2003) ("[T]he Department [has] adopted . . . a presumption that the PRC [i]s a nonmarket economy . . . country pursuant to 19 U.S.C. § 1677(18)(A), requiring companies desiring an individualized antidumping duty margin to so request and to demonstrate an absence of state control."); *Foshan Shunde Yongjian Housewares & Hardware Co. v. United States*, 35 CIT __, __, Slip Op. 11–00123 at 35 (Oct. 12, 2011) (not reported in the Federal Supplement) ("A producer may rebut this presumption by 'affirmatively demonstrat[ing] its entitlement to a separate, company-specific margin.'" (quoting *Sigma Corp. v. United States*, 117 F.3d 1401, 1405 (Fed. Cir. 1997))).

[4] "[T]he United States uses a 'retrospective' assessment system under which final liability for antidumping . . . duties is determined after merchandise is imported." 19 C.F.R. § 351.212(a). While an importer deposits estimated duties upon the entry of merchandise, the actual duties are determined later in the assessment process, at the time when the entries are liquidated. *See* 19 C.F.R. § 141.103; *Parkdale Int'l v. United States*, 475 F.3d 1375, 1376–77 (Fed. Cir. 2007) ("While liability to pay dumping duties accrues upon entry of subject merchandise, . . . the actual duty is not formally determined until after entry, and not paid until the [entries] are liquidated by [Customs]." (citing 19 C.F.R. § 141.1(a))). "Generally, the amount of duties to be assessed is determined in a review of the order covering a discrete period of time." 19 C.F.R. § 351.212(a). If no request for a review is made, Commerce instructs Customs to liquidate the entries at the estimated antidumping duties at the time of entry. 19 C.F.R. § 351.212(c)(i). If a timely request for review is made, Commerce publishes the notice of initiation of the review in the *Federal Register* and commences the review, during which time liquidation is suspended. 19 C.F.R. §

On November 30, 2010, the domestic industries asked Commerce to conduct an administrative review of forty-seven PRC producers and exporters of diamond sawblades and parts thereof. [5] On December 28, 2010, Commerce initiated the first administrative review under the PRC order, and selected Advanced Technology & Materials Co., Ltd. and its affiliates (collectively, "ATM") and Weihai Xiangguang Mechanical Industrial Co., Ltd. ("Weihai") for individual examination. Seventeen other exporters and producers, including Hebei Husqvarna, filed applications for separate rates.

On December 6, 2011, Commerce published its Preliminary Results, in which it (1) calculated a de minimis antidumping duty margin for ATM, (2) calculated an 8.5% ad valorem antidumping duty margin for Weihai, and (3) assigned an 8.5% ad valorem antidumping duty margin to the separate rate respondents, including Hebei Husqvarna. *See* Diamond Sawblades and Parts Thereof From the PRC, 76 Fed. Reg. 76,135, 76,141–42 (Dep't of Commerce Dec. 6, 2011) (preliminary results of antidumping duty administrative review and intent to rescind review in part).

Thus, until March 27, 2012, it appeared that Commerce was on schedule to meet the statutory deadline for issuance of a final determination, and that Hebei Husqvarna would receive a separate rate in the final determination. On that date, however, representatives of the domestic diamond sawblade industry filed a submission with Commerce alleging that the three mandatory respondents in the separate antidumping duty administrative review of imports of diamond sawblades from Korea were the subject of a transshipment investigation by the Korean Customs Service. The administrative review of Korean diamond sawblades was being conducted in parallel with the PRC administrative review, covering the same POR and following a similar timetable for completion.

The domestic industry alleged that the Korean respondents exported to Korea diamond sawblades that were produced in China and illegally changed the country of origin labels from China to Korea. The domestic industry further claimed that the diamond sawblades were then re-exported to the United States. In response to these allegations, Commerce issued supplemental questionnaires to the three Korean respondents and to two Chinese companies that the Department determined were affiliated with these Korean respon-

351.212(c)(2); 19 C.F.R. § 351.221(b). Following the review, Commerce publishes the final results of the review, and the entries are liquidated in accordance with those final results, unless there is an appeal to this Court. 19 C.F.R. § 351.221(b). The final results of the review set the cash deposit rate going forward. 19 C.F.R. § 351.221(b).

[5] On March 28, 2011, petitioners withdrew their review request for ten of the forty-seven companies, including Industrial.

dents. No questionnaires were issued to Hebei Husqvarna, and no allegation was made that Hebei Husqvarna conspired with the Korean respondents or their Chinese affiliates.

On June 4, 2012, the statutory deadline for the issuance of the final results of the first administrative review of the PRC Order, Commerce issued a memorandum announcing that it was "defer[ing] the final results of the first administrative reviews of the antidumping duty orders" because it "has not had sufficient time to adequately develop and analyze evidence regarding the fraud allegations." Mem. from Gary Taverman, Senior Advisor for Antidumping & Countervailing Duty Operations, to Paul Piquado, Assistant Sec'y for Imp. Admin., A-580855, A-570–900, at 1, 4 (Dep't of Commerce June 4, 2012) (attached as Compl. Ex. A) ("Deferral Mem."). The Department explained that the fraud allegations could affect "sales and cost information that is essential to the results of this [PRC] administrative review." Deferral Mem. 5. On June 27, 2012, Commerce issued a memorandum to all parties with its anticipated schedule for completing the administrative results, estimating that the final results would issue on December 21, 2012. In the interim, entries of Hebei Husqvarna sawblades continue to be subject to the PRC-wide cash deposit rate of 164.09%.

LEGAL FRAMEWORK

Because a writ of mandamus "is one of 'the most potent weapons in the judicial arsenal,' three conditions must be satisfied before it may issue." *Cheney v. U.S. Dist. Court for Dist. of Columbia*, 542 U.S. 367, 380 (2004) (citations omitted). "First, there must be a clear duty on the part of the defendant to perform the act in question." *Mukand Int'l, Ltd. v. U.S.*, 502 F.3d 1366, 1369 (Fed. Cir. 2007). "Second, the petitioner must satisfy the burden of showing that [its] right to issuance of the writ is clear and indisputable," and that it has "no other adequate means to attain the relief [it] desires—a condition designed to ensure that the writ will not be used as a substitute for the regular appeals process." *Cheney*, 542 U.S. at 380–81 (internal quotation marks and citations omitted). "Third, even if the first two prerequisites have been met, the issuing court, in the exercise of its discretion, must be satisfied that the writ is appropriate under the circumstances." *Id.* at 381.

DISCUSSION

I. Commerce Did Not Have a "Clear Duty" to Issue the Final Results Within the Statutorily-Provided Timeframe

Under 19 U.S.C. § 1675(a)(1)(B), "[a]t least once during each 12-month period beginning on the anniversary of the date of publication of . . . an antidumping duty order . . . , if a request for such a review has been received . . . , [Commerce] shall . . . review, and determine . . . , the amount of any antidumping duty." The Department is then directed to "publish in the Federal Register the results of such review, together with notice of any duty to be assessed, estimated duty to be deposited, or investigation to be resumed." 19 U.S.C. § 1675(a)(1). As to the timing of the review, under 19 U.S.C. § 1675(a)(3)(A), Commerce

> shall make a preliminary determination . . . within 245 days after the last day of the month in which occurs the anniversary of the date of publication of the order . . . , and a final determination . . . within 120 days after the date on which the preliminary determination is published. If it is not practicable to complete the review within the foregoing time, the administering authority . . . may extend that 120-day period to 180 days. The administering authority may extend the time for making a final determination without extending the time for making a preliminary determination, if such final determination is made not later than 300 days after the date on which the preliminary determination is published.

According to plaintiffs, this statutory framework translates into Commerce's "clear duty to determine an estimated duty to be deposited within the statutorily proscribed timeframe." Pls.' Pet. 9. In other words, plaintiffs believe that "Commerce has a non-discretionary statutory duty to determine the 'estimated duty to be deposited' upon completion of the administrative review. And, by not timely completing that administrative review, Commerce failed to fulfill this statutory duty to Plaintiffs." Pls.' Reply to Def.'s Opp. to Pet. for Writ of Mandamus 3 (ECF Dkt. No. 21) ("Pl.'s Reply").

Moreover, plaintiffs believe that this "clear duty" is further illustrated by Commerce's past performance. "Indeed, by Commerce's consistent and well-established timely completion of preliminary results and final results in investigations, administrative reviews, and sunset reviews, . . . Commerce itself appears to have construed Congress' statutory timeline as mandatory." Pls.' Reply 3.

Defendant responds that "Commerce has no clear, non-discretionary duty to issue a provisional cash deposit rate for Husq-

varna's entries of subject merchandise." Def.'s Resp. in Opp. to Pet. for Writ of Mandamus 2 (ECF Dkt. No. 20) ("Def.'s Resp."). While "Husqvarna contends that on June 4, 2012, it was statutorily entitled to the 'timely completion' of the administrative review and an 'estimated duty deposit rate' . . . , the time limits set forth in section 1675(a) are directory and not mandatory." Def.'s Resp. 8 (quoting Pls.' Pet. 10).

To support this assertion, defendant relies on Federal Circuit precedent holding that "when Congress intends there to be consequences for noncompliance with statutory deadlines for government action, it says so expressly."[6] *Hitachi Home Elecs. (Am.), Inc. v. United States*, 661 F.3d 1343, 1347 (Fed. Cir. 2011). In *Hitachi*, the Court determined that, because Congress had not expressly imposed any consequences for Customs' failure to act within two years,[7] the two-year deadline in the statute at issue was directory, not mandatory. *Hitachi*, 661 F.3d at 1347. In doing so, the Court relied on Supreme Court decisions for the proposition that "if a statute does not specify a consequence for noncompliance with statutory timing provisions, the federal courts will not in the ordinary course impose their own coercive sanction." *United States v. James Daniel Good Real Prop.*, 510 U.S. 43, 63 (1993); *see also Gilda Indus., Inc. v. United States*, 622 F.3d 1358, 1365 (Fed. Cir. 2010) ("[A]bsence of a consequence [in the statute] indicates . . . that [the relevant subsection] is a directory provision and not 'mandatory.'").

Here, the defendant insists that 19 U.S.C. § 1675(a)(3)(A) "does not contain any provision attaching consequences if Commerce fails to issue the final results within these timeframes. Because Congress

[6] An example of a statute that expressly includes "consequences for noncompliance with statutory deadlines for government action," is the Speedy Trial Act. 18 U.S.C. § 3162(a)(2) (2006). That statute reads, "[i]f a defendant is not brought to trial within the time limit required . . . the information or indictment shall be dismissed on motion of the defendant." *Id.* In *Zedner*, the Supreme Court confirmed that "[t]he sanction for a violation of the [Speedy Trial] Act is dismissal." *Zedner v. United States*, 547 U.S. 489, 509 (2006).

[7] In *Hitachi*, plaintiff argued "that its protest was allowed by operation of law when Customs failed to allow or deny it within the statutory time limit of two years [because] 'the plain meaning of the statute is that any protest not expressly denied by Customs within two years is allowed by Customs.'" *Hitachi*, 661 F.3d at 1347–48 (citation omitted). Under 19 U.S.C. § 1515(a), the statute at issue in *Hitachi*, "[u]nless a request for an accelerated disposition of a protest is filed . . . the appropriate customs officer, within two years from the date a protest was filed in accordance with section 1514 of this title, shall review the protest and shall allow or deny such protest in whole or in part." Hitachi urged that "the use of the phrase 'shall allow or deny' in § 1515(a) means that in the absence of any express denial, a protest is automatically allowed after two years have passed." *Hitachi*, 661 F.3d at 1348. The Federal Circuit concluded, however, that "[n]othing in the language of § 1515(a) supports Hitachi's position. While the statute contains the word 'shall,' . . . this is not enough to impose a specific penalty for noncompliance. There is no statement of any consequence in the event that Customs does not act." *Id.*

imposed no consequence for Commerce's failure to issue its final results within the timelines set forth in section 1675, the timeframe is directory, not mandatory." Def.'s Resp. 9 (citing *Norman G. Jensen, Inc. v. United States*, 687 F.3d 1325, 1330 (Fed. Cir. 2012) ("The clear import of our determination that Congress did not expressly impose any consequence for Customs' failure to [allow or deny a protest] within two years is that the two-year requirement is directory, not mandatory.")). Therefore, defendant concludes, "Husqvarna's contention that it was statutorily entitled to a new cash deposit rate on June 4, 2012 is without basis." Def.'s Resp. 9–10.

The court finds that plaintiffs have not identified a clear duty on the part of defendant to issue the final results within the time period set out by the statute. While plaintiffs may be able to point to some general duty on the part of the Department to issue the final results within a set period of time, in order for the writ to issue that duty must be "clear." Here, because no consequence is specified for noncompliance with the timing set forth in the statute, Commerce is under no clear duty to issue the final results within the statutory timeframe.

This holding conforms to the overwhelming weight of authority. First, several Federal Circuit cases indicate that the deadlines found in 19 U.S.C. § 1675(a)(3)(A) are directory, not mandatory. *See, e.g.*, *Jensen*, 687 F.3d at 1330 ("The clear import of our determination [in *Hitachi*] that Congress did not expressly impose any consequence for Customs' failure to act within two years is that the two-year requirement is directory, not mandatory."); *Hitachi*, 661 F.3d at 1347 ("[W]hen Congress intends there to be consequences for noncompliance with statutory deadlines for government action, it says so expressly."); *Liesegang v. Sec'y of Veterans Affairs*, 312 F.3d 1368, 1377 (Fed. Cir. 2002) ("In the absence of any consequences for noncompliance, . . . timing provisions are at best precatory rather than mandatory."); *Kemira Fibres Oy v. United States*, 61 F.3d 866, 871 (Fed. Cir. 1995) ("[E]ven in the face of a statutory timing directive, when a statute does not specify the consequences of non-compliance, courts should not assume that Congress intended that the agency lose its power to act.").

Second, the United States Supreme Court and other circuits are in accord with this view. *See, e.g.*, *Barnhart v. Peabody Coal Co.*, 537 U.S. 149, 161 (2003) ("[A] statute directing official action needs more than a mandatory 'shall' before the grant of power can sensibly be read to expire when the job is supposed to be done."); *Sw. Penn. Growth Alliance v. Browner*, 121 F.3d 106, 113–15 (3d Cir. 1997) (holding that a statute stating that an agency "shall" act by a certain

deadline does not divest that agency's ability to act unless there is some additional indication in the statute of a congressional intent to bar further action); *In re Siggers*, 132 F.3d 333, 336 (6th Cir. 1997) ("The law is well established in this and other jurisdictions that '[a] statutory time period is not mandatory unless it *both* expressly requires an agency or public official to act within a particular time period *and* specifies a consequence for failure to comply with the provision.'" (citations omitted)); *Hendrickson v. FDIC*, 113 F.3d 98, 101 (7th Cir. 1997) ("Standing alone, moreover, use of the word 'shall' in connection with a statutory timing requirement has not been sufficient to overcome the presumption that such a deadline implies no sanction for an agency's failure to heed it.").

Thus, because there are no consequences established for Commerce's failure to act within the timeframe set forth in 19 U.S.C. § 1675(a)(3)(A), plaintiffs have not demonstrated that Commerce had a clear duty to issue the final results within the timeframe set out by the statute.

II. Plaintiffs Did Not Possess a "Clear Right" to the Relief Sought & Have an Adequate Alternative Remedy

A. Provisional Cash Deposit Rate

By their petition, plaintiffs ask the court to direct Commerce to assign Hebei Husqvarna a "provisional cash deposit rate" pending the issuance of the Department's final determination. According to plaintiffs, because there is no question that they will not be found to be subject to PRC governmental control, their rate would necessarily be lower than the 164.09% PRC-wide cash deposit rate to which Hebei Husqvarna is now subject.

Plaintiffs argue that Hebei Husqvarna has "a clear right to demand the relief sought, the publication of a provisional cash deposit amount." Pls.' Pet. 13. Looking to the statute, plaintiffs urge that "Hebei Husqvarna is entitled to a new cash deposit rate *upon timely completion of the administrative review*. . . . [E]ven though in its preliminary results Commerce assigned Hebei Husqvarna a separate rate cash deposit duty amount of 8.50 percent *ad valorem*, . . . Hebei Husqvarna is required to continue to post 164.[09] percent *ad valorem* deposits long after the statutory timeline for publishing the results of the review has expired." Pls.' Pet. 12 (emphasis added). For this reason, "[r]equiring Hebei Husqvarna to continue to post estimated duty deposits at the punitive [PRC]-wide rate . . . prejudices the interests of Hebei Husqvarna," and is especially egregious in light of the fact that "Hebei Husqvarna . . . had nothing to do with the circumstances which Commerce cites as the reason for exceeding its

statutorily required timeline for completion of the administrative review." Pls.' Pet. 10–11. Therefore, plaintiffs conclude,

> Hebei Husqvarna's right to a new cash deposit rate is squarely grounded in the statute and with the international obligations of the United States. The request for administrative review was proper, and when Hebei Husqvarna was not selected as a mandatory respondent, Hebei Husqvarna relied upon the statutory timeframe to make business decisions regarding imports from China. Such reliance was wholly appropriate where Commerce has a recent past practice of timely completing administrative reviews.

Pls.' Pet. 13.

In addition, plaintiffs argue that the assignment of a provisional cash deposit rate for Hebei Husqvarna would not interfere with Commerce's ability to act, i.e., to complete its administrative review, nor would the provisional cash deposit rate affect the final assessment rates. Thus, plaintiffs claim that "[t]he issuance of such a cash deposit rate would be fair, in accordance with statute, and would not interfere with the ability of Commerce to calculate the most accurate dumping margin possible after considering all available evidence for entries made during the [POR]." Pls.' Pet. 10. In other words, according to plaintiffs, "the operation of the statutory deadline here would never deprive Commerce of taking any action it deems necessary to resolve the fraud issues." Pls.' Reply 4–5. For this reason, "Commerce's stated reasoning for the abrogation of its statutory duty to Plaintiffs is unreasonable because it maintains in place a punitive cash deposit rate when less sweeping alternatives were available to the agency." Pls.' Reply 4–5.

Next, plaintiffs observe that "Commerce may have deferred its final results because it believes that the assessment rate it ultimately assigns to the separate rate respondents will be impacted by whether Weih[a]i engaged in fraud by transshipping subject merchandise. But, that is not a sufficient reason to defer assigning Hebei Husqvarna a new cash deposit rate." Pls.' Pet. 11. To support their claim that uncertainty with respect to Hebei Husqvarna's ultimate rate is an unsuitable reason for not assigning a provisional rate, plaintiffs provide an overview of the different scenarios that might occur de-

pending on the outcome of the fraud investigation.[8] In so doing, however, plaintiffs concede that "the result of Commerce's fraud investigation *may* impact the ultimate rate determined for assessment." Pls.' Pet. 6 n.12 (emphasis added). Furthermore, plaintiffs state in their Petition that their cash deposit rate "will either be 21.43 percent . . . or something less" and request that the court issue a writ requiring Commerce to set a cash deposit rate "of either 21.43 percent . . . or 8.50 percent." Pls.' Pet. 11, 2. In their proposed order, however, plaintiffs request that the court order Commerce to "issue a new cash deposit rate for Hebei Husqvarna of 8.50 percent." Proposed Order 1 (ECF Dkt. No. 8). As defendant points out, the "inconsistencies in these requests demonstrate that even if there were a duty to publish a new estimated deposit rate, nothing would compel Commerce to choose any particular estimate." Def.'s Resp. 14. Put another way, plaintiffs' arguments concerning their "clear right" to a provisional cash deposit rate are undermined by the fact that it is entirely unclear, even to plaintiffs, what that rate should be. Notably, plaintiffs cite no law authorizing Commerce to issue a provisional rate, nor do they point to any statutorily-authorized procedure as to how the rate would be determined.

Defendant's arguments are more persuasive. First, Commerce correctly points out that the "final antidumping duty rate assigned to the

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[8] Plaintiffs provide the following description of these various possible scenarios, which, in fact, demonstrate the uncertainty surrounding what Hebei Husqvarna's rate will be in the final results:

> [T]he rate assessed for entries during the [POR] is different than the cash deposit posted on entries occurring after June 4, 2012. . . . [E]stablishing a new cash deposit rate for Hebei Husqvarna . . . will in no way impact that assessment rate.
>
> Should Commerce find that Weih[a]i was involved in the transshipment scheme, . . . Commerce will assign Weih[a]i an antidumping duty margin based upon adverse facts available. Commerce must exclude a margin based upon adverse inferences from its calculation of the average rate for separate rate respondents which will be used for assessment purposes. Should the other mandatory respondent, ATM, continue to receive a *de minimis* antidumping duty margin, . . . Commerce will liquidate entries made by the separate rate respondents using a margin based upon "any reasonable method," which would be the rate most recently established for the separate rate respondents—or, 21.43 percent *ad valorem*.
>
> If, however, Commerce finds that Weih[a]i was not involved in any fraudulent scheme, Weih[a]i's calculated margin, 8.50 percent, *ad valorem*, would continue to be the basis for the separate rate respondents' margins—as it had in the preliminary results—for assessment purposes. If Weih[a]i receives a different calculated rate, that calculated margin would be the basis for the separate rate respondents' margins for assessment purposes. This assumes that ATM will continue to receive a *de minimis* margin. If ATM receives a margin above *de minimis*, that margin would be averaged with that calculated for Weih[a]i, so long as Weih[a]i's margin is not based upon adverse inferences, and would be the basis for the separate rate respondents' assessment.

Pls.' Pet. 6–7 n.12.

separate rate companies (including Hebei Company) will depend upon the final rate Commerce calculates for the mandatory respondents . . . , which will not become final until Commerce issues its final results." Def.'s Resp. 10. This is the case because "if for some reason, a useable rate cannot be determined from the margins assigned to mandatory respondents, Commerce will have to determine an alternative methodology for calculating the margin for the separate rate companies. If Commerce makes a final determination that Hebei Company is eligible for a separate rate, such a rate will be determined in accordance with th[is] practice . . . , depending on the outcome of one or more of those variables." Def.'s Resp. 11 (citation omitted). In other words, defendant has shown that the determination of a separate rate for Hebei Husqvarna is entirely dependent upon the results of the completed review. This being the case, defendant is correct that the Department "cannot issue cash deposit rates based on estimates that have no basis on the record." Def.'s Resp. 12.

Next, defendant correctly asserts that "Husqvarna has failed to identify any statute or regulation that purports to require that Commerce issue a provisional antidumping duty cash deposit rate if Commerce does not issue the final results within the timeframes identified in 19 U.S.C. § 1675(a)." Def.'s Resp. 13. For Commerce, under the statutory provision for an administrative review, "the most Husqvarna can legitimately claim . . . is that it 'is entitled to a new cash deposit rate upon timely *completion* of the administrative review.' Because Commerce has not yet issued the final results of its administrative review, however, the relief Husqvarna seeks is not suitable for a writ of *mandamus*." Def.'s Resp. 13 (quoting Pls.' Pet. at 12). In other words, for Commerce, plaintiffs' clear right under the statute is a right to have a rate determined in the final results. Indeed, plaintiffs appear to concede as much in their papers before making the leap to the conclusion that the statute requires the setting of a provisional rate. Pls.' Pet. 12 ("Hebei Husqvarna is entitled to a new cash deposit rate *upon timely completion of the administrative review*.") (emphasis added).

All of this being the case, plaintiffs have failed to establish that they have a clear and indisputable right to a provisional cash deposit rate. Indeed, they have not even established that Commerce has the authority to issue such a provisional rate at all. Pursuant to statute, Commerce is required to set rates at the end of a review. 19 U.S.C. § 1675(a)(1) (Upon completion of a review, Commerce "shall publish in the Federal Register the results of such review, together with notice of any duty to be assessed [and] estimated duty to be deposited."). As defendant points out, the completion of the review is required for the

setting of accurate rates, especially for separate rate respondents, because a large number of factors must be considered. As noted, plaintiffs have failed to cite any authority entitling them to the issuance of a provisional rate, authorizing the issuance of a provisional rate, or providing a procedure for the determination of a provisional rate. Their arguments, therefore, have failed to demonstrate that they have a clear and indisputable right to a provisional cash deposit rate.

B. Plaintiffs' "Adequate Means to Attain Relief"

Next, plaintiffs insist that "[n]o such alternative remedy exists in this case." Pls.' Pet. 13. For plaintiffs, "Hebei Husqvarna is solely seeking a new cash deposit rate. The alternative remedy is to delay announcement of the new deposit rate . . . for reasons that have nothing to do with Hebei Husqvarna." Pls.' Pet. 13. Moreover, "[t]here is nothing in the statute, Commerce's regulations, or court precedent which would prevent Commerce from setting a provisional cash deposit rate during the interim period when it considers the allegations of fraud." Pls.' Pet. 13. Furthermore, plaintiffs argue, "[t]he prejudice to Hebei Husqvarna is substantial. Even though Hebei Husqvarna is entitled to a separate rate antidumping duty cash deposit rate, it is still subject to the prohibitively high China-wide cash deposit rate." Pls.' Pet. 14.

Despite Hebei Husqvarna's arguments to the contrary, the court agrees with defendant that "because Customs will refund to Husqvarna any excess duty deposits, including interest, upon completion of each applicable administrative review (or following any subsequent Court challenges . . .), Husqvarna will not suffer undue harm or be deprived of meaningful judicial relief due to the continued suspension of liquidation of the entries." Def.'s Resp. 14–15. In other words, "because liquidation of Husqvarna's entries [is] suspended, and any excess duty deposits it is now making will be refunded with interest at liquidation of those entries, Husqvarna possesses the adequate alternative remedy of awaiting for the antidumping duty procedures to be completed." Def.'s Resp. 15. Thus, the court finds that the refund of any excess duties paid plus interest upon liquidation provides plaintiffs with an alternative remedy under these facts. Therefore, plaintiffs have an adequate means of attaining relief without resort to mandamus.

For these reasons, plaintiffs' petition also fails on the second requirement for the writ.

III. Mandamus Relief Is Not "Appropriate Under the Circumstances"

Because the court has found that no clear duty is imposed by the statutory time limits, and that plaintiffs have no clear and indisputable right to have the writ issue directing the assignment of a provisional cash deposit rate, the final requirement only merits a word. As to this final requirement, plaintiffs insist that "[a] writ of mandamus provides an appropriate means of granting relief to Plaintiffs" because it "would afford relief to Hebei Husqvarna . . . that [it] lawfully should have, while permitting Commerce to take all appropriate steps to protect the integrity of the antidumping procedure from fraud." Pls.' Pet. 14–15. Furthermore, their "proposed remedy, *i.e.*, the establishment of an interim cash deposit rate in place until the yet-to be-issued final results are issued, maintains the *status quo* but removes the harm Commerce's sweeping action causes Plaintiffs. This is precisely the 'less drastic' remedy the Supreme Court envisioned in *Brock*." Pls.' Reply 9–10 (citing *Brock v. Pierce Cnty.*, 476 U.S. 253, 260 (1986) ("When, as here, there are less drastic remedies available for failure to meet a statutory deadline, courts should not assume that Congress intended the agency to lose its power to act.")).

Again, the court is convinced by defendant's arguments. As defendant points out, "based upon the facts and circumstance of this case, Commerce does not have a clear statutory duty to issue a new cash deposit rate until it issues its final results of the administrative review." Def.'s Resp. 16. Furthermore, "*mandamus* is never appropriate when, as is the case here, the party seeking *mandamus* is afforded an adequate alternative remedy. In this case, . . . [s]uspension of liquidation . . . is an adequate remedy, and appropriate under the facts and circumstance of this case." Def.'s Resp. 16.

"Mandamus is a drastic and extraordinary remedy." *Mukand*, 502 F.3d at 1369. The court is sympathetic to plaintiffs' situation, and understands the fairness arguments that support plaintiffs' position. Plaintiffs, however, have not demonstrated that the issuance of the writ is authorized by law. As the Supreme Court has stated, "[w]e do not agree that we should, or can, invent a remedy to satisfy some perceived need to coerce the courts and the Government into complying with the statutory time limits." *United States v. Montalvo-Murillo*, 495 U.S. 711, 721 (1990). Therefore, plaintiffs do not meet the requirements that are "designed to ensure that the writ will not be used as a substitute for the regular appeals process." *Cheney*, 542 U.S. at 380–81.

CONCLUSION

For the foregoing reasons, plaintiffs' Petition for a Writ of Mandamus (ECF Dkt. No. 8) is DENIED.

Dated: December 6, 2012
New York, New York

/s/ Richard K. Eaton
RICHARD K. EATON

Slip Op. 12–151

PAPIERFABRIK AUGUST KOEHLER AG AND KOEHLER AMERICA, INC., Plaintiff, v. UNITED STATES, Defendant, and APPLETON PAPERS INC., Defendant-Intervenor.

Before: Timothy C. Stanceu, Judge
Court No. 11–00147

[Staying action pending appeal in *Union Steel v. United States*, CAFC Court No. 2012–1248]

Dated: December 10, 2012

William Silverman and *Richard P. Ferrin*, Drinker Biddle & Reath LLP, of Washington, D.C., for plaintiffs.

Joshua E. Kurland, Trial Attorney, Commercial Litigation Branch, Civil Division, and *Claudia Burke*, Assistant Director, U.S. Department of Justice, of Washington, D.C., for defendant. With them on the briefs were *Stuart F. Delery*, Acting Assistant Attorney General, and *Jeanne E. Davidson*, Director. Of counsel was *Matthew D. Walden*, Office of the Chief Counsel for Import Administration, U.S. Department of Commerce, of Washington, D.C.

Gilbert B. Kaplan and *Daniel Schneiderman*, King & Spalding LLP, of Washington, D.C., for defendant-intervenor.

OPINION AND ORDER

Stanceu, Judge:

Plaintiffs Papierfabrik August Koehler AG and Koehler America, Inc. (collectively "Koehler") contest the final determination ("Final Results") that the International Trade Administration, U.S. Department of Commerce ("Commerce" or the "Department"), issued to conclude the first administrative review of an antidumping duty order on lightweight thermal paper (the "subject merchandise") from Germany, covering entries made during the period November 20, 2008 through October 31, 2009. *See Lightweight Thermal Paper from Germany: Notice of Final Results of the First Antidumping Duty Administrative Review*, 76 Fed. Reg. 22,078 (Apr. 20, 2011) ("*Final Results*").

Plaintiffs' complaint contains three claims, the third of which challenges the Department's use of the "zeroing" methodology in the first administrative review, whereby Commerce assigned U.S. sales of subject merchandise from Germany made above normal value a dumping margin of zero, instead of a negative margin, in the calculation of the weighted-average dumping margin.[1] Compl. ¶ 27 (June 3, 2011), ECF No. 6. In this action, plaintiffs are opposed by defendant United States and defendant-intervenor Appleton Papers Inc.

At oral argument held on October 18, 2012, the court requested that the parties make submissions on the question of whether the court should stay this action pending the final disposition of *Union Steel v. United States,* 36 CIT __, 823 F. Supp. 2d 1346 (2012) ("*Union Steel*"). *Union Steel* involves a challenge to the Department's use of zeroing in an administrative review of an antidumping duty order. *Union Steel,* 36 CIT __, __, 823 F. Supp. 2d at 1347–48. An appeal of the judgment entered by the Court of International Trade in that action is now pending before the United States Court of Appeals for the Federal Circuit ("Court of Appeals").[2]

Plaintiffs and defendant oppose a stay. Pls.' Br. Regarding Stay Issue (Oct. 26, 2012), ECF No. 67 ("Pls.' Opp'n"); Def.'s Opp'n to Proposed Stay of Proceedings (Oct. 26, 2012), ECF No. 66 ("Def.'s Opp'n"). Plaintiffs, alternatively, support a partial stay, in which litigation of the claim on zeroing would be stayed while the other claims proceed. Pls.' Opp'n 6. Defendant-intervenor supports a stay of the action inclusive of all claims. Def-Intervenor's Br. in Supp. of Staying the Proceeding 1 (Oct. 26, 2012), ECF No. 68.

"[T]he power to stay proceedings is incidental to the power inherent in every court to control the disposition of the causes on its docket with economy of time and effort for itself, for counsel, and for litigants." *Landis v. North American Co.*, 299 U.S. 248, 254 (1936). The decision when and how to stay a proceeding rests "within the sound discretion of the trial court." *Cherokee Nation of Okla. v. United States*, 124 F.3d 1413, 1416 (Fed. Cir. 1997) (citations omitted). In making this decision, the court must "weigh competing interests and maintain an even balance." *Landis*, 299 U.S. at 257. For the reasons discussed below, the court will stay this action.

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[1] In their first claim, Plaintiffs Papierfabrik August Koehler AG and Koehler America, Inc. (collectively "Koehler") challenge the failure of U.S. Department of Commerce ("Commerce") to disclose certain correspondence between members of Congress and the Secretary of Commerce until the date of the Department's final determination. Compl. ¶ 23 (June 3, 2011), ECF No. 6. Plaintiffs' second claim contests the Department's decision not to adjust plaintiffs' home market prices to account for monthly home market rebates. *Id.* ¶ 25.

[2] The United States filed a Notice of Appeal of the judgment in *Union Steel* on March 6, 2011. ECF No. 79 (Consol Ct. No. 11–00083). The appeal has been docketed as *Union Steel v. United States*, CAFC Court No. 2012–1248.

Plaintiffs' zeroing claim challenges the Department's use of the zeroing methodology to calculate Koehler's weighted-average dumping margin in the first administrative review. Compl. ¶¶ 27–30. Plaintiffs argue that Commerce has interpreted section 771(35) of the Tariff Act of 1930 ("Tariff Act"), 19 U.S.C. § 1677(35) (2006) [3] inconsistently by employing zeroing in the review despite having abandoned that methodology in antidumping investigations. [4] *Id.* ¶ 29. Plaintiffs direct their claim to section 771(35)(A) of the Tariff Act, which defines "dumping margin" as the "amount by which the normal value exceeds the export price or the constructed export price of the subject merchandise." 19 U.S.C. § 1677(35). Plaintiffs argue that the Department's inconsistent interpretations render the use of zeroing in the Final Results unlawful. Compl. ¶ 30.

In *Union Steel*, the Court of International Trade affirmed a remand redetermination in which Commerce had explained its rationale for zeroing in administrative reviews. *Union Steel,* 36 CIT __, __, 823 F. Supp. 2d at 1359–60. The issue now on appeal in *Union Steel* is whether the Department's use of zeroing in an administrative review of an antidumping duty order rests upon a lawful statutory interpretation in light of the explanation given by Commerce on remand. Accordingly, the outcome of *Union Steel* likely will affect the court's disposition of plaintiffs' claim challenging the Department's use of zeroing.

Defendant opposes a stay on a number of grounds. Defendant argues, first, that the doctrine of exhaustion of administrative remedies bars plaintiffs' zeroing claim. Def.'s Opp'n 3; Def.'s Mem. in Opp'n to Pls.' Rule 56.2 Mot. for J. upon the Agency R. 34 (Mar. 06, 2012), ECF No. 39 ("Def.'s Resp."). An exhaustion issue arises in this case because plaintiffs failed to raise the issue of zeroing during the administrative review. Def.'s Opp'n 3; Def.'s Resp. 35–36.

In litigation involving challenges to antidumping determinations, the U.S. Court of International Trade "shall, where appropriate, require the exhaustion of administrative remedies." 28 U.S.C. § 2637(d) (2006). The Department's regulation requires that parties' administrative case briefs raise all issues "that continue in the submitter's view to be relevant to the Secretary's final determination or final results." 19 C.F.R. § 351.309(c)(2) (2008).

Plaintiffs argue, *inter alia*, that exhaustion was not required in this case because zeroing was not a "live" issue during the period for case brief submissions. Br. in Support of Pls.' Mot. for J. on the Agency R. under Rule 56.2 34 (Nov. 16, 2011), ECF No. 27. However, plaintiffs

[3] Further citations to the Tariff Act of 1930 are to the relevant portions of Title 19 of the U.S. Code, 2006 edition.

concede that they did not raise the issue of zeroing before Commerce during the administrative review and addressed it for the first time in a letter sent to the Department on April 25, 2011, five days after issuance of the Final Results. Pls.' Opp'n 10–11. As a result, plaintiffs have failed to exhaust their administrative remedies with respect to their claim challenging zeroing before the court.

In trade cases, the court may exercise discretion with respect to whether to require exhaustion. *See Corus Staal BV v. United States*, 502 F.3d 1370, 1381 (Fed. Cir. 2007) ("*Corus Staal*"). Moreover, the exhaustion requirement has several recognized exceptions, one of which may apply when a pertinent judicial decision is rendered after the relevant administrative determination. *See Gerber Food (Yunnan) Co. v. United States*, 33 CIT ___, ___, 601 F. Supp. 2d 1370, 1377 (2009). Here, the intervening judicial decision exception applies because there was a change in the controlling law on the use of zeroing.

For nearly the entire administrative review, the legality of the Department's use of zeroing in administrative reviews was settled, the Court of Appeals repeatedly having upheld the Department's use of zeroing in administrative reviews as a reasonable statutory interpretation entitled to deference. *See*, *e.g.*, *SKF USA Inc. v. United States*, 630 F.3d 1365, 1373–74 (Fed. Cir. 2011); *Corus Staal*, 502 F.3d at 1375; *Timken Co. v. United States*, 354 F.3d 1334, 1342 (Fed. Cir. 2004). But on March 31, 2011, thirteen days before the *Final Results* were issued, the Court of Appeals decided *Dongbu Steel Co. v. United States*, 635 F.3d 1363 (Fed. Cir. 2011) ("*Dongbu*"), in which, for the first time, it declined to affirm a judgment of this Court sustaining the Department's use of zeroing in an administrative review of an antidumping order, remanding for Commerce to explain its inconsistent interpretations of 19 U.S.C. § 1677(35). The Court of Appeals reasoned that while Commerce has discretion to interpret the statute with respect to zeroing, "[this] discretion is not absolute" and that "[i]n the absence of sufficient reasons for interpreting the same statutory provision inconsistently, the Department's action is arbitrary." *Dongbu*, 635 F.3d at 1371–73.

On June 29, 2011, approximately ten weeks after the *Final Results* were issued, the Court of Appeals reinforced its changed position on zeroing in *JTEKT Corp. v. United States*, 642 F.3d 1378 (Fed. Cir. 2011) ("*JTEKT*"). The Court of Appeals rejected the Department's reasoning, concluding that "[w]hile Commerce did point to differences between investigations and administrative reviews, it failed to address the relevant question — why is it a reasonable interpretation of the statute to zero in administrative reviews, but not in investigations?" *JTEKT*, 642 F.3d at 1384.

Defendant argues that the appellate decisions in *Dongbu* and *JTEKT* are not intervening judicial decisions that excuse plaintiffs' failure to exhaust because they did not change existing law on zeroing but merely remanded the Departmental decisions for explanation. Def.'s Opp'n 6. Defendant's argument is unconvincing. Contrary to defendant's characterization, these decisions effectively unsettled previously settled law, setting aside judgments of this Court affirming the use of zeroing in reviews despite the Department's having discontinued zeroing in antidumping investigations. Because the controlling law is now unsettled, the court deems it appropriate to allow the Court of Appeals to address the issue in *Union Steel* before adjudicating plaintiffs' zeroing claim.

Although acknowledging that ordering a stay is a matter for the court's discretion, Def.'s Opp'n 1, defendant argues that a stay is not appropriate because plaintiffs cannot establish a "clear case of hardship or inequity in being required to go forward" with the litigation, *id.* at 7 (citing *Landis*, 299 U.S. at 255). Defendant misconstrues the applicable standard. A party moving for a stay "must make out a clear case of hardship or inequity in being required to go forward, if there is even a fair possibility that the stay for which he prays *will work damage to someone else*." *Landis*, 299 U.S. at 255 (emphasis added). Here, Defendant has not shown that a stay will cause it harm, and the court perceives no harm that would accrue to the defendant should a stay be ordered.

Further, defendant submits that ordering a stay would create a "significant administrative burden" for the court and the defendant, predicting a "deluge when all cases stayed pending *Union Steel* or other zeroing appeals become simultaneously ripe for adjudication." Def.'s Opp'n 9. The court is not persuaded that a stay will have such a result. To the contrary, a stay will streamline and simplify resolution of the zeroing issue, avoiding unnecessary remands and appeals.

Defendant also argues that a stay is inappropriate because there is not a strong likelihood that plaintiffs' position will prevail in *Union Steel*. *Id*. Defendant maintains that "[a]bsent a showing of irreparable harm, plaintiff must show a strong likelihood of success on the merits to be entitled to a stay, or interim relief, pending review." *Id*. (citing *Balouris v. United States Postal Serv.,* 277 F. App'x 980, 980 (Fed. Cir. 2008) (unpublished) (citations omitted)). Once again, defendant misconstrues the applicable standard. The principle on which defendant relies refers to a plaintiff's burden to obtain a stay pending appeal. The procedural posture of this case is not one in which there has been a final judgment, and thus the proposed stay is not one that

is pending appeal. Therefore, the court, when evaluating whether or not to stay this action, need not consider the likelihood that plaintiffs' challenge to zeroing will succeed.

Finally, plaintiffs argue for a partial stay of their zeroing claim. [4] Pls.' Opp'n 6–9. A partial stay, however, is not in the interest of judicial economy. A partial stay may necessitate multiple decisions and separate remands on the zeroing and non-zeroing issues, which would delay and extend proceedings through piecemeal litigation and appellate reviews. *See* USCIT R. 1.

In conclusion, the objections raised by plaintiffs and defendant do not persuade the court that a stay of this action should be avoided.

ORDER

Upon consideration of the submissions filed by plaintiffs Papierfabrik August Koehler AG and Koehler America, Inc., defendant United States, and defendant-intervenor Appleton Papers Inc., and upon all other papers and proceedings herein, and upon due deliberation, it is hereby

ORDERED that this case be, and hereby is, stayed until 30 days after the final resolution of all appellate review proceedings in *Union Steel v. United States*, CAFC Court No. 2012–1248.

Dated: December 10, 2012
New York, New York

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

[4] Plaintiffs and defendant cite recent cases of this Court where, in similar situations, stays were not ordered. Whether to order a stay, however, is a matter within the court's sound discretion.