U.S. Court of International Trade

Slip Op. 16–25

FUSHUN JINLY PETROCHEMICAL CARBON CO., LTD. AND FANGDA CARBON NEW MATERIAL CO., LTD., Plaintiffs, v. UNITED STATES, Defendant, AND SGL CARBON LLC AND SUPERIOR GRAPHITE CO., Defendant-Intervenors.

Before: R. Kenton Musgrave, Senior Judge
Court No. 14–00287

OPINION

[Sustaining fourth administrative review of antidumping duty order on small diameter graphite electrodes from the People's Republic of China.]

Dated: March 23, 2016

Lizbeth R. Levinson and *Ronald M. Wisla*, Kutak Rock LLP, of Washington DC, for the plaintiffs.

Melissa M. Devine, Trial Attorney, Commercial Litigation Branch, Civil Division, U.S. Department of Justice, of Washington DC, for the defendant. With her on the brief were *Benjamin C. Mizer*, Principal Deputy Assistant Attorney General, *Jeanne E. Davidson*, Director, and *Claudia Burke*, Assistant Director. Of Counsel on the brief was *Nanda Srikantaiah*, Attorney, Office of the Chief Counsel for Trade Enforcement & Compliance, U.S. Department of Commerce.

David A. Hartquist, *R. Alan Luberda*, and *Brooke M. Ringel*, Kelley Drye & Warren LLP, of Washington DC, for the defendant-intervenors SGL Carbon LLC and Superior Graphite Company.

Musgrave, Senior Judge:

This opinion addresses challenges brought by the plaintiffs Fushun Jinly Petrochemical Carbon Co., Ltd. ("Fushun") and Fangda Carbon New Material Co., Ltd. ("Fangda") to *Small Diameter Graphite Electrodes from the People's Republic of China: Final Results of Antidumping Duty Review; 2012–2013*, 79 Fed. Reg. 57508 (Sep. 25, 2014) ("*Final Results*") as reasoned in the accompanying issues and decision memorandum ("IDM"). Substantial evidence of record, however, supports the *Final Results* on those challenges.

Background

The matter concerns the fourth administrative review of the order on subject merchandise,[1] as determined by the International Trade Administration, U.S. Department of Commerce ("Commerce"). After the review's March 29, 2013 initiation, Commerce selected Fushun and Fangda as mandatory respondents, PDoc 16, and published preliminary results on March 24, 2014. *Small Diameter Graphite Electrodes from the PRC*, 79 Fed. Reg. 15994 (Mar. 24, 2014) (prelim. determ.), PDoc 228 ("*Preliminary Results*"), and accompanying preliminary decision memorandum, PDoc 222 ("PDM").

Concerning two of the issues brought here, Commerce preliminarily found that Fushun had withheld or misrepresented information and had impeded the review, and accordingly applied "total" facts available with an adverse inference after disregarding Fushun's submissions. PDM at 4–7; CDoc 243 ("AFA Memo"). As a consequence, because Fushun had not demonstrated its separation from the PRC government, Commerce preliminarily determined that Fushun was also subject to the 159.64 percent PRC-wide margin. PDM at 7; AFA Memo at 14.

Concerning one of the other challenges brought here, after the Ukraine was selected as the primarysurrogate country Commerce granted Fangda a by-product offset for its forming scrap by-product and valued it with the Ukrainian Harmonized Tariff Schedule ("HTS") item 2713.12 for "Petroleum Coke, Calcined." PDM at 23; IDM at 31.

Fushun and Fangda submitted administrative case briefs after publication of the *Preliminary Results*. Fangda's brief objected to Commerce's valuation of its "forming scrap" by-product, arguing that the Ukrainian value was aberrational, and it also challenged Commerce's VAT methodology. CDoc 251. Fushun's brief was rejected on the ground that it improperly contained new factual information, and its revised brief challenged Commerce's determination to apply total facts available with an adverse inference. CDoc 254. In a separate submission, Fushun requested that Commerce reconsider its rejection of the original brief, arguing that the rejection deprived it of the opportunity to comment on the impact of the final determination on liquidation instructions with respect to a certain customer. CDoc 256.

On September 25, 2014, Commerce published its *Final Results*. 79 Fed. Reg. 57508. Commerce continued to apply total facts available with an adverse inference to Fushun, *see* IDM at 8–13, and continued to find that the Ukrainian value for Fangda's forming scrap by-

[1] *See Antidumping Duty Order: Small Diameter Graphite Electrodes from the PRC* (hereinafter "PRC"), 74 Fed. Reg. 8775 (Feb. 26, 2009).

product was appropriate, *see id.* at 30–36. Commerce also rejected Fushun's request to reconsider its rejected case brief arguments and Fangda's challenge to its VAT methodology. *Id*. at 2–3, 22–25. Commerce made no changes to either party's margin. *See Final Results*, 79 Fed. Reg. at 57509.

The plaintiffs then brought suit here, challenging (1) the selection of the surrogate price for valuing the factors of production for forming scrap, arguing that Commerce's selection is aberrational and unsupported by substantial evidence, (2) the deduction of non-refunded value added taxes ("VAT") from U.S. price as not in accordance with law, (3) the application of total adverse facts available to Fushun, arguing that substantial evidence does not support finding that Fushun concealed or withheld information, and that (4) Fushun deserved a separate rate. In addition, Fushun urges the court (5) to fashion a remedy to exclude an importer that did not purchase merchandise from Fushun during the period of review ("POR") from being subject to the adverse rate.

Jurisdiction and Standard of Review

Jurisdiction is predicated upon 19 U.S.C. §1516a(a)(2)(B)(iii) and 28 U.S.C. §1581(c). Commerce's final results are to be sustained unless they are "unsupported by substantial evidence on the record, or otherwise not in accordance with law". 19 U.S.C. §1516a(b)(l)(B)(i).

Discussion

I

First briefed is the plaintiffs' challenge to the selection of the surrogate value ("SV") for the Fangda Group's forming scrap by-product created during and reintroduced into the production of the subject merchandise.

A

"Normal" value for products from a non-market economy country is typically determined on the basis of surrogate values selected for the factors of production ("FOPs") utilized in producing the merchandise, plus amounts for general expenses, the cost of containers, coverings, and other expenses, and assumed profit. *See* 19 U.S.C. §1677b(c)(1). Because FOPs are based on "the values of such factors in a market economy country or countries considered to be appropriate", *id*., Commerce has discretion in the selection of FOPs, so long as they represent the "best available information" for using as a surrogate value.

See 19 U.S.C. §1677b(c)(1)(B); *see also Nation Ford Chemical Co. v. United States*, 166 F.3d 1373, 1377 (Fed. Cir. 1999).

In that exercise, Commerce relies on one or more surrogate countries that are (A) at a level of economic development comparable to that of the non-market economy country, and (B) significant producers of comparable merchandise. 19 U.S.C. §1677b(c)(4). Commerce will normally value all FOPs from a single surrogate country source, 19 C.F.R. §351.408(c)(2), and in the selection of the surrogate country Commerce attempts to seek data representing investigation or review period-wide prices, prices specific to the input in question, prices that are net of taxes and import duties, prices that are contemporaneous with the period of investigation or review, and data that are publicly available. *See* Import Administration Policy Bulletin No. 04.1: Non-Market Economy Surrogate Country Selection Process (Dep't of Commerce Mar. 1, 2004).

The primary raw material inputs for small diameter graphite electrode ("SDGE") products are calcined petroleum coke and "needle" coke, which is a premium-quality type of calcined petroleum coke produced only by a small number of specialized producers in the United States, the United Kingdom, Japan, and the PRC. Responding to Commerce's requests for information on its production of SDGEs, Fangda's Group[2] reported separate FOPs for domestic needle coke,[3] imported needle coke, self-produced calcined petroleum coke (involving raw petroleum coke, labor and electricity inputs) and forming scrap. Because the Fangda Group's reported market economy POR purchases of needle coke exceeded 33 percent of its total POR purchases of domestic and market economy needle coke,[4] Commerce valued both the reported domestic and market economy needle coke FOPs using the weighted average of the Fangda Group's market economy needle coke purchases during the POR in accordance with the provisions of 19 C.F.R. §351.408(c)(l) that were in effect at that time. Preliminary SV Mem., CDocs 242–43, at 9–10 and Ex. 3. *See* Pls' 56.2 Br. at 15 (confidential). That surrogate value is undisputed here.

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[2] "Collapsed" alongside Fangda during the administrative proceeding were affiliates Beijing Fangda Carbon Tech Co., Ltd., Chengdu Rongguang Carbon Co., Ltd., Fushun Carbon Co., Ltd., and Hefei Carbon Co., Ltd. ("Fangda Group"). IDM at 1 n.1. *See* 19 C.F.R. §351.401(f).

[3] According to the papers, needle coke has a distinct crystalline structure that is necessary for achieving high power, super-high power and ultra-high power performance standards in the highest-quality electrode products. Generally speaking, the higher the performance standard of a given electrode, the higher will be the needed percentage of needle coke relative to calcined petroleum in the production process, in contrast to "regular" power electrode products that may be manufactured solelywith calcined petroleum coke inputs and without incorporatingany needle coke.

[4] *See* Fangda Section D Resp., CDocs 44–61, at Ex. D-6.

All calcined petroleum coke consumed by the Fangda Group in production during the POR was "self-produced" by two of the group's members and another affiliate of the Fangda Group. Commerce valued the self-produced calcined petroleum coke based on its FOPs, consisting of raw petroleum coke, electricity, and labor inputs.[5] There is no dispute over Commerce's selection of the surrogate values for the reported FOPs for the Fangda Group's self-produced calcined petroleum coke. *See* Preliminary Analysis Mem. for Fangda Group at 4. Commerce valued the raw petroleum coke inputs using the average unit value ("AUV ") of imports under Ukrainian HTS item 2713.11 (raw petroleum coke) equal to $243.8298/MT, valued the reported electricity inputs at 0.8199 Ukrainian Hryvnia ("UAH ") per kilowatt hour/MT, and valued the reported direct and indirect labor hours at 16.3033 UAH per hour. Preliminary SV Mem. at Ex. 3, *supra*. Fangda points out that when the surrogate values Commerce selected for raw petroleum coke, electricity, and labor inputs are applied to the FOPs reported by the Fangda Group affiliate for its entire POR production of calcined petroleum coke, based upon the average of monthly UAH/dollar exchange rate during the POR of $0.1220917, the resulting value of its self-produced calcined petroleum coke is a certain, determinable figure between $250 and $450 per metric ton ("benchmark").

The specific issue here disputed concerns the surrogate value for forming scrap, a by-product of SDGE production. Although the antidumping statute does not address the treatment of by-products generated during the production process, from an accounting perspective it is appropriate to offset production costs by the value of such by-products, and towards that end Commerce considers its by-product accounting methodology as consistent with the statute, *see* 19 U.S.C. §1677b(c), as further honed from time to time, *cf. Guangdong Chemicals Import & Export Corp. v. United States*, 30 CIT 1412, 1422, 460 F. Supp. 2d 1365, 1373 (2006) *with*, *e.g.*, *Juancheng Kangtai Chemical Co. v. United States*, 39 CIT ___, Slip Op. 15–93 (Aug. 21, 2015) at 66–81. Parties requesting the offset have the burden of presenting to Commerce evidence regarding the amount of by-product produced, as well as evidence that the generated by-product is re-used in the production of the subject merchandise or has commercial value, before Commerce will incorporate offsets into the margin calculation. *E.g.*, *American Tubular Prods., LLC v. United States*, 38 CIT ___, Slip Op. 14–116 (Sep. 26, 2014) at 17–18, *appeal pending*, Fed. Cir. No. 2016–1127.

[5] *See* Fangda 2nd Supp. Resp., CDocs 231–39, at Exs. S2-D2, p. 23, and S2-D3, p. 30 (Calcined Petroleum Coke Worksheets).

Forming scrap is produced in the initial forming stage of electrode production.[6] Fangda mixes all forming scrap from all power levels of electrode products together, and on this point Commerce emphasizes that there is no record information that indicates the component breakdown of forming scrap when it is reintroduced into the kneading stage of production. *See generally* Fangda 2d Supp. Sec. D Resp. at Ex. D-1, CDoc 56; *cf.* Pl's USCIT R. 56 Brief at 5–6 *with* Def's Resp. at 9, 11. Fangda reintroduces its forming scrap at that stage in order to lower its cost of SDGE production.

In the *Preliminary Results*, Commerce identified the Fangda Group's FOPs for forming scrap as a type of calcined petroleum coke by-product, and valued it using the AUV of Ukrainian import data for HTS item 2713.12 (calcined petroleum coke), *i.e.*, $1,820 per MT. *See* Fangda 2d Supp. Sec. D Resp. at 9 and Ex. 3. Fangda agreed in its administrative case brief that HTS 2713.12 is the proper category for valuing the forming scrap by-product, but it argued that the Ukrainian AUV is aberrational when compared with its own values for calcined petroleum coke and its needle coke purchases. *E.g.*, Fangda Admin. Case Brief at 15, CDoc 251. Fangda did not recommend an alternative methodology for valuing the forming scrap by-product but suggested instead a "building up" methodology based on its self-produced calcined petroleum coke input.

After noting that Fangda did not supply a build-up methodology and that Fangda did not provide evidence as to the ratio of calcined petroleum coke to needle coke in the forming scrap by-product, Commerce concluded that the data would not support a build-up calculation of the forming scrap value and that selecting a surrogate value that included both calcined petroleum and needle coke would be more specific to the by-product in question. *See* IDM at 31. Continuing to evaluate the surrogate value information from the Ukraine, the primary surrogate country, Commerce then determined that it would be appropriate to value forming scrap using Ukrainian HTS 2713.12 because it is the most product-specific HTS category available. *Id.* at 31–32.

Summarizing, Commerce found that: (a) the record shows that the forming scrap used by Fangda Group contains both needle coke and calcined petroleum coke, (b) Ukrainian HTS 2713.12 covers both products and contains imports of both, (c) Ukrainian import data for HTS 2713.12 are publicly available, contemporaneous to the period of review and duty and tax exclusive, and therefore (d) those data, with

[6] Fangda Group's production process is apparently similar to that described in *U.K. Carbon and Graphite Co. v. United States*, 37 CIT ___, ___, 931 F. Supp. 2d 1322, 1330–31 (2013).

an AUV of $1,820/MT, comprise the best available information. *Id*. at 31, 36. Commerce further determined that the record did not indicate the ratio of calcined petroleum coke to needle coke in the forming scrap, and that the Ukrainian value for HTS 2713.12 did not contain a small quantity of imports and was therefore not aberrational. *Id*. at 31–35. Consequently, Commerce continued to use HTS 2713.12 data from the Ukraine to value Fangda's forming scrap by-product.

B

Fangda agrees in principle that forming scrap may be valued using import statistics under HTS item 2713.12, but it argues that the agency's determination to value the Fangda Group's forming scrap using the AUV of $1,820/MT based on the Ukrainian import data for that tariff item "as is" was not supported by substantial evidence and not the best information available for valuing forming scrap.

Fangda first contends the Ukrainian AUV is "skewed" by the needle coke prices reflected in the underlying data and is therefore overinflated as compared with the composition of its forming scrap. This is so, Fangda argues, because the Fangda Group's forming scrap consists "predominantly" of calcined petroleum coke: all forming scrap from the group's electrode production is mixed together, and for the "vast majority" of its products, more calcined petroleum coke was consumed than needle coke. Fangda argues that its group provided Commerce the purchase information for all of its FOP inputs as well as the information related to all of its self-produced calcined coke, and that the information clearly showed that the combined production and consumption of calcined petroleum coke in the forming stage (from which point the forming scrap was reclaimed as a by-product) was vastly greater than the consumption of needle coke. Fangda further argues that the cost of manufacture and production worksheets for the three Fangda production companies corroborated this point, and that based on a reasonably conservative inference of the approximate ratio of calcined petroleum coke to needle coke in its forming scrap, the commercial value thereof should thus at most be substantially less than the premium needle coke price that the Ukrainian AUV "obviously" reflects from the import data for HTS item 2713.12.[7]

[7] Fangda juxtaposes the Ukrainian AUV of $1,820 against the Fangda Group's somewhat-higher purchase prices of imported needle coke as well as the data covering the wide range of prices it proposed as surrogate values for valuing calcined petroleum coke ($266 MT to $700 MT), *see* Pls' 56.2 Br. at 14–15, and while Fangda allows that forming scrap may contain varying amounts of needle coke if the earlier production involved electrode products containing needle coke, it also allows that in addition to containing previously reintroduced

Those import data, Fangda argues, are "weighted" with a "higher" proportion of needle coke because the import data from the four needle coke producing countries alone account for approximately half the imports into the Ukraine. Fangda juxtaposes the average prices thereof against the average price of the remaining half of the imports into the Ukraine from the non-needle coke producing countries, and in doing so Fangda argues the Ukrainian AUV more closely approximates a needle coke price, as may be discerned by comparison of the Ukrainian AUV with the Fangda Group's purchases of needle coke. Fangda argues the AUV of $514.43/MT from South Africa's imports during the POR under HTS item 2713.12 is the best information in the record for valuing forming scrap rather than the Ukrainian import data, since Commerce identified South Africa as a potential surrogate country source and its AUV for HTS item 2713.12 is more reasonably representative of the commercial value of the Fangda Group's forming scrap when juxtaposed between its logically-determined benchmark for calcined petroleum coke, *supra*, and the average price of the Fangda Group's own needle coke purchases. *See* Pls. 56.2 Br. at 9–13.

The court must conclude Fangda's arguments on the record insufficient to overcome Commerce's surrogate value selection for forming scrap. Regarding the argument that South Africa's data is "best" for valuing the Fangda Group's forming scrap, if one were to calculate a weighted average based on Fangda's argued benchmark for calcined petroleum coke and the simple average of Fangda Group's needle coke purchase prices in (rough) proportion to Fangda's argued ratio of calcined petroleum coke and needle coke in its group's forming scrap, the resulting figure is significantly higher than the South African AUV for HTS 2713.12, which hardly supports the argument that that AUV is the "best" information on the record for valuing its forming scrap.

Regarding the AUV of the Ukrainian import data, Fangda's arguments do not overcome the absence of information on the record necessary to establish its case. Fangda argues that its purchase and consumption information clearly establish the overall average ratio of needle coke and calcined petroleum coke in the forming scrap by-product for the entire POR, but Commerce's expressed concern is regarding the lack of record evidence establishing that ratio for *subject* merchandise, *i.e.*, the relevant subset of the Fangda Group's production, and Fangda does not refer the court to an aspect of the record that would indicate the ratio of inputs in its group's non-

forming scrap, graphite scrap, modified coal tar pitch and stearic acid, forming scrap obtained from "regular" power electrodes will contain little or no needle coke.

subject merchandise forming scrap input that might be used to reconcile the averages for the entire POR production and consumption information for calcined petroleum coke and needle coke and the (implicit) production ratio for subject merchandise as argued by Fangda.

Instead, while claiming that the "vast majority" of its products consume more calcined petroleum coke than needle coke, Fangda allows that "regular" graphite electrodes may be produced without needle coke. That implies, for example, that production runs of "regular" non-subject merchandise graphite electrodes using only calcined petroleum coke (with concomitant forming scrap produced, mixed together with other forming scrap, and reintroduced during such runs) will necessarily result in increases of the percentage of needle coke and decreases of the percentage of calcined petroleum coke in the remaining needle-coke-to-calcined-petroleum-coke inputs ratio that would be attributable to subject merchandise production runs from Fangda's reported consumption of needle coke and calcined petroleum coke in production during the POR. The process of "mixing of all forming scrap . . . together", Pl's 56.2 Br. at 10, must be one that is continuous throughout the POR (a single or even occasional such mixing during the POR would be risable), but Fangda's papers to the court do not illuminate further on its subject and non-subject merchandise production.

Similarly, Fangda's argument that the Ukrainian data are "heavily skewed toward needle coke", *e.g.*, Pls' Reply at 9, must be placed in context *vis-à-vis* Fangda's arguments regarding the composition of its group's forming scrap. Therein, the argument does not overcome Commerce's concern that without more precise record information as to the composition of forming scrap produced during production runs of subject merchandise, one cannot conclude that the composition of the Ukrainian import data for HTS 2713.12 is distortive. *See*, *e.g.*, Def's Resp. at 12 ("the purchase and consumption information that Fangda provided . . . is limited to subject small diameter electrodes, and does not reflect all electrode production during the period of review"); IDM at 32 ("the forming scrap from the production of different power levels of SDGE production is not kept separate, and that production information does not contain all electrodes produced").

Furthermore, even if Fangda's *arguendo* proportions of calcined petroleum coke and needle coke in forming scrap produced during production of subject merchandise are accurate (from which it might be concluded that the Ukrainian import data are "distortive" because they are not representative of those proportions; *e.g.*, Pls' 56.2 Br. at 10–12), the point would not necessarily result in resort to selection of

HTS 2713.12 data pertaining to an entirely different country in contravention of Commerce's preference for selecting surrogate values for FOPs from a single surrogate country. *See* 19 C.F.R. §351.408(c)(2). The solution might involve, for example, conversion of the AUV of the Ukrainian data for HTS 2713.12 from a simple to a weighted average that would reflect Fangda's argued calcined-petroleum-coke-to-needle-coke ratio. But whether that exercise even produces a "better" value for the Fangda Group's forming scrap, at any rate, it is not one that Fangda framed to Commerce, and regardless, the court may not, *sua sponte* or otherwise, "displace the [agency's] choice between two fairly conflicting views", *id.*, because "the possibility of drawing two inconsistent conclusions from the evidence does not prevent an administrative agency's finding from being supported by substantial evidence." *Consolo v. Federal Maritime Commission,* 383 U.S. 607, 620 (1966) (citations omitted).

On the other hand, in evaluating the reasonableness of the AUV of the Ukrainian import data for HTS 2713.12 as a surrogate for approximating the value of Fangda Groups's forming scrap, it is always the case that the "substantiality of evidence must take into account whatever in the record fairly detracts from its weight." *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 488 (1951). In that regard, Commerce's analysis is thin at points to the extent it appears to resolve to *ipse dixit* statements or circular reasoning. For example, even though no party placed information on the record concerning the precise composition in imports of needle coke versus calcined coke under Ukrainian HTS 2713.12 or under the same HTS category of another potential surrogate country, *see* IDM at 31–32, Commerce cannot avoid the not-unreasonable inference that the imports into the Ukraine under HTS 2713.12 likely consisted of roughly half needle coke and half "all other" calcined petroleum coke. *Cf.* IDM at 26 n.108 (acknowledging Fangda's arguments in this regard). Commerce may technically be correct as to the "unknown" percentages of needle coke and calcined petroleum coke among the Ukrainian import data, but this is not an instance of an "unknown unknown;" rather it is an instance of a "known unknown,"[8] *i.e.*, there are indicia on the record of a reasonable range within which those percentages likely fall. *See infra*.

[8] *Cf.*, *e.g.*, *Yates v. United States*, 135 S.Ct. 1074, ___ (2015) ("Congress enacts catchalls for known unknowns") (internal quotes, brackets, and citation omitted).

However, given the absence of more precise information regarding the composition of the Fangda Group's forming scrap, the above is of less concern here than Commerce's atypical response to Fangda's argument that the Ukrainian import data are aberrationally small[9] (*i.e.*, 4,442 MT during the entire POR) as compared to the import data for South Africa (207,682 MT) or those of Thailand, Indonesia and the Philippines (53,534 MT, 54,204 MT and 61,569 MT, respectively). The court's understanding is that when considering an allegation that data represent an aberrationally small quantity, Commerce typically determines whether the price represented thereby (*i.e.*, the Ukrainian AUV in this instance) is aberrational by comparing it against other sources of market value. *See*, *e.g.*, *Shakeproof Assembly Components Division of Illinois Tool Works, Inc. v. United States*, 23 CIT 479, 485, 59 F. Supp. 2d 1354, 1360 (1999); *Certain Cut-to-Length Carbon Steel Plate From the PRC*, 62 Fed. Reg. 61964, 61981 (Nov. 20, 1997) (final LTFV determ.) ("[f]or pig iron, we were unable to use the Indian Monthly Statistics as we determined that the import price was aberrational because the Indian data was based on a very small quantity and was almost two times the price of the Indonesian pig iron"); *Hand Tools Final Results, Heavy Forged Hand Tools, Finished or Unfinished, With or Without Handles, from the PRC*, 60 Fed. Reg. 49251, 49253 (Sept. 22, 1995) (final rev. results) ("we have compared the Indian import statistics to [other] sources of market value to determine whether the Indian import values are aberrational"). Commerce did not engage in such an exercise during the administrative proceeding but instead concluded that the Ukrainian import data for HTS 2713.12 are not aberrationally small by noting, first, that the Ukrainian import volume for that tariff item is still 61% of the volume of Ukrainian electrode exports in category HTS 8545.11 (which Commerce concluded does not represent an aberrationally small percentage), and second, by observing that in "scale" the volume of Ukrainian imports of HTS 2713.12 represents a "substantial" volume of Ukrainian electrode exports. IDM at 34.

Commerce does not here enlighten as to the relevance of such a comparison, but the court can "uphold a decision of less than ideal clarity if the agency's path may reasonably be discerned." *Bowman Transportation, Inc. v. Arkansas-Best Freight System, Inc.*, 419 U.S. 281, 286 (1974). Of course, an administrative determination that does not reflect "economic reality" is unsustainable as unsupported by

[9] *See* Pls' 56.2 Br. at 21–22, quoting, *inter alia*, *Shanghai Foreign Trade Enterprises Co. Ltd. v. United States*, 28 CIT 480, 495, 318 F. Supp. 2d 1339, 1353 (2004) (Commerce's practice is normally to "ensure that a small quantity of imports did not produce a price that is aberrational relative to other sources of market value").

substantial evidence. *Yangzhou Bestpak Gifts & Crafts Co., Ltd. v.United States*, 716 F. 3d 1370, 1378 (Fed. Cir. 2013), quoting *Eurodif*, *supra*, 555 U.S. at 317–18. Still, Commerce need not duplicate the exact production experience of a respondent, so long as it chooses, to the extent possible from the record, a surrogate value for the input that most accurately represents the "fair" market value in a hypothetical market-economy picture of the NME relevant to the proceeding. *Nation Ford*, *supra*, 166 F.3d at 1377 (quoting CIT decision). The "hypothetical" used for that purpose in this instance is the Ukraine -- which, as the domestic industry here points out, accorded with the plaintiffs' request not only to include the Ukraine among Commerce's list of countries determined to be at a level of economic development comparable to the PRC but also to select it as the primary surrogate country in the review. Def-Ints' Resp. at 4, referencing Respondents' Surrogate Country Cmts (Aug. 21, 2013), PDoc 88, at 2.

Obviously, Fangda had second thoughts on the Ukraine's selection as the primary surrogate country when it came to the forming scrap surrogate value selection, and Fangda here claims it proved the Ukrainian import volume aberrationally small via comparison thereof with the import volumes of the other potential surrogate countries as well as based on Fangda's own analysis of price. *See* Pls' Reply at 3. According to the IDM, however, Fangda was only able to identify the import value by metric ton and total price from each of the "dominant" needle coke producing countries (the United States, the United Kingdom, and Japan), IDM at 32–33, and

> [i]mports from these countries into [the] Ukraine amount to 50 percent[ ] of the Ukrainian summary quantity of HTS 2713.12 and have an average unit value of 2,703 USD/MT while the Ukrainian value [*i.e.*, AUV] of HTS 2713.12 is 1820.86 USD/MT. Also, Fangda Group attempts to quantify the makeup of Ukrainian HTS 2713.12 by comparing the ratio of import values to quantities from each of these countries to the weighted average market economy price we established for needle coke based on Fangda Group market economy purchases. Fangda Group then attempts to conclude that all imports from these countries are so valuable that they must all be needle coke. If the same logic is applied to South African imports of HTS 2713.12[,] we find that 52 percent of imports come from a dominant provider of needle coke, the United States,[ ] and the average unit value of these imports is 557 USD/MT while the South African value of HTS 2713.12 is 510 USD/MT.

IDM at 33 (footnotes omitted).

At least in that regard, Fangda's logic appeared flawed to Commerce. Fangda here, however, stresses: that the AUVs for HTS 2713.12 for South Africa, Indonesia, the Philippines, and Thailand ranged from $161.39/MT to $605.19/MT, or between one-tenth and on-third of the Ukranian AUV; that its group's total purchase volume of raw petroleum coke (for processing into calcined petroleum coke), calcined petroleum coke, domestic needle coke, and imported needle coke was over 40 times that of the Ukrainian import volume during the POR; that the administrative record established that under HTS 2713.12, the AUVs for Indonesia, the Philippines, and Thailand were each based upon sample sizes 12 times greater than the Ukrainian sample size; and also that the South African AUV was based upon a sample size almost 50 times greater than the Ukrainian AUV. *See* Respondents' Post-Preliminary Surrogate Value Submission at Ex. 2; PDoc 231. Those points, however, shed only dim light on the reasonableness of relying upon the Ukrainian AUV and none on the proportions of calcined petroleum coke and needle coke among those countries' imports under HTS 2713.12 or on the underlying variation in the values thereof, nor do they conclusively prove that the Ukrainian AUV is a statistical outlier in the trade of HTS 2713.12 imports. The fact that the Ukrainian AUV may be "the" outlying value among those countries on Commerce's primary surrogate country list is an accident of the surrogate valuation process, from a particular country, and over a particular time period, but that is not, in and of itself, a reason for rejecting that value.

The real question then, in accordance with Commerce's "typical" consideration of an aberrational volume assertion, is whether the Ukrainian import data represent non-aberrational commercial values, not simply the country-wide volume itself. *See*, *e.g.*, *Shakeproof*, *supra* ; *cf.* Pls' Reply at 7. And on that question, the fact of the matter is that Commerce had to consider, in addition to its preference for data are publicly-available, contemporaneous with the period of review, tax-exclusive, reflective of broad market averages, and representative of FOPs from the primary surrogate country, the Ukrainian import data in light of the fact that the forming scrap input is itself a hybridization of a number of other inputs including calcined petroleum coke and needle coke. *See* IDM at 31, 36. If "the process of constructing foreign market value for a producer in a nonmarket economy country is difficult and necessarily imprecise", *Sigma Corp. v. United States*, 117 F.3d 1401, 1408 (Fed. Cir. 1997) (discussing predecessor provision of normal value), then multiple variables necessarily introduce an even greater level of complexity and imprecision into the analysis of selecting a single surrogate FOP therefor.

As Fangda points out, the record reflects a range of values for the inputs that comprise forming scrap against which to evaluate the Ukrainian value(s) of the import data for HTS 2713.12, but not all of them would meet Commerce's selection criteria. Fangda emphasizes that the Ukrainian imported needle coke prices are approximately $2,703/MT on average, which far exceeded the average of its own group's market economy purchase prices of needle coke, but as Commerce also pointed out, Fangda's conclusions as to the price differential at this point, resting largely on its own purchases of needle coke, reflect isolated transactions between Fangda and its needle coke suppliers rather than broad market averages. Fangda's own purchase prices reflect its own "economic reality," but they are not dispositive of the reasonableness of using the Ukrainian data for HTS 2712.12 as a surrogate for the value of forming scrap, which also reflect "economic reality" (of the "fair" market values of the chosen "hypothetical" market economy's mix of calcined petroleum coke and needle coke within the HTS item number that Fangda agrees is the appropriate item for seeking a surrogate value for forming scrap). *See Nation Ford*, *supra*, 166 F.3d at 1377.

As coda, the defendant also emphasizes that Fangda's arguments do not take into account the value added by other material inputs within forming scrap (such as stearic acid --which surrogate value Commerce determined to be $1,803.40/MT --*see* Prelim. SV Memorandum, CDocs 242–43 at Ex. 3), as well as labor and electricity. *See*, *e.g.*, Def's Resp. at 11; IDM at 32. The court acknowledges it would not be inappropriate to conceptualize the value of forming scrap as represented by more than simply the separate proportional values of calcined petroleum coke and needle coke, but the bottom line here is that given the absence of precise information as to the composition Fangda's forming scrap and of the ranges and variation on the record of the values of calcined petroleum coke and needle coke as compared with the ranges of those values among the Ukrainian import data, *see*, *e.g.*, Pls' 56.2 Br. at 13–14, it cannot be concluded that the Ukrainian AUV of $1,820 for HTS 2712.12 is significantly overstated or "skewed" as a surrogate for Fangda's forming scrap, because the standard of review is one of substantial record evidence.

In the final analysis of the relief Fangda seeks, by arguing for the South African AUV, Fangda is fundamentally asking the court to reweigh the evidence or substitute its own analysis or judgment thereon, which the court may not do in the absence of a reason from the record therefor without intruding into Commerce's domain. *See, e.g.*, *Downhole Pipe & Equipment, L.P. v. United States*, 776 F.3d

1369, 1376–77 (Fed. Cir. 2015), referencing *Trent Tube Division, Crucible Materials Corp. v. Avesta Sandvik Tube AB*, 975 F.2d 807, 815 (Fed. Cir. 1992). *Sub silencio*, the court has considered Fangda's remaining arguments on the issue and finds them to be similar in effect, by asking the court to reweigh or substitute a different analysis of the record. Thereby, they do not overcome Commerce's "broad discretion to determine 'the best available information' in a reasonable manner on a case-by-case basis." *Timken Co. v. United States*, 26 CIT 434, 438, 201 F. Supp. 2d 1316, 1321 (2002) (citation omitted). Commerce selected an HTS category that reflected the two primary components of forming scrap (needle coke and calcined petroleum coke), it evaluated the Ukrainian import data therefor, and it concluded that they were not aberrational. Substantial evidence of record supports Commerce's determination, and the court will not "second guess" the agency on the issue. *Cf. JTEKT Corp. v. United States*, 642 F.3d 1378, 1382 (Fed. Cir. 2011); *Royal Thai Gov't v. United States*, 436 F.3d 1330, 1339 (Fed. Cir. 2006).

II

The statute authorizes a deduction from U.S. price equal to "the amount if included in such price, of any export tax, duty, or other charge imposed by the exporting country on the exportation of subject merchandise to the United States". 19 U.S.C. §1677a(c)(2)(B). On this point, the plaintiffs argue Commerce's deduction from their U.S. price to account for the unrefunded portion of PRC domestic VAT taxes upon their exports to the United States is contrary to law. Pls' 56.2 Br. at 25–32. The IDM explains that the deduction is consistent with *Methodological Change for Implementation of Section 772(c)(2)(B) of the Tariff Act of 1930, as Amended, In Certain Non-Market Economy Antidumping Proceedings*, 77 Fed. Reg. 36481 (June 19, 2012) ("*Methodological Change*"), which recognized that the PRC's VAT operates differently than a typical VAT, pursuant to which companies typically either receive a full rebate of the VAT upon export or may credit the VAT paid on input purchases against the VAT the companies collect from their domestic sales. The IDM explains that the unrefunded (or irrecoverable) portion of the PRC VAT amounts to a "tax, duty or other charge imposed on exports that is not imposed on domestic sales." IDM at 23.

The plaintiffs argue that the holdings of *Magnesium Corporation of America v. United States*, 166 F.3d 1364 (Fed. Cir. 1999) ("*Magnesium Corporation*") still control, *i.e.*, that the "plain meaning" of the relevant statutory language was consistent with Commerce's previous interpretation of the statutory provision and "prohibited" Commerce

from making any deduction from U.S. price to account for export taxes, duties, or charges imposed by non-market economy ("NME") countries as defined by 19 U.S.C. §1677(18), and that this court recently affirmed Commerce's previous interpretation that this statutory provision "prevented" Commerce from adjusting U.S. price on account of the PRC's VAT, ruling that this issue had been "resolved long ago"[10] by the CAFC in *Magnesium Corporation*.

The plaintiffs misinterpret. The relevant appellate decision found "plain" that the language of the statute does not require all export taxes to be deducted from the U.S price but requires only deduction of those amounts that are included in the price of the merchandise; hence, whether VAT and export taxes are included in, and should be deducted from, the U.S. price is within Commerce's discretion to determine. *Magnesium Corporation*, 166 F.3d at 1370–71.

At any rate, the plaintiffs agree that change in administrative practice is permissible if a reasoned explanation is provided for the change. They argue, however, that Commerce cannot change practice or interpret the statute contrary to the plain language of the statute. *Dorbest v. United States*, 604 F.3d 1363, 1371 (Fed. Cir. 2010). Specifically, they contend that the plain terms of the stature require an "export tax, duty or other charge" that is "imposed by the exporting country", 19 U.S.C. §1677a(c)(2)(B), and that the PRC's VAT is an internal tax only that by definition is not "imposed" upon export of the subject merchandise. They also argue that the statute only permits Commerce to deduct from U.S. price "the amount if included in such price" and that neither the final results nor the response briefs submitted by the opposition explain how the non-receipt of the refund of internal VAT taxes is reflected in the U.S. price of the subject merchandise, and that nothing in the administrative record establishes that the PRC's VAT was "added" to the invoiced sales price to Fangda's U.S. customers. Pls' 56.2 Br. at 30; Pls' Reply at 12. Similar contentions, however, were addressed at length in *Methodological Change*:

> In adopting this methodological change, the Department considers taxes levied by the [PRC] and Vietnamese governments to be different from other internal transactions between companies in an NME context. Although we do not know how individual companies in those NME countries set prices, we do know that the government taxes a portion of companies' sales receipts. Consistent with our CVD determinations in *CFS Paper* and

[10] *Globe Metallurgical, Inc. v. United States*, 35 CIT ___, ___, 781 F. Supp. 2d 1340, 1348 (2011).

PRCBs, we can measure a transfer of funds between certain NMEs and companies therein, regardless of the direction the money flows. Given that, and given that we know how much respondent companies receive for the U.S. sale, we have determined it appropriate to take taxes into account, as directed by the statute. *See* section 772(c)(2)(B) of the Act.

Specifically, the statute defines an NME as "any foreign country that the administering authority determines does not operate on market principles of cost or pricing structures, so that sales of merchandise in such country do not reflect the fair value of the merchandise." *See* section 771(18) of the Act. As a result, when the Department evaluates whether a tax is included in the price of an NME export sale, it cannot take into consideration the same assumptions as those taken into account when performing a similar type of evaluation for a market economy sale, which does operate in accordance with market principles of cost or pricing structures. Accordingly, it is not an issue of price formation (*i.e.*, whether the seller considers tax when forming price) because that is a market economy concept which is inapplicable by the very definition of an NME.

Additionally, because these are taxes affirmatively imposed by the [PRC] and Vietnamese governments, we presume that they are also collected.[ ] The unrefunded VAT or affirmatively imposed export tax only arises through the fact that there were export sales.

As a result, because the liability arises as a result of export sales, this is where payment originates. Therefore, to achieve what is called for in the statute, the gross price charged to the customer must be reduced to a net price received. In cases involving imports from the PRC or Vietnam, "included in the price" means whether the respondent has reported a price which is gross (*i.e.*, inclusive) or net (*i.e.*, exclusive) of tax. As such, if a gross price has been reported, a deduction must be made for those taxes imposed on the sale, and if a net price has been reported, deductions are not required. We note that, in prior cases involving imports from the PRC or Vietnam where the Department was aware that such a tax was imposed, it has typically been expressed as a percentage of the export selling price. Therefore, any such deduction to export price would also be performed on a percentage basis.

> We further note that deducting internal NME tax transactions from export price or constructed export price is consistent with the Department's longstanding policy, which is consistent with the intent of the statute, that dumping comparisons be tax-neutral. *See Antidumping Duties; Countervailing Duties*, 62 FR 27296, 27369 (May 19, 1997) (citing Statement of Administrative Action accompanying the Uruguay Round Agreements Act, H.R. Doc. No. 103–316, vol. 1, 827, reprinted in 1994 U.S.C.C.A.N. 3773, 4172).
>
> In response to comments that the methodological change does not consider other cost elements that are presumed to be reflected in a price from a market economy country, but not from an NME country, we note that the new methodology does not consider other elements of cost or price because, pursuant to section 773(c)(1)(B) of the Act and consistent with the PRC's and Vietnam's Protocols of Accession to the World Trade Organization ("WTO"), the Department can reject internal costs and prices in an NME country for antidumping and countervailing duty purposes. What is relevant for margin calculation purposes is the net revenue the company ultimately receives on sales made to its U.S. customers, after adjusting for taxes, as provided for by the statute.

Methodological Change, 77 Fed. Reg. at 36483.

The plaintiffs, however, contend that Commerce's and the defendant-intervenors' explanation (that the agency's interpretation is permissible because the PRC is not a Soviet-style NME)[11] is "utter nonsense" because the relevant statutory provisions, 19 U.S.C. §1677a(c)(2)(B) and 19 U.S.C. §1677(18), do not contemplate "different levels of NME status": a country is either an NME or it is not an NME. Likewise, the plaintiffs criticize the *Final Results*' explanation of the statute's encompassing of irrevocable VAT as "a cost that arises as a result of export sales", *IDM* at 23, because "[t] he whole purpose of the statute's NME methodology statute is to disregard prices and costs incurred in the production and sale of the subject merchandise that were incurred in the NME country". Pls' Reply at 13, referencing 19 U.S.C. §1677a(c).

The court disagrees that "disregard" is accurate or necessarily (depending upon circumstances) appropriate. First, the plaintiffs' points appear addressed more towards the determination of the "normal value" ("NV") of a product of an NME country, not U.S. price. NMEs

[11] *See* Def's Resp. at 17–19; Def-Ints' Resp. at 30.

are specified in the NV statute, 19 U.S.C. §1677b(c)(1)(B), not in the U.S. price statute, 19 U.S.C. §1677a(c)(2)(B), and the NV statute explicitly permits the addition of "other expenses" to the FOP methodology. Second, with regard to U.S. price, neither the governing statute nor its legislative history defines "export tax, duty or other charge imposed" for the purpose of adjusting U.S. price, which is aside from the import of the terms "if included in the price" in the statute that were held unambiguous (in the sense of the relevant amount either being included or not included in such price) by *Magnesium Corporation*. Commerce reconsidered its interpretation and concluded that "export tax, duty or other charge imposed" includes VAT that is not fully refunded upon exportation and also that whether a deduction therefor is required depends upon whether the price is reported on a gross or net basis. 77 Fed. Reg. at 36482–83. *Cf.* 19 U.S.C. §1677a(c)(2)(B) ("if included in the price"). Such a methodological update, achieved through notice and comment, compels *Chevron* deference. *See United States v. Eurodif S.A.*, 555 U.S. 305, 316 (2009), referencing *United States v. Mead Corp.*, 533 U.S. 218, 229 230 (2001) (citing *Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837 (1984)). On this issue, the plaintiffs do not persuade that deduction of the portion of the PRC's VAT that was unrefunded or irrecoverable upon export of their subject merchandise to the United States was contrary to law and not supported by substantial evidence.

III

The third issue argued by the plaintiffs concerns Commerce's determination to apply total adverse facts available ("AFA") to Fushun. *See* IDM at 8–13; AFA Memo at 1–14. The statute authorizes Commerce to use "facts otherwise available" if the record lacks necessary information, if a party withholds information Commerce requested, fails to provide information in a timely manner or in the form or manner Commerce requested, significantly impedes the proceedings, or provides information that cannot be verified. 19 U.S.C. §1677e(a). Commerce may disregard all of the information a party submits and determine the party's dumping margin using "total" facts otherwise available when the deficiency affects the reliability of all or most of a respondent's submissions. *See Ad Hoc Shrimp Trade Action Comm. v. United States*, 802 F.3d 1339, 1357 (Fed. Cir. 2015); *Jiangsu Changbao Steel Tube Co. v. United States*, 36 CIT ___, ___, 884 F. Supp. 2d 1295, 1302 (2012), citing *Shanghai Taoen Int'l Trading Co. v. United States*, 29 CIT 189, 193 n.13, 360 F. Supp. 2d 1339, 1348 n.13 (2005)). Further, Commerce can apply an adverse inference

under 19 U.S.C. §1677e(b) if an interested party "has failed to cooperate by not acting to the best of its ability to comply with a request for information". *See also Ad Hoc Shrimp*, 802 F.3d at 1357.

During the administrative proceeding, Commerce applied total AFA after considering the totality of Fushun's responses on the initial question of whether Fushun's U.S. sales involved any resellers during the POR. By way of brief background, during the prior three administrative reviews Fushun dealt with one of its customers in the United States directly and informally (*i.e.*, orally). During this fourth administrative review, Fushun continued such dealings with this customer as to most contractual terms including price, but payment to Fushun was to be handled by another company assisting Fushun's customer. Fushun initially reported the new arrangement as a single hyphenated-entity consisting of its customer and the new company making payment(s). Upon further questioning by Commerce, Fushun provided copies of two written contracts it had executed with the paying company to Commerce as part of Fushun's second supplemental questionnaire response as well as a full explanation (with apologies for any confusion that arose as to its prior responses to Commerce's questions) regarding reseller arrangements. *See Non-Market Economy Antidumping Proceedings: Assessment of Antidumping Duties*, 76 Fed. Reg. 65694 (Oct. 24, 2011) (reseller policy).

Here, the court must observe that the reseller policy appears concerned only with the proper margin for "non-reviewed entries," which margin depends upon whether record evidence indicates a producer or exporter knew or should have known that its sales to a third party (or reseller) were destined for the United States. *See generally id*. That is apparently not the case on this record, as Fushun clearly knew that its sales to the particular U.S. customer were destined for the United States notwithstanding the involvement of the paying company (or "reseller"), and Fushun reported the relevant sales on its U.S. sales database to Commerce. The AFA problem before the court, however, encompasses more than the arguable initial confusion Fushun may have experienced in attempting to describe to Commerce its sales to the relevant U.S. customer, with whom Fushun's apparently cordial business relationship spanned years.

The plaintiffs' papers present a (mostly) compelling recap of relevant events from Fushun's perspective, but, and without delving here into the myriad (and mostly confidential) arguments the parties present on the AFA issue, the basic problem, from Commerce's perspective, was that the issue had "morphed" over time during the administrative proceeding. In particular, in the process of responding to Commerce's questionnaires, Fushun also provided certain docu-

mentation that showed a discrepancy on an important sale term, which Fushun claimed was created at the behest of its customer as a result of advice the customer had received from a customs broker regarding the reseller policy. That advice turned out to be erroneous, as such documentation was unnecessary for the customer to import the subject merchandise at the cash deposit rate set for Fushun.

Be that as it may, after considering the totality of record, including the inconsistencies of Fushun's section A, section C, first supplemental, and second supplemental responses, Commerce determined that Fushun withheld information that Commerce had requested, failed to provide information in the form or manner Commerce requested, impeded the proceeding, and provided information that could not be verified. IDM at 8–11; AFA Memo at 1–13; 19 U.S.C. §1677e(a)(A), (C), (D). In light of the administrative memorandum on the subject (with record citations therein) the court cannot conclude Commerce's determination on the issue unsupported by substantial evidence or not in accordance with law. The Federal Circuit has held that withholding key information or providing false information "unequivocally" demonstrate that a party did not put forth its "maximum effort." *Essar Steel Ltd. v. United States*, 678 F.3d 1268 (Fed. Cir. 2012).

IV

The penultimate issue concerns the plaintiffs' arguments that Fushun should be entitled to a separate rate. The arguments are unpersuasive. Unlike *Qingdao Taifa Group Co. v. United States*, 33 CIT 1090, 637 F. Supp. 2d 1231 (2009), *aff'd*, 467 Fed. Appx. 887 (Fed. Cir. 2012), to which Fushun refers for support, *see* Pls' 56.2 Br. at 42, Fushun failed to "establish[ ] independence from government control"[12] and therefore eligibility for a separate rate, given its original section A and supplemental section A responses that were deemed unreliable. *See* PDM at 4–7; AFA Memo at 14. Because Commerce uses total facts available "in situations where none of the reported data is reliable or usable", *Zhejiang DunAn Hetian Metal Co. v. United States*, 652 F.3d 1333, 1348 (Fed. Cir. 2011), discussing *Steel Authority of India, Ltd. v. United States*, 25 CIT 472, 149 F. Supp. 2d 921 (2001), Commerce applies in such situations the presumption of government control as well as the PRC-wide rate. *See Ad Hoc Shrimp*, *supra*, 802 F.3d at 1356–57. Commerce's application thereof in this instance was in accordance with law.

[12] *See Qingdao Taifa,* 33 CIT at 1098, 637 F. Supp. 2d at 1240–41 (citation omitted).

V

Last addressed is the plaintiffs' request for equitable relief for one of Fushun's importers. The issue involves certain entries that Fushun claimed in its administrative case brief as pertaining to purchases of subject merchandise during the previous administrative review that did not enter the United States until this fourth administrative review. The basis for this claim was predicated upon certain data from U.S. Customs and Border Protection ("CBP") for the POR on the record. Commerce rejected Fushun's case brief on the ground that it involved "new factual information", *see* IDM at 2–3, and Commerce here contends the issue should be dismissed because it involves the factual information that should have been submitted at least 30 days prior to the preliminary determination, *i.e.*, March 24, 2014. *See* 19 C.F.R. §351.301(c)(3)(ii). Commerce argues that because Fushun did not do so, these "new" arguments should be disregarded for failure to exhaust administrative remedies.

The plaintiffs contend that the issues raised in Fushun's case brief were "legal," not factual. Pls' 56.2 Br. at 43–44. Commerce insists, however, that the plaintiffs do not cite to any statutory or regulatory provision that would provide relief for Fushun's importer under this set of circumstances, they simply rely on the assertion that the sales relevant to their claim were made during the previous review period and lack record evidence showing a connection between this importer, the date of sale that the plaintiffs proffer, and the entries identified among the CBP data. Commerce contends that the plaintiffs would have needed to substantiate the conclusion they draw from the data in Fushun's United States Sales Listing, CDoc 32, to the amount of the particular type of entries they contend are listed in the CBP data, CDoc 2, by submitting actual evidence, but the time for submissions of factual information had already passed, and that without such record evidence it would be mere speculation concerning the entries in question. In short, Commerce contends it simply could not rely upon the unsubstantiated statements made by Fushun's counsel. Def's Resp. at 44–45, citing *Lucent Technologies, Inc. v. Gateway, Inc.*, 580 F.3d 1301, 1327 (Fed. Cir. 2009) and *Home Meridian International Inc. v. United States*, 36 CIT ___, ___, 865 F. Supp. 2d 1311, 1322 (2012), *reversed in part on other grounds*, 772 F.3d 1289 (Fed. Cir. 2014).

All of which, however, is rather academic, because the law governing this issue is explicit, as outlined in the defendant's confidential response to the plaintiffs' brief on their USCIT Rule 56.2 motion. Fushun's entries therefore appear to have been properly assessed.

Conclusion

There appearing to be no grounds for the relief requested, a separate judgment dismissing this action will be entered concurrently herewith.

Dated: March 23, 2016
New York, New York

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

Slip Op. 16–26

UNITED STATES, Plaintiff, v. JUAN CARLOS CHAVEZ, AND CHAVEZ IMPORT & EXPORT, INC., Defendants.

Before: R. Kenton Musgrave, Senior Judge
Court No. 12–00104

JUDGMENT

The plaintiff, United States, having commenced this case pursuant to 19 U.S.C. §1592 and 28 U.S.C. §1582 on April 12, 2012 via summonses and a complaint seeking to recover, after collecting on bond(s), unpaid duties totaling US$40,288.82, against the defendant Juan Carlos Chavez in the remaining amount of US$8,773.77 and against the defendant Chavez Import & Export, Inc. ("CIE") in the remaining amount of US$31,515.05, and assess penalties against the defendant Juan Carlos Chavez in the amount of US$25,441.72 (allegedly twice the amount of duties of which the United States was deprived), and against the defendant CIE in the amount of of US$105,916.50 (allegedly the domestic value of the merchandise that was the subject of the false statements), for a total of US$131,358.22 against the defendants, allegedly resulting from misclassifications in violation of 19 U.S.C. §1592 of seven entries, to wit, APJ-00053366, AWB-00056832, AWB-00056840, AWB-00066146, AWB-00067110, AWB-00068118, and AWB-00068753, declaring "Soft Dairy Express" under the Harmonized Tariff Schedule of the United States ("HTSUS") in either HTSUS 0405.20.4000 (dairy spreads: butter substitutes, whether in liquid or solid state, other than those containing over 45 percent by weight of butterfat) and/or "White Cheese" classifiable under HTSUS 0406.90.9900 (cheeses and curds that do not contain cow's milk), and also incorrectly claiming duty-free treatment under the Caribbean Basin Economic Recovery Act; the plaintiff alleging that the correct classifications of those entries are under HTSUS 1901.90.4300 (certain dairy products containing over 10 percent by weight of milk solids) or HTSUS 0406.90.9700 (cheeses and curds

that do contain cow's milk), neither of which classifications qualify for duty-free treatment under the Caribbean Basin Economic Recovery Act; and also alleging that some of the entries contained false valuations allowing them to be processed through informal entry without surety bonds; and also alleging that (amended) pre-penalty notices and demands for duties and penalty notices were issued to the defendants; and also alleging that on April 14, 2010 the defendants executed waivers for a period of two years concerning any statutes of limitation defenses with respect to the entries for which the defendants were an importer of record; and also alleging that U.S. Customs and Border Protection ("Customs") did not receive any written notice from the defendant corporation pursuant to Florida Statute 607.1406 informing of any claims that Customs might be entitled to assert against said corporation and that said corporation did not publish or file a notice of dissolution pursuant to Florida Statute 607.1407 in order to address claims that were unknown to it; and the defendant Juan Carlos Chavez having filed an answer to the complaint on April 22, 2014 denying the substance of the plaintiff's allegations as to misclassification; and court on April 22, 2015 having issued an order to show cause why the matter should not be dismissed for lack of prosecution; and the plaintiff having responded on April 30, 2015 via request to the Clerk of the Court to enter default against the defendant CIE; and the Clerk of the Court having done so on May 5, 2015, ECF No. 23; and the plaintiff on May 4, 2015, having moved for summary judgment against the defendant Juan Carlos Chavez; and the court having granted three unopposed motions for extension of time to the defendant Juan Carlos Chavez to respond to the plaintiff's motion for summary judgment; and the defendant Juan Carlos Chavez having been provided with duplicate copies of the plaintiff's motion for summary judgment, ECF No. 38 (Sep. 29, 2015), and having been ordered on January 19, 2016 to show cause why judgment should not be entered in favor of the plaintiff; *see* ECF No. 42, and the court having received no response or even other contact from the defendant Juan Carlos Chavez as of this date; Now, therefore, it is hereby

ORDERED that the plaintiff's motion for summary judgment, ECF No. 22, be, and hereby is, granted, and it is further

ORDERED, ADJUDGED, AND DECREED that plaintiff recover from defendant Juan Carlos Chavez the amount of $8,773.77 in unpaid duties, plus pre-judgment interest on the amount of $8,773.77 calculated from June 14, 2010, plus post-judgment interest on the

amount of $8,773.77, plus a civil penalty of $25,441.72, plus post-judgment interest on that amount, plus costs to the government, and it is further

ORDERED that the plaintiff provide a status report or motion on the remainder of this case by May 2, 2016.

Dated: March 25, 2016
New York, New York

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

Slip Op. 16–27

JEDWARDS INTERNATIONAL, INC., Plaintiff, v. UNITED STATES, Defendant.

Before: Leo M. Gordon, Judge
Court No. 11–00031

OPINION

[Cross-motions for summary judgment denied; judgment entered classifying subject merchandise.]

Dated: March 28, 2016

John C. Eustice, *Richard A. Mojica*, *Richard H. Abbey*, and *Daniel P. Wendt*, Miller & Chevalier Chartered, of Washington DC for Plaintiff Jedwards International, Inc.

Jennifer E. LaGrange, Trial Attorney, Commercial Litigation Branch, Civil Division, U.S. Department of Justice of Washington, DC for Plaintiff United States. On the brief with her were *Benjamin C. Mizer*, Principal Deputy Assistant Attorney General, *Jeanne E. Davidson*, Director, *Reginald T. Blades, Jr.*, Assistant Director. Of counsel on the brief was *Sheryl A. French*, Attorney, Office of Assistant Chief Counsel for International Trade Litigation U.S. Customs and Border Protection of New York, NY.

Gordon, Judge:

Plaintiff Jedwards International, Inc. ("Plaintiff" or "Jedwards") challenges the classification by U.S. Customs and Border Protection ("Customs") of Jedwards' entries of imported krill oil under the Harmonized Tariff Schedule of the United States ("HTSUS"). Before the court are the cross-motions for summary judgment of Jedwards and Defendant United States. *See* Pl.'s Mot. for Summ. J., ECF No. 41 ("Pl.'s Br."); Def.'s Mem. in Supp. of its Cross-Mot. for Summ. J. & Opp. to Pl.'s Mot. for Summ. J., ECF No. 51 ("Def.'s Br."); Pl.'s Opp. to Def.'s Cross-Mot. for Summ. J. & Reply Br. in further Supp. of its Mot. for Summ. J., ECF No. 56; Def.'s Reply in Supp. of its Cross-Mot. for Summ. J. & Opp. to Req. to File Amicus Br., ECF No. 59 ("Def.'s Reply"). The court has jurisdiction pursuant to 28 U.S.C. § 1581(a) (2012).

For the reasons set forth below, the court classifies the subject entries under HTSUS 1603.00.90.

I. Undisputed Facts

The following facts are not in dispute. The merchandise at issue in this case is krill oil, described on Plaintiff's commercial invoices "Krill Oil Superba™." Jt. Statement of Undisp. Facts ¶ 1, ECF No. 38 ("Jt. Undisp. Facts"). Plaintiff's krill oil is a dark, viscous liquid with a strong odor obtained from Antarctic krill, which is a shrimp-like marine invertebrate animal. Plaintiff markets its krill oil as a nutritional supplement. *Id.* ¶¶ 4, 6.

Plaintiff's krill oil is manufactured in a two-stage process. Stage one involves heating, cooking, drying, and separating the krill meal from the krill animal. Stage two involves extraction of substances from the krill meal using ethanol. The resulting solution is filtered, concentrated, and blended to specification. Consequently, with the exception of residual amounts of ethanol solvent left over from the manufacturing process, Plaintiff's krill oil contains only substances that are naturally occurring in krill. *Id.* ¶¶ 7–8. Customs tested Plaintiff's krill oil revealing the following approximate chemical composition: 53% phospholipids, 23% triglycerides; 8% free fatty acids; and 3% each of mono- and di-glycerides. Plaintiff's krill oil also contains 7% water, 1.7% sodium chloride, and astaxanthin (an antioxidant). *Id.* ¶¶ 15–18.

II. Standard of Review

The court reviews Customs' protest decisions *de novo*. 28 U.S.C. § 2640(a)(1). USCIT Rule 56 permits summary judgment when "there is no genuine issue as to any material fact." USCIT R. 56(c); *see also Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247 (1986). In considering whether material facts are in dispute, the evidence must be considered in the light most favorable to the non-moving party, drawing all reasonable inferences in its favor. *See Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 157 (1970); *Anderson*, 477 U.S. at 261 n.2.

A classification decision involves two steps. The first step addresses the proper meaning of the relevant tariff provisions, which is a question of law. *See Faus Group, Inc. v. United States*, 581 F.3d 1369, 1371–72 (Fed. Cir. 2009) (citing *Orlando Food Corp. v. United States*, 140 F.3d 1437, 1439 (Fed. Cir. 1998)). The second step involves determining whether the merchandise at issue falls within a particular tariff provision as construed, which, when disputed, is a question of fact. *Id.*

When there is no factual dispute regarding the merchandise, the resolution of the classification issue turns on the first step, determin-

ing the proper meaning and scope of the relevant tariff provisions. *See Carl Zeiss, Inc. v. United States*, 195 F.3d 1375, 1378 (Fed. Cir. 1999); *Bausch & Lomb, Inc. v. United States*, 148 F.3d 1363, 1365–66 (Fed. Cir. 1998). This is such a case, and summary judgment is appropriate. *See Bausch & Lomb*, 148 F.3d at 1365–66.

While the court accords deference to Customs' classification rulings relative to their "power to persuade," *United States v. Mead Corp.*, 533 U.S. 218, 235 (2001) (citing *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944)), the court has "an independent responsibility to decide the legal issue of the proper meaning and scope of HTSUS terms." *Warner-Lambert Co. v. United States*, 407 F.3d 1207, 1209 (Fed. Cir. 2005) (citing *Rocknel Fastener, Inc. v. United States*, 267 F.3d 1354, 1358 (Fed. Cir. 2001)).

III. Discussion

Classification disputes under the HTSUS are resolved by reference to the General Rules of Interpretation ("GRIs") and the Additional U.S. Rules of Interpretation. *See Carl Zeiss*, 195 F.3d at 1379. The GRIs are applied in numerical order. *Id.* Interpretation of the HTSUS begins with the language of the tariff headings, subheadings, their section and chapter notes, and may also be aided by the Explanatory Notes published by the World Customs Organization.[1] *Id.* "GRI 1 is paramount. . . . The HTSUS is designed so that most classification questions can be answered by GRI 1 . . . ." *Telebrands Corp. v. United States*, 36 CIT ___, ___, 865 F. Supp. 2d 1277, 1280 (2012).

Pursuant to GRI 1, merchandise that is described "in whole by a single classification heading or subheading" is classifiable under that heading. *CamelBak Prods. LLC v. United States*, 649 F.3d 1361, 1364 (Fed. Cir. 2011). If that single classification applies, the succeeding GRIs are inapplicable. *Mita Copystar Am. v. United States*, 160 F.3d 710, 712 (Fed. Cir. 1998).

The court construes tariff terms according to their common and commercial meanings, and may rely on both its own understanding of the terms as well as upon lexicographic and scientific authorities. *See Len-Ron Mfg. Co. v. United States*, 334 F.3d 1304, 1309 (Fed. Cir. 2003). The court may also refer to the Explanatory Notes "accompanying a tariff subheading, which—although not controlling—provide interpretive guidance." *E.T. Horn Co. v. United States*, 367 F.3d 1326, 1329 (Fed. Cir. 2004) (citing *Len-Ron*, 334 F.3d at 1309).

Upon entry, Plaintiff classified its krill oil under HTSUS subheading 1603.00.90, which includes "[e]xtracts and juices of meat, fish or

[1] The Explanatory Notes are the World Customs Organization's official interpretation of the Harmonized System upon which the HTSUS is based.

crustaceans, molluscs or other aquatic invertebrates" other than clam juice. HTSUS subheading 1603.00.90. An "extract" is "a preparation containing the essence of the substance from which it is derived." *Marcor Development Corp. v. United States*, 20 CIT 538, 545–46, 926 F. Supp. 1124, 1132–33 (1996) (discussing numerous lexicographical sources and the Explanatory Notes to Chapter 16). Subheading 1603.00.90 therefore covers, among other things, preparations of aquatic crustaceans that retain the essence of the crustacean. There is no dispute that Plaintiff obtains its product by capturing and extracting substances from krill, which are small aquatic crustaceans. Jt. Undisp. Facts ¶ 4. There is also no dispute that Plaintiff's krill oil retains the "essence" of the krill: "[W]ith the exception of *residual amounts* of ethanol solvent left over from the manufacturing process, Plaintiff's krill oil *only* contains substances that are naturally occurring in krill." *Id.* ¶ 7 (emphasis added). Plaintiff's krill oil is therefore *prima facie* classifiable under HTSUS subheading 1603.00.90 as an extract of an aquatic crustacean.

Customs, however, classified Plaintiff's krill oil under subheading 3824.90.40. This subheading falls under Section VI of the HTSUS, "Products of the Chemical or Allied Industries," which includes Chapter 38, entitled, "Miscellaneous Chemical Products." HTSUS subheading 3824.90.40 covers "[p]repared binders for foundry molds or cores; chemical products and preparations of the chemical or allied industries (including those consisting of mixtures of natural products), not elsewhere specified or included: Other: Other: Fatty substances of animal or vegetable origin and mixtures thereof." Defendant maintains that subheading 3824.90.40 is the correct classification for Plaintiff's krill oil. Def.'s Br. at 17.

Plaintiff for its part argues that the correct classification for its krill oil is under Chapter 15 (not under Chapter 16 as it originally classified its merchandise upon entry). Pl.'s Br. at 16. The relevant provisions of Chapter 15 cover animal "fats or oils." *See* HTSUS subheadings 1506.00.00, 1517.90.90.

The court is not persuaded that the parties' asserted classifications are correct. *See Jarvis Clark Co. v. United States*, 733 F.2d 873, 878 (Fed. Cir. 1984) ("[T[he court's duty is to find the *correct* result." (emphasis in original)). Instead, the court holds that Plaintiff's original classification upon entry, subheading 1603.00.90, is the correct classification.

As for Customs' assessed classification, subheading 3824.90.40 is a "basket" or "catchall" provision, which by its own terms applies if the imported merchandise is "not elsewhere specified or included" within

the tariff schedule. *See Lynteq, Inc. v. United States*, 976 F.2d 693, 699 (Fed. Cir. 1992) (interpreting similar language in HTSUS Chapter 32). Plaintiff's krill oil, extracted from an aquatic crustacean and therefore *prima facie* classifiable under subheading 1603.00.90, is "elsewhere specified or included" within the HTSUS and is not classifiable under subheading 3824.90.40. On a more practical level, Plaintiff's natural nutritional supplement does not appear to fit logically alongside "nonrefractory mortars and concretes," "nonagglomerated metal carbides mixed together or with metallic binders," and "prepared binders for foundry molds or cores." *See* HTSUS heading 3824.

Defendant argues that the court should defer to HQ Ruling H097639 (Aug. 24, 2010) ("August 2010 Ruling"), in which Customs classified Plaintiff's krill oil under Chapter 38 and ruled subheading 1603.00.90 inapplicable. That Ruling, however, lacks a "thoroughness, logic, and expertness," to warrant deference. *Mead*, 533 U.S. at 220. Customs misread the Explanatory Notes to Chapter 16 as *requiring* extracts to contain preservatives such as salt, but the Explanatory Notes simply state that they "may" contain such preservatives, EN 16.03 ("All these products *may* contain salt or other substances added in sufficient quantities to ensure their preservation." (emphasis added)). Customs also misread a decision of this Court to support the inapplicability of Chapter 16. Citing *Marcor Development Corp. v. United States*, 20 CIT at 546, 926 F. Supp. at 1133, Customs in its August 2010 Ruling concluded that Plaintiff's krill oil is not an "extract" because it consists of 53% phospholipids and "a number of other ingredients in varying percentages." HQ Ruling H097639. Customs failed to acknowledge that *Marcor* involved an *added* ingredient in a high quantity that prevented the imported product from being an extract. *See Marcor*, 20 CIT at 545–46, 926 F. Supp. at 1132–33. Here, on the other hand, Plaintiff's krill oil only contains substances naturally occurring in krill (and a small amount of leftover solvent). Jt. Undisp. Facts ¶¶ 7–8. Therefore, despite Defendant's arguments to the contrary, *Marcor* does not preclude the classification of Plaintiff's product as an extract of krill.

Plaintiff's proposed classification under Chapter 15 presents a more interesting possibility than Customs' assessed classification. Chapter 15 covers "Animal or vegetable fats and oils and their cleavage products; prepared edible fats; animal or vegetable waxes." Plaintiff argues that its krill oil should be classified under subheading 1506.00.00, as an "animal . . . oil", or alternatively under subheading 1517.90.90 covering "edible mixtures or preparations of animal . . .

oils," or under Pl.'s Br. at 16–17, 31–32. The question is whether Plaintiff's product is an "animal oil" within the meaning of Chapter 15.

Though the term "animal oil" is not specifically defined in the HTSUS, the Explanatory Notes to Chapter 15 define "animal oils" as "esters of glycerol with fatty acids (such as palmitic, stearic and oleic acids)." EN 15A.[2] That descriptive, "esters of glycerol with fatty acids," is also found in many lexicographic sources defining animal oils and fats. *See* Hawley's Condensed Chemical Dictionary 487 (13th ed. 1997) ("Oils derived from animals . . . are composed largely of glycerides of the fatty acids . . . ."); Van Nostrand's Encyclopedia of Chemistry 603 (5th ed. 2005) (defining "fat" as a "glyceryl ester of higher fatty acids," and noting that "[t]here is no chemical difference between a fat and an oil"); David W.A. Sharp, The Penguin Dictionary of Chemistry 166 (3d ed. 2003) ("esters of fatty acids with glycerol"); *see also* Def.'s Br. at 20, 31–33 (pointing out that four of the five dictionaries Plaintiff cites share this definition).

"Esters of glycerol" are "glycerides"—"esters obtained from glycerol by the replacement of one, two, or three hydroxyl groups with a fatty acid," known as monoglycerides, diglycerides, and triglycerides, respectively. Merriam-Webster Dictionary Online, http://www.merriam-webster.com/dictionary/monoglyceride (last visited this date) (defining "monoglyceride"); Merriam-Webster Dictionary Online, http://www.merriam-webster.com/dictionary/ diglyceride (last visited this date) (defining "diglyceride"); Merriam-Webster Dictionary Online, http://www.merriamwebster.com/dictionary/ triglyceride (last visited this date) (defining "triglyceride").

The typical "esters of glycerol" found in animal fats are triglycerides. Hawley's Condensed Chemical Dictionary, *supra* 1133 (defining "Triglycerides" as the "chief constituent" of animal or vegetable fats and oils); Dictionary.com, http://dictionary.reference.com/browse/fat?s=t (last visited this date) (defining "fat," under heading "fat in Science," as comprised "chiefly of triglycerides"); *see also* Institute of Shortening and Edible Oils, *Food Fats and Oils* 1 (9th ed. 2006) (commercial source describing triglycerides as the "[m]ajor" component of fats and oils, as opposed to monoglycerides, diglycerides, and other "minor" components); Richard D. O'Brien, *Fats and Oils: Formulating and Processing for Applications* 8 (3d ed. 2009) ("The primary constituents in crude fats and oils are the triglycerides . . . .");

[2] The Explanatory Notes exclude jojoba oil and sperm whale oil from the definition. EN 15(A) (HTSUS heading 1515 (covering jojoba oil): HTSUS heading 1521 (covering various "waxes," including "spermaceti")).

1 Kirk-Othmer Concise Encyclopedia of Chemical Technology 804 (4th ed. 1999) ("Fats and oils are comprised primarily of triglycerides . . . .").

In addition to triglycerides, oils obtained from animals always contain "minor constituents such as free fatty acids, phospholipids, sterols, hydrocarbons, pigments, waxes, and vitamins." 13 Ullman's Encyclopedia of Industrial Chemistry 2–3 (6th ed. 2003); O'Brien, *supra* 1 ("All edible fats and oils . . . consist predominantly of glycerol esters of fatty acids, or triglycerides, with some nonglyceridic materials present in small or trace quantities.").

Plaintiff's krill oil has 23% triglycerides and 53% phospholipids. Triglycerides are not the "predominant" constituent and phospholipids should only be a "minor" constituent for Plaintiff's krill oil to be an animal oil within the meaning of Chapter 15. Ullman's Encyclopedia of Industrial Chemistry, *supra*; O'Brien, *supra* 1; *see also* Bio Factsheet, The Structure and Biological Functions of Lipids, September 2000 (Jan. 14, 2015) (explaining that phospholipids are *not* triglycerides). Defendant suggests in its cross-motion that the court should require a 95% threshold for triglyceride content. Def.'s Br. at 1. *But see* Def.'s Reply at 3–4 (arguing in the alternative for application of a lower threshold). Plaintiff counters with evidence and lexicographic sources indicating that specific animal or vegetable oils covered under Chapter 15 consist of less than 95% triglycerides. The court need not resolve the precise percentage of triglycerides required for a substance to be an animal oil. It suffices to say that triglycerides constitute neither the majority of Plaintiff's krill oil nor the largest component by share. Of the possible thresholds for triglycerides in animal oils that the court might consider, Plaintiff's krill oil meets none.

Plaintiff eschews the definition of animal oils in the Explanatory Notes, and instead proffers a more generic definition of the term "oil" that Plaintiff argues is "(1) viscous; (2) liquid or easily liquefiable at room temperatures; (3) combustible; (4) soluble in certain organic solvents such as ether but not in water; and (5) used in a great variety of products (*e.g.*, foodstuffs, lubricants and fuels)." Pl.'s Mot. at 18 (combining three online dictionary definitions of "oil"). Such a broad-based definition of oil is of questionable use here because the term "oil" is relatively ubiquitous throughout the HTSUS. Such ubiquity counsels caution. The court is reluctant to stray from the interpretive guidance of the Explanatory Notes for Chapter 15, which provide a workable definition of the specific term "animal oil." Given that definition, the court does not believe it wise or practical to attempt to fashion a one-size fits all definition for the term "oil" here.

Plaintiff challenges any definition of "animal oil" predicated on triglyceride content by identifying various substances it believes should be classified as animal and vegetable oils under Chapter 15 but could not if triglyceride content is considered. Plaintiff's own authority, however, notes that several of the substances do in fact consist primarily of triglycerides. Def.'s Reply at 4–5 (table listing each substance by triglyceride content as reported in Plaintiff's sources, including cod liver oil (subheading 1504.10.20), maize oil (subheadings 1515.21.00 and 1515.29.00), palm oil (subheadings 1511.10.00 and 1511.90.00), and olive oil (heading 1509)). Plaintiff argues that the substance lanolin does not consist primarily of triglycerides, but the HTSUS does *not* describe lanolin as an "animal oil." *See* HTSUS 1505 (covering "[w]ool grease and fatty substances derived therefrom (including *lanolin)*" (emphasis added)). Plaintiff also notes that jojoba oil and sperm whale oil do not consist primarily of triglycerides despite their classification in Chapter 15, *see* HTSUS heading 1515 (covering jojoba oil); HTSUS heading 1521 (covering various "waxes," including "spermaceti"). The Explanatory Notes, though, specifically *exclude* both of these substances from the definition of animal and vegetable oils, EN 15(A) ("*With the exception of sperm oil and jojoba oil*, animal or vegetable fats and oils are esters of glycerol with fatty acids (such as palmitic, stearic and oleic acids." (emphasis added)), meaning Chapter 15 in particular and the Harmonized System as a whole already account for these two exceptions. Plaintiff's remaining examples do not appear by name in the HTSUS. These other substances derived from certain species of marine animals may pose interesting classification hypotheticals, but they do not in the court's view raise any doubts about the definition of animal oil provided in the Explanatory Notes.

Plaintiff also contends that its krill oil is known commercially as an "oil," and should therefore be classified as such. *Id.* at 22–23 (citing *Intercontinental Marble Corp. v. United States*, 381 F.3d 1169 (Fed. Cir. 2004)). The court understands the appeal of this argument, but unfortunately, although "the manner in which merchandise is advertised and marketed is a factor to be considered in determining its classification, it is not controlling." *Dominion Ventures, Inc. v. United States*, 10 CIT 411, 413 (1986); *accord Processed Plastic Co. v. United States*, 29 CIT 1129, 1139, 395 F. Supp. 2d 1296, 1306 (2005); *Totes, Inc. v. United States*, 16 CIT 796, 797 (1992). Here, while Plaintiff's substance is marketed as krill "oil," that substance is technically an "extract" and not an "animal oil" within the meaning of the tariff schedule.

Plaintiff also maintains that the court should reject a definition of animal oil that requires a "predominance" of triglycerides because that definition is partially derived from scientific dictionaries. Pl.'s Br. at 19. Technical sources, however, often do "supplement the dictionary definitions with additional necessary precision." *Rocknel Fastener Inc. v. United States*, 267 F.3d 1354, 1361 (Fed. Cir. 2001); *see also Kahrs Int'l, Inc. v. United States*, 713 F.3d 640, 644 (Fed. Cir. 2013) (explaining that a court may consult "reliable information sources" to ascertain the common or commercial understanding of a term). The scientific sources here add "additional necessary precision" because they help confirm the relative quantum of triglycerides required for a substance to be an animal oil within tariff schedule. These scientific sources do not conflict with the common or commercial meaning, *see Alexandria Int'l, Inc. v. United States,* 13 CIT 689, 692 (1989), because, as described above, common and commercial sources note that triglycerides are predominant in animal oils.

IV. Conclusion

For the foregoing reasons, Plaintiff's motion for summary judgment and Defendant's cross-motion for summary judgment are denied. In accordance with *Jarvis Clark,* Plaintiff's imported krill oil is classifiable under HTSUS subheading 1603.00.90. Judgment will enter accordingly.

Dated: March 28, 2016
New York, New York

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

Slip Op. 16–28

TIANJIN WANHUA CO., LTD., Plaintiff, v. UNITED STATES, Defendant.

Before: Leo M. Gordon, Judge
Consol. Court No. 14–00183

OPINION

[Final results of administrative review sustained.]

Dated: March 29, 2016

David J. Craven, Riggle and Craven of Chicago, IL for Plaintiff Tianjin Wanhua Co., Ltd.

Peter J. Koenig, *Ludmilla Savelieff*, and *Nicholas Galbraith*, Squire Patton Boggs of Washington, DC for Plaintiff Shaoxing Xiangyu Green Packing Co., Ltd.

John D. Greenwald, *Jonathan M. Zielinski*, and *Thomas M. Beline*, Cassidy Levy Kent (USA) LLP, of Washington, DC for Plaintiff-Intervenors DuPont Teijin Films China Limited, DuPont Hongi Films Foshan Co., Ltd., and DuPont Teijin Films Hongji Ningbo Co., Ltd.

Jane C. Dempsey, Trial Attorney, Commercial Litigation Branch, Civil Division, U.S. Department of Justice of Washington, DC for Defendant United States. On the brief with her were *Benjamin C. Mizer*, Principal Deputy Assistant Attorney General, *Jeanne E. Davidson*, Director, *Patricia M. McCarthy*, Assistant Director and *David F. D'Alessandris*, Trial Attorney. Of counsel on the brief was *Michael T. Gagain*, Attorney, Office of the Chief Counsel for International Trade for Trade Enforcement and Compliance, U.S. Department of Commerce of Washington, DC.

J. Michael Taylor, *Stephen A. Jones*, and *Mark T. Wasden*, King & Spalding LLP of Washington, DC for Defendant-Intervenor Terphane, Inc.

Ronald I. Meltzer, *Patrick J. McLain*, *David M. Horn*, and *Jeffrey I. Kessler*, Wilmer, Cutler, Pickering, Hale and Dorr, LLP of Washington, DC for Defendant-Intervenor Mitsubishi Polyester Film, Inc. and SKC, Inc.

Gordon, Judge:

This action involves an administrative review conducted by the U.S. Department of Commerce ("Commerce") of the antidumping duty order covering polyethylene terephthalate film, sheet, and strip from China. *See Polyethylene Terephthalate Film, Sheet, and Strip from the People's Republic of China*, 79 Fed. Reg. 37,715 (Dep't of Commerce July 2, 2014) (final results admin. review) ("*Final Results*"); *see also* Issues and Decision Memorandum for the Final Results of the Antidumping Duty Administrative Review on Polyethylene Terephthalate Film, Sheet, and Strip from the People's Republic of China, A-570–924 (Dep't of Commerce June 24, 2014), *available at* http://enforcement.trade.gov/frn/summary/prc/2014–15574–1.pdf (last visited this date) ("*Decision Memorandum*"). Before the court are Plaintiff Tianjin Wanhua Co., Ltd.'s ("Wanhua") and Consolidated Plaintiff Shaoxing Xiangyu Green Packing Co., Ltd.'s ("Green Packing") USCIT Rule 56.2 motions for judgment on the agency record. Mem in Supp. of Mot. for J. on the Agency R. Submitted By Pl. Tianjin Wanhua Pursuant to R. 56.2 of the Rs. of the U.S. Ct. of Int'l Trade, ECF No. 46 ("Wanhua Br."); Pl. Shaoxing Xiangyu Green Packing Co., Ltd. R. 56.2 Mem. for J. on the R., ECF No. 48 ("Green Packing Br."); *see also* Reply to Resp. of Def. United States to Mot. for J. on the Agency R. Submitted by Pl. Tianjin Wanhua Pursuant to R. 56.2 of the Rs. of the U.S. Ct. of Int'l Trade, ECF No. 68; Reply Br. of Pl. Shaoxing Xiangyu Green Packing Co., Ltd., ECF No. 70. Plaintiff-Intervenors DuPont Teijin Films China, Limited, DuPont Hongji Films Foshan Company, Limited, and DuPont Teijin Films Hongji Ningbo Company, Limited join in support of the Rule 56.2 Motions for Judgment on the Agency Record filed by Wanhua and Green Packing.

See Statement in Lieu of USCIT R. 56.2 Mot. 1–2, ECF No. 47. Defendant responds opposing Wanhua and Green Packing's Rule 56.2 motions. Def.'s Resp. to Pls.' R. 56.2 Mots. for J. on the Agency R., ECF No. 51 ("Def.'s Resp."); Defendant-Intervenors Mitsubishi Polyester Film, Inc. and SKC, Inc. respond in support of the *Final Results*. *See* Def.-Intervenors' Br. in Opp. to Pls.' Mots. for J. on the Agency R., ECF No. 58. Defendant-Intervenor Terphane, Inc. confirms that it agrees with and incorporates the arguments made by Defendant in its response to Plaintiffs' Rule 56.2 motions. *See* Letter in Lieu of Resp. Br. 1, ECF No. 57. The court has jurisdiction pursuant to Section 516A(a)(2)(B)(iii) of Tariff Act of 1930, as amended, 19 U.S.C. § 1516a(a)(2)(B)(iii) (2012),[1] and 28 U.S.C. § 1581(c) (2012).

Wanhua challenges Commerce's surrogate country selection and decision to deduct value added tax ("VAT") from Wanhua's export price. Green Packing also challenges the surrogate country selection, as well as Commerce's surrogate valuation for recycled polyethylene terephthalate chip ("PET chip") without applying Green Packing's proposed by-product offset. For the reasons set forth below, the court sustains the *Final Results* on each issue.

I. Standard of Review

For administrative reviews of antidumping duty orders, the court sustains Commerce's "determinations, findings, or conclusions" unless they are "unsupported by substantial evidence on the record, or otherwise not in accordance with law." 19 U.S.C. § 1516a(b)(1)(B)(i). More specifically, when reviewing agency determinations, findings, or conclusions for substantial evidence, the court assesses whether the agency action is reasonable given the record as a whole. *Nippon Steel Corp. v. United States*, 458 F.3d 1345, 1350–51 (Fed. Cir. 2006). Substantial evidence has been described as "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *DuPont Teijin Films USA v. United States*, 407 F.3d 1211, 1215 (Fed. Cir. 2005) (quoting *Consol. Edison Co. v. NLRB*, 305 U.S. 197, 229 (1938)). Substantial evidence has also been described as "something less than the weight of the evidence, and the possibility of drawing two inconsistent conclusions from the evidence does not prevent an administrative agency's finding from being supported by substantial evidence." *Consolo v. Fed. Mar. Comm'n*, 383 U.S. 607, 620 (1966). Fundamentally, though, "substantial evidence" is best understood as a word formula connoting reasonableness review. 3

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

Charles H. Koch, Jr., *Administrative Law and Practice* § 9.24[1] (3d ed. 2015). Therefore, when addressing a substantial evidence issue raised by a party, the court analyzes whether the challenged agency action "was reasonable given the circumstances presented by the whole record." Jane C. Bergner, Steven W. Feldman, the late Edward D. Re, and Joseph R. Re, 8–8A, *West's Fed. Forms, National Courts* § 13342 (5th ed. 2015).

Separately, the two-step framework provided in *Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 842–45 (1984), governs judicial review of Commerce's interpretation of the antidumping statute. *See United States v. Eurodif S.A.*, 555 U.S. 305, 316 (2009) (Commerce's "interpretation governs in the absence of unambiguous statutory language to the contrary or unreasonable resolution of language that is ambiguous.").

When reviewing substantial evidence issues from non-market economy proceedings involving Commerce's selection of the "best available" pricing and cost data from "surrogate" economies/companies, 19 U.S.C. § 1677b(c), the court's "duty is 'not to evaluate whether the information Commerce used was the best available, but rather whether a reasonable mind could conclude that Commerce chose the best available information.'" *Zhejiang DunAn Hetian Metal Co. v. United States*, 652 F.3d 1333, 1341 (Fed. Cir. 2011) (quoting *Goldlink Indus. Co. v. United States*, 30 CIT 616, 619, 431 F. Supp. 2d 1323, 1327 (2006)); *see also Downhole Pipe & Equip., L.P. v. United States*, 776 F.3d 1369, 1379 (Fed. Cir. 2015); *CITIC Trading Co. v. United States*, 27 CIT 356, 366 (2003) ("[W]hile the standard of review precludes the court from determining whether [Commerce's] choice of surrogate values was the best available on an absolute scale, the court may determine the reasonableness of Commerce's selection of surrogate prices."); *Dorbest Ltd. v. United States*, 30 CIT 1671, 1675–76, 462 F. Supp. 2d 1262, 1269–70 (2006) ("The term 'best available' is one of comparison, *i.e.*, the statute requires Commerce to select, from the information before it, the best data for calculating an accurate dumping margin. . . . This 'best' choice is ascertained by examining and comparing the advantages and disadvantages of using certain data as opposed to other data.").

II. Discussion

A. Exhaustion

Wanhua challenges Commerce's decision to adjust Wanhua's U.S. prices to account for Chinese VAT as contrary to 19 U.S.C. § 1677a(c)(2)(B). Wanhua Br. at 11–13. Green Packing challenges Commerce's selection of Indonesia as the primary surrogate country, ar-

guing that the South African data for the most important input was superior to the Indonesian data when measured against Commerce's announced selection criteria. Green Packing Br. at 10–12. Neither Wanhua nor Green Packing raised these arguments in their administrative case briefs. *See* Case Br. of Tianjin Wanhua Co., Ltd. 17–18 (Dep't of Commerce Feb. 12, 2014), PD 255 (presenting a factual argument against export price adjustment but no legal argument); Case Brief of Shaoxing Xiangyu Green Packing Co., Ltd. (Dep't of Commerce Feb. 11, 2014), PD 254 (stating that "South Africa has the best quality of data, as compared to the others" and Commerce "should use South Africa as the surrogate country in the final determination" without any further elaboration or citation to the record). Defendant urges the court to disregard these arguments as unexhausted. Def.'s Resp. at 10–11, 25–28.

The court agrees with Defendant that requiring exhaustion is appropriate in these circumstances. The U.S. Court of International Trade must require exhaustion of administrative remedies "where appropriate." 28 U.S.C. § 2637(d). "This form of non-jurisdictional exhaustion is generally appropriate in the antidumping context because it allows the agency to apply its expertise, rectify administrative mistakes, and compile a record adequate for judicial review—advancing the twin purposes of protecting administrative agency authority and promoting judicial efficiency." *Carpenter Tech. Corp. v. United States*, 30 CIT 1373, 1374–75, 452 F. Supp. 2d 1344, 1346 (2006) (citing *Woodford v. Ngo*, 548 U.S. 81, 88–90 (2006)). The court "generally takes a 'strict view' of the requirement that parties exhaust their administrative remedies before the Department of Commerce in trade cases." *Corus Staal BV v. United States*, 502 F.3d 1370, 1379 (Fed. Cir. 2007).

An important corollary to the exhaustion of administrative remedies is Commerce's own regulatory requirement that parties raise all issues within their administrative case briefs. 19 C.F.R. § 351.309(c)(2) (2015) ("The case brief must present all arguments that continue in the submitter's view to be relevant to the final determination."); *Mittal Steel Point Lisas Ltd. v. United States*, 548 F.3d 1375, 1383 (Fed. Cir. 2008) (parties are "procedurally required to raise the[ir] issue before Commerce at the time Commerce [is] addressing the issue"). This requirement works in tandem with the exhaustion requirement and promotes the same twin purposes of protecting administrative agency authority and promoting judicial efficiency.

Both Wanhua and Green Packing had the opportunity during this proceeding to raise their arguments in their case briefs, and both

chose not to do so. By declining to develop or argue these issues, Wanhua and Green Packing signaled that neither issue warranted attention from Commerce. In so doing, Wanhua and Green Packing undermined Commerce's ability to analyze both issues in the *Decision Memorandum* and in turn deprived the court of a fully developed record on the contested issues. Furthermore, Commerce's regulatory requirement that parties raise all issues within their administrative case briefs carries the force of law, and the court cannot simply ignore it. Exhaustion is therefore appropriate.

Wanhua asserts in a footnote that the "pure question of law" exception to the exhaustion requirement applies here. Wanhua Br. at 11 n.2. There is no merit in this argument. First, the court does not entertain substantive arguments raised in footnotes. *Am. Tubular Prods., LLC v. United States*, 38 CIT ___, ___, Slip Op. 14–116 at 25–26 (2014) (citing *SmithKline Beecham Corp. v. Apotex Corp.*, 439 F.3d 1312, 1320 (Fed. Cir. 2006); *see also Calvert v. Wilson*, 288 F.3d 823, 836 (6th Cir. 2002) (explaining that courts generally consider arguments raised in footnotes to be waived, and citing sources); *City of Emeryville v. Robinson*, 621 F.3d 1251, 1262 n.10 (9th Cir. 2010) (deeming an issue waived where the party "fail[ed] to address the issue in its opening brief except in a footnote"). Second, the court simply notes that the pure question of law exception is just not likely to apply in this context. It only *might* apply for a clear statutory mandate that does not implicate Commerce's interpretation of the statute under the second step of *Chevron*. *See, e.g.*, *Agro Dutch Indus. Ltd. v. United States*, 508 F.3d 1024, 1032 (Fed. Cir. 2007) (applying pure question of law exception to *Chevron* step 1 issue). Even when the statute is clear, however, it is always preferable to have the agency's interpretation of the statute it is entrusted to administer set forth on the administrative record. *See* 2 Richard J. Pierce, Jr., Administrative Law Treatise § 14.3 (5th ed. 2010) (describing the primary jurisdiction doctrine and its relationship to *Chevron*); *see also Agro Dutch*, 508 F.3d at 1029 n. 4 (noting that Commerce had opportunity to, and did, put forth its interpretation on administrative record in two instances). In this case the statute does not define the phrase at the center of Wanhua's legal challenge. *See* 19 U.S.C. § 1677a(c)(2)(B) (using the phrase "export tax, duty or other charge imposed" without clarification). The pure question of law exception therefore cannot apply in this instance because its application would undermine the very purposes the exhaustion requirement is designed to promote. *See Fuwei Films (Shandong) Co. v. United States*, 35 CIT ___, ___, 791 F. Supp. 2d 1381, 1384–85 (2011).

To conclude, the court does not reach Wanhua's unexhausted challenge Commerce's decision to adjust Wanhua's U.S. prices to account for Chinese VAT as contrary to 19 U.S.C. § 1677a(c)(2)(B) and Green Packing's unexhausted challenge to Commerce's surrogate country selection. Each of those matters is sustained.

B. Surrogate Country Selection

In an antidumping duty administrative review, Commerce determines whether subject merchandise is being, or is likely to be, sold at less than fair value in the United States by comparing the export price (the price of the goods sold in the United States) and the normal value of the merchandise. 19 U.S.C. §§ 1675(a)(2)(A), 1677b(a). In the non-market economy context, Commerce calculates normal value using data from surrogate countries to value the factors of production. *Id.* § 1677b(c)(1)(B). Commerce must use the "best available information" in selecting surrogate data from "one or more" surrogate market economy countries. *Id.* § 1677b(c)(1)(B), (4). The surrogate data must "to the extent possible" be from a market economy country or countries that are (1) "at a level of economic development comparable to that of the nonmarket economy country" and (2) "significant producers of comparable merchandise." *Id.* § 1677b(c)(4). Commerce has a stated regulatory preference to "normally . . . value all factors in a single surrogate country." 19 C.F.R. § 351.408(c)(2).

When choosing among potential surrogate countries that are at a level of economic development comparable to the non-market economy country and are significant producers of comparable merchandise, Commerce evaluates the relative availability and reliability of surrogate value data sourced from each potential country. Commerce is guided by a general regulatory preference for publicly available, non-proprietary information. 19 C.F.R. § 351.408(c)(1), (4). Beyond that, Commerce generally considers the quality, product specificity, and contemporaneity of the available surrogate value data. *Decision Memorandum* at 3, 6–7.

The administrative record below included surrogate data for each factor of production sourced from two economically comparable significant producers of comparable merchandise: Indonesia and South Africa. *Id.* at 6–7. Commerce chose Indonesia, explaining that the Indonesian financial surrogate data "pertain to the production of identical merchandise, while the South African [data] pertain to the production of only comparable merchandise." *Decision Memorandum* at 13–14.

Wanhua challenges Commerce's selection of Indonesia over South Africa. Specifically, Wanhua argues that Commerce's failure to reject

the sole Indonesian financial surrogate, PT Argha Karya Prima Industry, Tbk ("Argha"), is inconsistent with past practice. According to Wanhua, Argha's annual report is incomplete under Indonesian law, and Argha probably enjoyed the benefit of "broadly-available non-industry-specific export subsidies." Wanhua Br. at 4–9. Wanhua insists that Commerce has a stated practice of rejecting incomplete annual reports, *id.* at 5–6 (citing *Wire Decking from the People's Republic of China*, 75 Fed. Reg. 32,905 (Dep't of Commerce June 10, 2010) (final LTFV determ.); *Lightweight Thermal Paper from the People's Republic of China*, 73 Fed. Reg. 57,329 (Dep't of Commerce Oct. 2, 2008) (final LTFV determ.); *Certain New Pneumatic Off-the-Road Tires from the People's Republic of China*, 73 Fed. Reg. 40,485 (Dep't of Commerce July 15, 2008) (final LTFV determ.)), as well as those sourced from subsidized companies, *id.* at 8 (citing *Certain Frozen Warmwater Shrimp from the People's Republic of China*, 72 Fed. Reg. 52,049 (Dep't of Commerce Sept. 12, 2007) (final results admin. review).

In the court's view, although this particular surrogate value selection is not without its issues, Commerce did not act inconsistent with past practice when it used Argha's financial statement. To clarify Commerce's actual practice, Commerce has rejected *incomplete financial statements* of potential surrogate companies because those statements did not include data necessary for calculating financial ratios. Here, however, as Commerce explained, the record includes a *complete financial statement* from Argha contained within an *incomplete annual report*:

> Wanhua argues that the Department needs a complete annual report on the record in order to calculate surrogate financial ratios. Wanhua cites three antidumping duty administrative reviews in support of its argument. However, the Department agrees with Petitioners that Wanhua has failed to support its claim that Argha Karya's financial statements are incomplete. First, in *Wire Decking/PRC* (2010), the Department was faced with partial financial statements (not a partial annual report) from an Indian producer that did not include key data necessary to calculate SVs. Specifically, the financial statements did not contain schedules A through D accompanying the balance sheet. Thus, the Department was unable to calculate surrogate financial ratios. In this case, Argha Karya's financial statements include the schedules necessary for the calculation of surrogate financial ratios. Second, in *Thermal Paper/PRC* (2008), the Department declared a set of financial statements incomplete because they did not include a fixed asset schedule. The fixed asset

> schedule is necessary as it supports the Department's use of a depreciation expense in its calculation of financial ratios. Argha Karya's financial statements on the record of the instant review include this schedule. Third, in *OTR Tires/PRC* (2008), the Department disregarded certain financial statements from the calculation of surrogate financial ratios because the financial statements did not contain the auditor's statements, extensive data on the income statement, and accompanying schedules, or were not legible. Argha Karya's financial statements on the record of this administrative review include an auditor's statement, the income statements are complete, the necessary schedules (as previously stated) are present, and the financial statements are legible.

Decision Memorandum at 11 (footnotes omitted). Unlike the administrative decisions Wanhua cites in its brief, Argha's financial statement contains all the data necessary for calculating financial ratios. *Id.* Commerce therefore reasonably distinguished this case from other instances in which it rejected incomplete financial statements. *See id.*

As the court noted above, however, the incomplete annual report is not without its issues. As Wanhua explains,

> The annual report was not complete, missing a substantial portion of the report. The record, as shown by the table of contents of the Argha annual report, indicates that the Argha annual report was missing pages 1 through 78. (Exhibit SVSI-1 to Wanhua's Resubmitted Surrogate Values for the Final Results, PD 228 at bar code 3178117–02, page 8 (Feb. 3, 2014).) The Department acknowledges that an annual report in Indonesia is required to contain multiple documents discussing the operations of the company. (Def. Resp. at 7.) The Government of Indonesia considers such information of sufficient relevance that it requires that it be included in all annual reports. (Rule Number X.K.6: Obligation to submit Annual Report for Issuers of Public Companies as provided as part of Exhibit SVSI-4 to Wanhua's Resubmitted Surrogate Values for the Final Results, PD 230 at bar code 3178117–04, pages 12–20 (Feb. 3, 2014).) These points are not in dispute.

Wanhua Reply Br. at 3. Wanhua further explains that it was the domestic interested parties that submitted the incomplete document. *Id.* Commerce appears to have given the domestic interested parties a pass, not following up or inquiring about the missing pages of the

annual report, *e.g.*, asking where and how it was obtained, why the pages were missing, or requiring the domestic interested parties to supply a complete version.

There is a further difficulty with the Argha annual report. Commerce has a general policy of disregarding import prices from Indonesia (as surrogate values for input prices) because Commerce has found in other proceedings that Indonesia maintains broadly available, non-industry specific export subsidies. *Decision Memorandum* at 11–12. Commerce makes a general inference "that *all* exports to *all* markets from Indonesia may be subsidized," and Commerce consequently "disregards *import prices* from Indonesia." *Id.* at 12 (emphasis added). Wanhua argues that Argha is primarily an export-oriented business, and given Commerce's general inference "that all exports to all markets from Indonesia may be subsidized" Commerce should have reasonably inferred that subsidies likely tainted Argha's operations. Wanhua Br. 8–9. Commerce sidesteps this problem by noting that Commerce is utilizing financial data from an Indonesian company, not *import prices* of goods from Indonesia into some other country, and that nowhere in the incomplete Argha annual report is there any reference to a subsidy. *Decision Memorandum* at 11–12. Wanhua questions the reasonableness of Commerce's inference, from an incomplete annual report, that Argha did not benefit from subsidies. Wanhua Br. at 9.

This is a good argument. The Argha annual report has obvious issues that test the reasonableness of its selection as the best available information to calculate Wanhua's margin. The court notes, however, that the question ultimately is not whether the incomplete Argha annual report in isolation is a good or bad surrogate value selection, but more specifically, whether Commerce's choice of that data set is reasonable (supported by substantial evidence) when compared with the other available data sets. *Dorbest*, 30 CIT at 1675–76, 462 F. Supp. 2d at 1269–70 ("The term 'best available' is one of comparison, *i.e.*, the statute requires Commerce to select, from the information before it, the best data for calculating an accurate dumping margin. . . . This 'best' choice is ascertained by examining and comparing the advantages and disadvantages of using certain data as opposed to other data.").

Turning to the data set that Wanhua favors, the South African AstraPak's financial statement was also a suboptimal choice. Whereas Argha produced "identical" merchandise, AstraPak produced "comparable" but not identical merchandise. *Decision Memorandum* at 13–14. Wanhua, unfortunately fails to address this deficiency, devoting all its energies on the disadvantages of the Argha

annual report. *See* Wanhua Br. at 9–10; Wanhua Reply Br. at 1–5. Missing is an analysis of the consequence of "comparable" vs. "identical" merchandise on the margin calculation, *e.g.*, what complexities or difficulties would or would not be engendered. So although the court may agree that the Argha annual report has weaknesses as a surrogate dataset, the court cannot evaluate those weaknesses against the noted weaknesses of the AstaPak dataset because Wanhua did not provide any comparative analysis. This is important. For the court to remand for Commerce to use the AstraPak dataset, Wanhua needed to establish that AstraPak, when compared with Argha, is the one and only reasonable surrogate selection on this administrative record, not simply that AstraPak may have constituted another possible reasonable choice. *Globe Metallurgical, Inc. v. United States*, 36 CIT ___, ___, 865 F. Supp. 2d 1269, 1276 (2012) (substantial evidence review "contemplates [that] more than one reasonable outcome is possible on a given administrative record"). The court therefore must sustain Commerce's surrogate dataset choice.

C. PET By-product

As described above, Commerce in non-market economy cases uses data sourced from a surrogate country to value a respondent's factors of production. 19 U.S.C. § 1677b(c)(1)(B). Factors of production include raw material inputs utilized to manufacture the subject merchandise. *Id.* § 1677b(c)(3). Commerce typically assigns a surrogate value to recycled inputs like it would any other raw material input. *Decision Memorandum* at 16. Commerce's policy, though, is to avoid double counting by offsetting the cost of production by the value of recycled inputs (or the value of by-product sold) when a respondent demonstrates that the cost of its recycled inputs are already accounted for elsewhere. *Id.* at 19.

Wanhua uses recycled PET as an input to produce the subject merchandise, which Commerce valued as it would any other factor of production. During the period of review, however, Wanhua recovered some PET by-product material from its own production of subject merchandise. Wanhua sold some of that PET by-product and reintroduced some into later production runs. Wanhua requested that Commerce offset the surrogate value for the recycled PET input to account for the fact that it used some of its own recycled PET as the input. Wanhua supported its request with internal records detailing specific quantities of sold and reintroduced PET by-product. After considering Wanhua's submissions, Commerce granted Wanhua's requested offset. Issues and Decision Memorandum for the Preliminary Results of

the Antidumping Duty Administrative Review on Polyethylene Terephthalate Film, Sheet, and Strip from the People's Republic of China, A-570–924, at 24–25 (Dep't of Commerce Dec. 18, 2013), *available at* http://enforcement.trade.gov/ frn/summary/prc/2013–30919–1.pdf.

Like Wanhua, Green Packing captures PET by-product materials created during the manufacture of subject merchandise. Like Wanhua, Green Packing claims that it sells some of that by-product and uses some of that by-product as an input to produce the subject merchandise. But unlike Wanhua, Green Packing did not provide Commerce with *any* information to substantiate its claims about how the recycled PET chip it produces relates to the recycled PET chip it used to manufacture the subject merchandise. As a result, Commerce selected a surrogate value for Green Packing's recycled PET chip input but declined to grant Green Packing an offset. *Decision Memorandum* at 21–25.

Green Packing now challenges Commerce's treatment of Green Packing's recycled PET chip input as unreasonable. Green Packing's main argument is that Commerce double counted the cost of the recycled PET input, since the recycled PET chip input is a by-product of the manufacturing process. Green Packing asserts that Commerce should have either assigned a zero value to the recycled PET input or granted a by-product offset to avoid this double counting. In support of its position, Green Packing points to *DuPont Teijin Films China Ltd. v. United States*, 38 CIT ___, 7 F. Supp. 3d 1338 (2014) ("*DuPont*"), a decision that rejected Commerce's explanation for applying a surrogate value to an input obtained from earlier production runs without also granting an offset.

The court does not agree that Commerce should have assigned a zero to Green Packing's recycled PET chip input. As Commerce explained below, Green Packing did not provide any details regarding the quantities of recycled PET chip that it produced and reintroduced as an input. Commerce could not in the absence of such detail "exclude the reintroduced PET chips from its NV calculation (or assign a zero value to them) on the basis that they are completely balanced out by the recyclable PET waste by-product generated." *Decision Memorandum* at 16–17. As Commerce explained, "[t]here is no record evidence to indicate that the quantity of reintroduced PET chips will be equivalent to, or closely match, the recyclable PET waste by-product generated during any given period." *Id.* Green packing also listed recycled PET chip as an ingredient *necessary* to produce the subject merchandise, meaning that assigning a zero to that input would, as Commerce noted, "be equivalent to removing that input altogether from the calculation of [normal value]." *Id.* at 17.

Green Packing also argues that the manufacturing overhead surrogate value accounts for its recycled PET chip input. Commerce explained, however, that the manufacturing overhead is a percentage applied to the total cost of all raw material inputs. The overhead cost therefore only accounts for recycled PET chip to the extent that recycled PET chip is included in the total raw material cost. As Commerce detailed below:

> The Department calculates overhead by multiplying the surrogate overhead ratio by a respondent's cost of manufacturing, which is comprised of raw materials, labor, and energy. Therefore, the overhead ratio is applied to all three components of the cost of manufacturing. Even if the labor and energy expenses associated with Respondents' recycling process have been reported, overhead would be understated if the overhead ratio is not multiplied by the total value of all of the materials used in production, including the reintroduced PET chips. This is why the Department, in calculating a respondent's overhead costs, must determine SVs for all inputs, including recycled inputs such as reintroduced PET chips.

Decision Memorandum at 18. Consequently, in the court's view, Commerce reasonably assigned a non-zero surrogate value to Green Packing's recycled PET chip input.

As for Green Packing's proposed offset, the court agrees with Green Packing that in certain circumstances the only accurate way to account for by-product reintroduced as an input into later production runs may be to offset the cost of production by the amount of by-product used. This is exactly what Commerce did for Wanhua. Unlike Wanhua, though, Green Packing chose not to paper the record with evidence to substantiate its request for an offset. "The interested party that is in possession of the relevant information has the burden of establishing . . . the amount and nature of a particular adjustment." 19 C.F.R. § 351.401(b)(1) (2015); *see also QVD Food Co. v. United States*, 658 F.3d 1318, 1324 (Fed. Cir. 2011) ("'[T]he burden of creating an adequate record lies with [interested parties] and not with Commerce.'" (quoting *Tianjin Mach. Imp. & Exp. Corp. v. United States*, 16 CIT 931, 936, 806 F. Supp. 1008, 1015 (1992))). Here, Green Packing simply asserted, without evidentiary support, that the amount of by-product produced and the amount of by-product reentered into production process were, without exception, the same figure. In the court's view, Commerce reasonably concluded that Green Packing failed to demonstrate that it was entitled to a by-product offset. *Decision Memorandum* at 21–23.

The court notes that *DuPont* does not compel a different outcome here. In *DuPont*, Commerce applied a surrogate value to the recycled PET input for the first time in the final results. The court in *DuPont* provided Commerce with the choice on remand of either assigning zero for the recycled PET input surrogate value or offsetting that value so as to "reasonably avoid[]" double counting. *DuPont*, 38 CIT at ___, 7 F. Supp. 3d at 1344–48. Commerce opted for the latter methodology. *DuPont Teijin Films China Ltd. v. United States*, 39 CIT ___, ___, Slip Op. 15–19 at 2–3 (2015). Here, unlike *DuPont*, Commerce applied a surrogate value to Green Packing's recycled PET input in the preliminary determination. Green Packing consistently declined Commerce's invitations to provide information that would enable Commerce to calculate an appropriate offset. *Decision Memorandum* at 21–23. Commerce therefore reasonably concluded that Green Packing did not demonstrate its entitlement to an offset.

Lastly, the court does not *see* any merit in Green Packing's challenge to the surrogate value Commerce ultimately selected for the recycled PET chip input. As explained above, the input in question is recycled PET chip, not PET waste film. Commerce used the average value of imports under Indonesian HTS 3907.60.90, which covers both primary PET chip and PET scrap that is transformed into primary form. *Decision Memorandum* at 19–20. Green Packing's proposed alternative, Indonesian HTS 3915.10, by its own terms only applies to *waste* products. Commerce therefore reasonably selected Indonesian HTS 3907.60.90, which as Commerce explained was more specific to the recycled PET chip input in question. *Id.* at 20.

III. Conclusion

For the foregoing reasons, the court sustains Commerce's application of a VAT adjustment to Wanhua's export price, Commerce's surrogate country selection, and Commerce's surrogate valuation of Green Packing's recycled PET chip input. Judgment will be entered accordingly.

Dated: March 29, 2016
New York, New York

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

Slip Op. 16–29

CATFISH FARMERS OF AMERICA, et al., Plaintiffs, v. UNITED STATES, Defendant, AND VINH HOAN CORP., QVD FOOD CO., LTD., VIETNAM ASSOCIATION OF SEAFOOD EXPORTERS AND PRODUCERS, ANVIFISH JOINT STOCK CO., BIEN DONG SEAFOOD CO., LTD., AND VINH QUANG FISHERIES CORP., Defendant-Intervenors.

Before: R. Kenton Musgrave, Senior Judge
Consol. Court No. 12–00087

OPINION

[Sustaining final results of redetermination of seventh administrative review of frozen fish fillets from the Socialist Republic of Vietnam.]

Dated: March 30, 2016

James R. Cannon, Jr., *Jonathan Mario Zielinski*, *Nazak Nikakhtar*,and *Nathaniel J. Halvorson*, Cassidy Levy Kent (USA) LLP, of Washington D.C., for the plaintiffs. On the initial comments were also *Valerie A. Slater* and *Dallas Woodrum*, Akin Gump Strauss Hauer & Feld LLP, of Washington D.C.

Ryan M. Majerus, Attorney, Commercial Litigation Branch, Civil Division, U.S. Department of Justice, of Washington D.C., argued for the defendant. With him on the brief were *Benjamin C. Mizer*, Principal Deputy Assistant Attorney General, *Jeanne E. Davidson*, Director, and *Franklin E. White, Jr.*, Assistant Director. Of Counsel on the brief was *Elika Eftekhari*, Attorney, Office of the Chief Counsel for Trade Enforcement and Compliance, U.S. Department of Commerce.

Matthew J. McConkey, Mayer Brown LLP, of Washington D.C., for defendant-intervenors Vinh Hoan Corporation and QVD Food Company, Ltd.

Andrew B. Schroth, Mark E. Pardo, and *Andrew T. Schutz*, Grunfeld Desiderio Lebowitz Silverman & Klestadt, LLP, of Washington D.C., for defendant-intervenor Vietnam Association of Seafood Exporters and Producers.

Robert G. Gosselink and *Jonathan M. Freed*, Trade Pacific, PLLC, of Washington D.C., for defendant-intervenors Anvifish Joint Stock Company, Bien Dong Seafood Company Ltd., and Vinh Quang Fisheries Corporation.

Musgrave, Senior Judge:

Before the court are the Final Results of Redetermination[1] on the seventh administrative review of the antidumping duty order covering certain frozen fish fillets from the Socialist Republic of Vietnam.[2]

[1] Final Results of Redetermination Pursuant to Court Order (June 29, 2015), ECF No. 92 ("Remand Results"), filed by the defendant's U.S. Department of Commerce, International Trade Administration ("Commerce" or "defendant") pursuant to *Catfish Farmers of America v. United States*, 38 CIT ___, Slip Op. 14–146 (Dec. 18, 2014) ("*Catfish Farmers I*").

[2] *See Certain Frozen Fish Fillets from the Socialist Republic of Vietnam: Final Results and Partial Rescission of the Seventh Antidumping Duty Administrative Review*, 77 Fed. Reg. 15039 (Mar. 14, 2012), PDoc-II-129 ("*Final Results*"), and accompanying issues and decision memorandum, PDoc-I-112 ("IDM"). The period of review ("POR") covers August 1, 2009 through July 31, 2010.

The plaintiffs[3] and a defendant-intervenor, Vinh Hoan Corporation ("Vinh Hoan"), continue to challenge several aspects of the Remand Results. Familiarity with the case is presumed. The court finds Commerce's Remand Results supported by substantial evidence on the record.

Background

To summarize briefly, *Catfish Farmers I* remanded the *Final Results*to Commerce to further explain, *inter alia*, Commerce's determination that the Bangladeshi Department of Agricultural Marketing ("DAM") data are the "best available information" for valuing the whole live fish input in light of the plaintiffs' concerns regarding (1) the DAM data's reliability and (2) their commercial quantities, and (3) Commerce's surrogate value by-product calculations for fish waste, fresh broken fillets, frozen broken fillets and fish oil. *See Catfish Farmers I*. On remand, Commerce considered these and other issues, ultimately continuing to determine the DAM data are reliable and constitute the best available information. Remand Results at 2–12, 16–25; Defendant's Response to Plaintiffs' and Defendant-Intervenors's Comments on the Final Remand Redetermination (Jan. 6, 2016), ECF No. 121 ("Def.'s Resp."), 6–15. Commerce also determined different surrogate values for each challenged by-product.

Discussion

The plaintiffs assert that Commerce's Remand Results are not supported by substantial evidence and otherwise not in accordance with law because (1) the DAM data are not specific to the main production input of whole live fish, and (2) the DAM data are otherwise not reliable. Plaintiff's Comments on Defendant's Remand Determination (Aug. 12, 2015) (Public Version), ECF No. 99 ("Pls' Cmts"). Defendant-intervenor Vinh Hoan challenges Commerce's fish oil by-product surrogate value ("SV"), claiming that imposing a cap on the price is not supported by the record and that the calculated cap incorporates serious errors. Defendant-Intervernor's Comments on the Final Redetermination Pursuant to Remand (Aug. 12, 2015), ECF No. 97 ("Def-Int's Cmts"); s*ee also* Plaintiff's Response to Defendant-Intervenor's Comments on the Remand Results (Oct. 9, 2014), ECF No. 114 ("Pls' Resp.").

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[3] Catfish Farmers of America, America's Catch, Alabama Catfish Inc., d/b/a Harvest Select Catfish, Inc., Heartland Catfish Company, Magnolia Processing, Inc., d/b/a Pride of the Pond, and Simmons Farm Raised Catfish, Inc. ("Catfish Farmers" or "plaintiffs").

I

The plaintiffs contend that Commerce's Remand Results are not supported by substantial evidence because the pricing data used to value the main production input of whole live fish (the DAM data) are not specific to the input in question and are not reliable. The plaintiffs' central argument regarding specificity is that because the DAM data reference wholesale price data and not farm-gate price data, they represent prices for "dead or sluggish" fish and are therefore not specific to whole live fish. Pls' Cmts at 2–11. The plaintiffs' contention against the reliability of the DAM data centers on previously-raised concerns regarding the lack of data validation by the DAM and the overlap between the DAM's "worksheet" data and its derivative "website" data.[4] *Id*. at 11–23. These arguments do not persuade the court that Commerce's determination is unsupported by substantial evidence on the record.

A

The plaintiffs assert that the DAM data are not specific because the data refer to "dead or sluggish" fish and not whole live fish. They contend that, as a result, using the DAM data results in a "less accurate" SV because the record demonstrates that the respondents' production consumes whole live fish and does not consume dead fish. To support their position, the plaintiffs rely on one affidavit from Bangladeshi counsel retained by the plaintiffs in this matter recounting interviews with certain DAM officials who aver that the DAM data include prices for dead fish. Pls' Cmts at 9, referencing Petitioners' July 25, 2011 Rebuttal SV Information Submission, PDoc-I-124 at Ex. 1. The affidavit avers that DAM officials stated during an interview that "fish are dead when sold at the [wholesale] market" and that the DAM data reference dead fish. *Id*. The plaintiffs further argue that because significant distinctions exist at the farm-gate and wholesale production levels that result in distorted prices, Commerce's determination to use wholesale price data provided by the DAM is legally unsustainable. The plaintiffs emphasize the relevant distinctions of the "condition" of farm-gate and wholesale fish: (1) that the fish are live when sold at the farm-gate and dead at the wholesale market, and (2) that farm-gate sales represent live fish at "an earlier

[4] Defendant-intervenor Vietnam Association of Seafood Exporters and Producers ("VASEP") originally placed the worksheet data on the record. VASEP's SV Submission (May 10, 2011) PDoc-I-100 at Ex. 13. Subsequently, VASEP placed the website data on the record. VASEP's Submission of Factual Data -- Bangladesh DAM Pricing Data Published on Government Internet Website (Dec. 22, 2011), PDoc-II-70 at Exs. 1–20.

point of sale" and the wholesale sales represent live fish at a "more downstream point of sale." Pls' Cmts at 4.

On the threshold issue of whether the DAM data reflect prices of live or dead fish, Commerce does not assert that respondents purchase dead or sluggish fish. Instead, Commerce argues that the data are specific to whole live fish because they only reference prices for "live fish". Commerce relies on an official letter from the DAM averring that the DAM data refer to prices for "whole live fish". Remand Results at 19, referencing VASEP's SV Submission (May 10, 2011), PDoc-I-100 at Exs. 13B & C.

Under the relevant standards of review, the court must uphold Commerce's determination, finding, or decision unless "unsupported by substantial evidence on the record, or otherwise not in accordance with law." 19 U.S.C. §1516a(b)(1)(B)(i). Where Commerce has the choice between two fairly conflicting views, "[t]he court may not substitute its judgment for that of the [agency] . . . even though the court would have justifiably made a different choice had the matter been before it *de novo*." *Timken Co. v. United States*, 26 CIT 590, 592, 209 F. Supp. 2d 1373, 1375 (2002) ("*Timken*"), quoting *Universal Camera v. NLRB*, 340 U.S. 474, 488 (1951) (internal citations and quotations omitted). Moreover, "the possibility of drawing two inconsistent conclusions from the evidence . . . does not mean that an agency's finding is not supported by substantial evidence." *Consolo v. Federal Maritime Comm'n*, 383 U.S. 607, 620 (1996) (internal citations omitted). Finally, where substantial evidence exists on both sides of an issue, "the statutory substantial evidence standard compels deference to the [agency]." *Nippon Steel Corp. v. United States*, 458 F.3d 1345, 1354 (Fed. Cir. 2006).

The two pieces of evidence relied upon by Commerce and the plaintiffs are facially contradictory. Where Commerce has conflicting evidence on the record and substantial evidence exists on both sides of an issue, the standard compels deference to Commerce, provided Commerce has reasonably explained its determination. Here, Commerce explained that it has "determine[d] that official government documentation . . . [is] more reliable than an unofficial document procured by interested parties' counsel[ ] about a conversation with Bangladeshi officials held for purposes of the underlying proceeding". Def's Resp. at 10; Remand Results at 19. The court cannot re-weigh the record evidence, nor can it substitute its own judgment on this issue, *Timken*, 26 CIT at 592, and further it is not persuaded that Commerce's decision to place more weight on the official DAM documentation was unreasonable. Therefore, the court finds Commerce's

determination that the DAM data reference whole "live" fish prices supported by substantial evidence.

B

As to the issue of whether the DAM data are specific, Commerce does not dispute that the respondents procure their fish input from farms; rather, it disputes the plaintiffs' "contention that prices labeled as being at the farm-gate level . . . are comprehensively superior to other SV data." Remand Results at 18–19. Commerce further explains that on this record, there is not enough detail to conclude that qualitative distinctions would bear upon the other SV criteria because (1) respondents' purchasing experiences differ, (2) any presumed differences between farm-gate and wholesale fish are mitigated by the perishable nature of the fish, and, importantly, (3) the underlying record lacks detail. Remand Results at 6–7 ("nothing in the record indicates a more accurate result would be achieved in this case by using prices identified as farm-gate (BAS data) instead of those which are wholesale (DAM data)" to value respondents' live fish); Def's Resp. at 10–11.

The plaintiffs reiterate their arguments that (1) the respondents do not consume dead fish in their production processes, (2) product specificity is the most important factor[5], (3) to the extent the DAM data reflect values for "live" fish, such fish will be "sluggish", and (4) the fact that the DAM wholesale data include values for dead or sluggish fish results in a "less accurate" result to value the respondents' whole live fish input. However, as the defendant responds, *on this record* nothing indicates that a more "accurate" (in terms of price differential) result would be achieved in this case by using prices identified as farm-gate (the BAS data) instead of those that are wholesale (the DAM data) in order to value the respondents' live fish. *See* Remand Results at 6; *see also* IDM at cmt 1.C. In other words, the plaintiffs' argument does not demonstrate that, on this record, using farm-gate price data instead of wholesale price data will result in a distorted SV for the whole live fish input. "Dead or sluggish fish" may be "less accurate" from a product specificity standpoint, but the bottom line (as always) is concerned with price. The court's clearly expressed concern previously was with respect to the inadvertent introduction of pricing distortions through the selection of wholesale data rather than farm-gate data; however, the plaintiffs' comments

[5] *Qingdao Sea-Line Trading Co. v. United States*, 766 F.3d 1378, 1386 (Fed. Cir. 2014) ("[t]he record further supports Commerce's conclusion that garlic bulb size is a more important factor than contemporaneity"). Notwithstanding such and similar intimation, the weight Commerce accords to each factor is within its discretion and dependent, *ad hoc*, on the record of a given proceeding and situation.

and arguments on the Remand Results do not demonstrate, on this record and at this point, that a meaningful price differential will result. The court therefore is not persuaded that Commerce's determination is unsupported by substantial evidence on this record.

II

As to reliability, on remand Commerce was directed to further explain its determination in light of: the discrepancies between the worksheet and website datasets; the DAM's non-responsiveness to Commerce's requests for information; and the plaintiffs' concern that the DAM data do not represent commercial quantities. *Catfish Farmers I*, 11–14. The court finds Commerce's determination that the DAM data[6] are reliable to be reasonable and supported by substantial evidence on the record.

A

In the Remand Results, Commerce explains that it considers the DAM data to reflect commercial quantities given the record evidence. Specifically, Commerce explains that the discrepancies between the two DAM datasets are not informative because it no longer "accord[s] weight" to the worksheets and that public availability concerns "became moot" with the public availability of the website data, and it emphasizes that the DAM's failure to respond to Commerce's questions is not meaningful because it submitted the questions with regard to the worksheet data, not the website data, and its questions to the DAM primarily centered on the issue of public availability. Commerce further notes that even if it did afford any weight to the worksheets, the average discrepancy is "about 3 percent, meaning there is no meaningful difference when taken together as a whole." Remand Results at 8; *see also* Def's Resp. at 11–12.

As to whether the DAM data reflects commercial quantities, the plaintiffs argue that Commerce had no basis to make such a finding in the absence of quantity or volume information associated with the DAM data. Pls' Cmts at 20–23. The plaintiffs particularly take issue with Commerce's reliance on the *Fisheries Statistical Yearbook of Bangladesh* to corroborate the DAM data, arguing that the reported volume of fish sold nationally cannot serve as a proxy for the volume of fish actually represented by the DAM data. *See* VASEP's SV Sub-

[6] As explained by Commerce in its *Final Results* and Remand Results, Commerce relies solely on the DAM website data in its determinations. *See* IDM at cmt 1.C ("Given that we continue to find the DAM [worksheets] not to be publicly available, we will now consider only the partial DAM data published online by the Bangladeshi government.")

mission (Nov. 15, 2011), PDocII-43 at Ex. 5D (Table 18) (*"Yearbook")*. The plaintiffs also argue that Commerce's treatment of the DAM's price observations in the previous review undermine Commerce's argument here, suggesting that because the DAM prices are reported on a "per quintal basis", or 100 kilogram lot basis, "the DAM's 766 website price observations could at most account for . . . 76.6 metric tons" during the POR. Pls' Cmts at 22. Continuing on this point, the plaintiffs contrast the DAM data with the BAS and FIGIS data[7] on the record, explaining that those sources have volume data associated with price data representing 83 metric tons ("MT") and 109,865 MT.

The defendant explains that the lack of volume data does not rule out or heavily weigh against the use of such price information, given the available record evidence. Commerce found that the record demonstrates significant production of 124,760 metric tons of *Pangasius* in Bangladesh in and around the POR. Remand Results at 8–9, referencing VASEP's SV Submission (Nov. 15, 2011), PDoc-II-43 at Ex. 5D (Table 18). The defendant argues that Commerce drew a reasonable inference regarding the DAM data and the *Yearbook* data, finding that given the scope, coverage, and frequency of data collection by the DAM for the POR and the "systematic, national-level price monitoring specific to the *Pangasius* species at issue . . . collected by a government agency and maintained on a regular basis", the DAM data represent commercial quantities. Def's Resp. at 13. Commerce also cites other reviews in which it relied on sources for major inputs that do not contain specific volume or value data used to establish the prices.[8] Similarly to its decisions in those cases, Commerce here found that based on the record as a whole, the DAM data reflect commercial quantities even in the absence of volume information.

Commerce has broad discretion to determine the best available information for an antidumping review, as the term "best available information" is not defined by statute. *Ad Hoc Shrimp Trade Action Comm. v. United States*, 618 F.3d 1316, 1322 (Fed. Cir. 2010); *see Nation Ford Chem. Co. v. United States*, 166 F.3d 1373, 1377 (Fed.

[7] These two sources were considered by Commerce for the *Final Results* alongside the DAM data: (1) *Fisheries Statistics of the Philippines* 2007–2009, an official government publication of the Philippine Government's Bureau of Agricultural Statistics ("BAS"), Fisheries Statistics Division, containing 2009 *Pangasius* prices; and (2) price and quantity data for 2009 for *Pangasius* pertaining to Indonesia from the U.N. Food and Agricultural Organization's Fisheries Global Information System ("FIGIS").

[8] See *Certain Steel Nails from the People's Republic of China: Final Determination of Sales at Less Than Fair Value and Partial Affirmative Determination of Critical Circumstances*, 73 Fed. Reg. 33977 (June 16, 2008) ("*Nails*") and accompanying IDM at cmt 10; *see also Steel Wire Garment Hangers from the People's Republic of China: Final Determination of Sales at Less than Fair Value*, 73 Fed. Reg. 47587 (Aug. 14, 2008) ("*Hangers*") and accompanying IDM at cmt 4.

Cir. 1999) (Commerce is afforded "wide discretion" to value factors of production in nonmarket economies). Commerce cannot base its analysis on mere speculation, but may draw reasonable inferences from the record. *Lifestyle Enterprise, Inc. v. United States*, 35 CIT ___, ___, 768 F. Supp. 2d 1286, 1309 (2011), referencing *Hebei Metals & Minerals Imp. & Exp. v. United States*, 28 CIT 1185, 1203, 366 F. Supp. 2d 1264, 1277 n.7 (2004). The court's inquiry "takes into account the entire record, which includes evidence that supports and detracts from the conclusion reached." *Sango Int'l L.P. v. United States*, 567 F.3d 1356, 1362 (Fed. Cir. 2009).

The court disagrees with the plaintiffs' interpretation of the "per quintal basis" price reports. The defendant correctly observes that this line of reasoning requires the unlikely assumption that reporting districts only sold one quintal (100 kg) of fish per week. While Commerce may have overstated the upper level limit by positing that the data may reflect "hundreds or thousands" of quintals, Commerce has made a reasonable inference that 76.6 MT is a "lower level volume cap" on the volume of sale reflected in the DAM data and not an absolute upper level volume cap as suggested by the plaintiffs. Further, the plaintiffs' questionable assertion that the DAM data "at most" reflect only 76.6 MT is undermined by the data the plaintiffs offer in the DAM data's stead. The BAS data reflect a volume of 83 MT; even assuming, *arguendo*, the plaintiffs' argument regarding the total production volume represented by the DAM data, the slightly higher total production volume represented by the BAS data is not a compelling reason for finding Commerce's acceptance of the DAM data over the BAS data unreasonable. The BAS and FIGIS data suffer from other flaws, and Commerce deemed them deficient as compared with the DAM data.

The plaintiffs also misrepresent Commerce's use of the *Yearbook*. Commerce does not assert the *Yearbook* as a proxy; instead, Commerce explains, the *Yearbook* evidence demonstrates that the Bangladeshi *Pangasius* industry is mature and not insignificant. Remand Results at 8–9, 24. Commerce's inference that the DAM data represent commercial quantities because the DAM data represent 767 price observations in 31 of 68 districts (including Mymensing, the largest *Pangasius* -producing district in Bangladesh) of a country producing 124,760 MT of *Pangasius* during the POR is reasonable given the record evidence taken as a whole. *See Lifestyle Enterprise, Inc.*, 768 F. Supp. 2d at 1309 (Commerce may draw reasonable inferences from the record). Moreover, the plaintiffs appear to take no issue with Commerce's reliance on previous reviews of *Nails* and

Hangers, where volume data was not included with the price data but the dataset was nonetheless found to be indicative of a broad market average.

Considering the foregoing, the plaintiffs' arguments do not persuade that Commerce's finding with respect to commercial quantities is not supported by substantial evidence or not in accordance with law.

B

As previously observed, *see Catfish Farmers I* at 8–14, notwithstanding that the DAM failed to respond to Commerce's requests, the defendant in its *Final Results* concluded that the DAM website provided a "robust" set of *Pangasius* prices in Bangladesh and were reliable for SV purposes. *Final Results* at 13. The matter was remanded for further explanation. The plaintiffs at this point assert that the defendant's Remand Results do not comply with the court's explicit instructions to reconsider the "non-responsiveness" of the DAM. As detailed below, Commerce asserts that the DAM's failure to respond to its questions does not form the basis for its reasoning in its SV analysis. The court finds that Commerce's explanation complies with the remand order in *Catfish Farmers I*, and that Commerce's determination on the issue of reliability is supported by substantial evidence on the record.

Regarding the reliability of the DAM data, the plaintiffs reiterate that they provided affidavits from two Bangladeshi farmers and one from local counsel, which averred that the DAM data were not gathered based on any statistical sampling technique (valid or otherwise), nor were they gathered using "structured questionnaires", as well as a second affidavit from counsel that averred there was no DAM process during the POR to validate the prices the DAM collects from the wholesale markets. Pls' Cmts at 11–12, referencing Petitioners' SV Rebuttal Submission (June 3, 2011), PDoc-I-109 at Exs. 5–7 and Petitioners' SV Rebuttal Submission (July 25, 2011), PDoc-I-124 at Ex. 1, para. 5. The plaintiffs also claim they submitted an "independent report" not prepared for this proceeding or at the plaintiffs' request that surveyed the quality of the aquaculture data collected and published by DAM and concluded that the DAM's market prices are "not up-to-date and in many cases not reliable." Pls' Cmts at 12, referencing Petitioners' Rebuttal SV Submission (Jan. 6, 2012), PDoc-II-76 at Ex. 2. The plaintiff emphasize, more importantly, that the defendant issued to the DAM letters containing questions about the manner in which the agency collected, analyzed and disseminated

wholesale prices for *Pangasius* fish, but that the DAM, significantly, failed to respond to either of the defendant's letters requesting that information. IDM at cmt 1.

According to the defendant, the focus of its questions to the DAM rested on the "public availability of the [DAM] worksheets" and so were not probative of the overall reliability of the DAM website data. Remand Results at 7 & 20. The defendant agrees with the plaintiffs that the questions it sent to the DAM "did not only pertain to public availability", but states that public availability was a "significant reason" for sending the information requests to the DAM. In the preliminary results, Commerce based its decision not to use the DAM data primarily on its finding that the DAM worksheet data were not publicly available, despite having found that the DAM worksheet data satisfied the other SV criteria. *See Certain Frozen Fish Fillets From the Socialist Republic of Vietnam: Preliminary Results and Partial Rescission of the Seventh Antidumping Duty Administrative Review*, 76 Fed. Reg. 55872, 55876–77 (Sept. 9, 2011) ("[a]s a result of the uncertainty regarding public availability of the DAM [worksheet] data, we find that Bangladesh does not provide the best available information with respect to valuation of whole live fish for purposes of the preliminary results"). In the *Final Results*, Commerce's concerns regarding public availability were resolved because the DAM website data placed on the record were publicly available. IDM at cmt 1.C. Commerce therefore determined that because the DAM website data were species-specific, represent a broad market average, contemporaneous with the POR, from an approved surrogate country, tax-and duty-exclusive, and publicly available, these data were the best available information on this record for valuing the whole fish input. *Id.*; *see* Remand Results at 3–4, 7–10.

The plaintiffs argue that because the DAM did not respond to Commerce's other questions regarding data validation and reliability, the DAM data cannot represent the best available information. Despite the court's continued concerns on this point, the plaintiffs do not persuade that further remand will be fruitful. Commerce must value the factors of production "based on the best available information regarding the values of such factors". 19 U.S.C. §1677b(c)(1). Commerce found flaws with each of the datasets placed on the record from which to value whole live fish. Commerce found the BAS data specific to the species and publicly available, but less contemporaneous than the DAM data and less representative of a broad market average. IDM at cmt 1.C. Commerce similarly found the FIGIS data less contemporaneous than the DAM data and less specific than the DAM

data, as the FIGIS data include prices for one species of *Pangasius* not covered by the antidumping duty order whereas the DAM data are specific to *Pangasius hypothalamus*, the species specific to the respondents' input. *See id.* at 1.B & C.

"When all the available information is flawed in some way, Commerce must make a judgment call as to what constitutes the 'best' information." *Lifestyle Enterprise, Inc. v. United States*, 751 F.3d 1371, 1378 (Fed. Cir. 2014). Despite the DAM's non-responsiveness to Commerce's requests for information, Commerce found that, on this record, the DAM website data satisfy its criteria for selecting the best available information, and that the DAM website data are a "more robust data source . . . especially with respect to specificity and contemporaneity" than the BAS or FIGIS data. IDM at cmt 1.C. While the court may have concerns regarding the non-responsiveness of the DAM and the verification of the DAM website data, as pointed out by the plaintiffs, it cannot substitute its own judgment for that of Commerce. *Timken*, 26 CIT at 592. Commerce determined that the DAM website data satisfy its criteria and that the DAM data were superior to the other data sources on the record. The court finds this determination supported by substantial evidence.

III

On remand, Commerce determined different by-product SVs for fish waste, fresh broken fillets, frozen broken fillets, and fish oil. Remand Results at 12–16. Commerce notes that there appear to be no challenges to the SVs for fish waste, fresh broken fillets and frozen broken fillets. Def's Resp. at 21; *see generally* Pls' Cmts, Def-Int's Cmts, and Pls' Resp.

For the fish oil SV, Commerce considered an Indonesian supplier price quote proffered by the plaintiffs, but ultimately found that the price quote was not the best available information because it did not meet the selection criterion for contemporaneity and appeared to be an unofficial price quote with no indication on the record that it reflected a market price. Remand Results at 15. Commerce therefore continued to value the fish oil by-product using the Indonesian Global Trade Atlas ("GTA") GTA import statistics data for Harmonized Tariff Schedule ("HTS") subheading 1504.20.90.00,[9] but capped (*i.e.* applied a ceiling to) the price at the calculated value of the FOPs and ratios used by Vinh Hoan to make fish oil in order to ensure that the value

[9] HTS 1504.20.90.00 covers "Fish Fats & Oils & Their Fractions Exc Liver, Refined Or Not, Not Chemically Mod, Solid Fractions, Not Chemically Mod, Other".

was "fully loaded".[10] Def's Resp. at 17–18; *see also* Remand Results at 15. Respondent Vinh Hoan challenges this SV determination as unsupported by substantial evidence.

However, in the *Final Results* and again in the Remand Results, Commerce determined that Vinh Hoan had a dumping margin of 0.00%, thus *de minimis* under 19 C.F.R. § 351.106(c)(2). *Final Result,*77 Fed. Reg. at 88579; Remand Results at 29. Even if Vinh Hoan is correct in its assertions against the defendant, a remand here would have no effect on Vinh Hoan's margin. As summarized in *Allegheny Ludlum Corp. v. United States*:

> The Supreme Court thus requires application of a two-part test to determine whether a case is ripe for judicial action. First, the court must determine whether the issues are fit for judicial decision -- that is, whether there is a present case or controversy between the parties, *see Lake Carriers' Ass'n v. MacMullen*, 406 U.S. 498, 502 (1972); *BP Chems Ltd. v. Union Carbide Corp.*, 4 F.3d 957, 977 (Fed. Cir. 1993); and second, whether there is sufficient risk of immediate hardship to warrant prompt adjudication -- that is, whether withholding judicial decision would work undue hardship on the parties, *MacMullen*, 406 U.S. at 506; *Pacific Gas & Elec. Co. v. State Energy Resources Conservation & Dev. Comm'n,* 461 U.S. 190, 20001 (1983). Both prongs must be satisfied before an Article III court may apply its adjudicative powers to a case's merits.

Allegheny Ludlum Corp. v. United States, 24 CIT 1424, 1448–49, 215 F. Supp. 2d 1322, 1344 (2000) (internal quotes and citations omitted) ("*Allegheny*"). The test is whether a present controversy exists as to which effective relief may be granted. *Associacao Dos Industriais de Cordoaria E Redes v. United States*, 17 CIT 754, 759, 828 F. Supp. 978, 984 (1993) ("*Cordoaria*").[11] Further, "a case will be dismissed as moot when the challenge presented to the [c]ourt cannot result in meaningful remedy." *Verson v. United States*, 22 CIT 151, 153, 5 F. Supp 2d 963, 966–67 (1998) (internal citations omitted). Here, an actual controversy no longer remains in this case because if Commerce redetermined the SV calculation in Vinh Hoan's favor, such determination would not alter the duty margin; it would still concep-

[10] Commerce explains that "fully loaded" here means "a value that accounts for the total sum of the value-added from converting fish waste/scrap to fish oil by including processing costs, overhead, selling and general administrative expenses (SG&A), and profit." Def's Resp. at 18.

[11] Relief may exist for controversies that appear moot, but are "capable of repetition, yet evade review." *Cordoaria*, 828 F. Supp at 984. That is not the case here, as this matter is not one that would "evade" review by agency expedient.

tually remain *de minimis*. Thus, "no live case or controversy exists because there is no actual injury that can be redressed by a favorable judicial decision." *See Verson*, 22 CIT 151 at 154 (internal citations omitted). Vinh Hoan's arguments are rendered moot because the relief requested would not result in improvement to its margin.

Conclusion

Because the court finds the Remand Results supported by substantial evidence on the record, the results will be sustained and judgment entered accordingly.

Dated: March 30, 2016
New York, New York

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

Slip Op. 16–30

LAMINATED WOVEN SACKS COMMITTEE, COATING EXCELLENCE INTERNATIONAL, LLC, AND POLYTEX FIBERS CORPORATION, Plaintiffs, v. UNITED STATES, Defendant.

Before: Leo M. Gordon, Judge
Court No. 12–00301

JUDGMENT

Before the court is the U.S. Department of Commerce Redetermination Pursuant to Court Remand Laminated Woven Sacks Comm. v. United States Court No. 12–00301, ECF No. 36 ("*Remand Results*"). All parties agree that the *Remand Results* comply with the court's instructions and should be sustained. Joint Status Report 1–2, ECF No. 37. Accordingly, it is hereby

ORDERED that the *Remand Results* are sustained.

Dated: March 30, 2016
New York, New York

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