# U.S. Court of International Trade

Slip Op. 18–74

ANDRITZ SUNDWIG GMBH, Plaintiff, v. UNITED STATES, Defendant.

Before: Jennifer Choe-Groves, Judge
Court No. 18–00142

[Dismissing this action for lack of subject matter jurisdiction.]

Dated: June 20, 2018

*James G. Hurst* and *Scott L. Johnston*, Givens & Johnston, PLLC, and *Stacey L. Barnes*, Kearney, McWilliams & Davis, PLLC, of Houston, TX, for Plaintiff Andritz Sundwig GMBH.

*Justin R. Miller*, Senior Trial Counsel, *Alexander J. Vanderweide* and *Hardeep K. Josan*, Trial Attorneys, and *Amy M. Rubin*, Assistant Director, Commercial Litigation Branch, Civil Division, U.S. Department of Justice, of New York, N.Y., for Defendant United States. With them on the brief was *Chad A. Readler*, Acting Assistant Attorney General. Of counsel were *Edward N. Maurer* and *Alexandra Khrebtukova*, Office of Assistant Chief Counsel, International Trade Litigation, U.S. Customs and Border Protection, of New York, N.Y.

***OPINION***

**Choe-Groves, Judge:**

This matter involves a request seeking the court's intervention to prevent the emergency exportation of machinery in wood packaging material containing an invasive insect species of the family *Siricidae*, commonly known as horntails or woodwasps. Plaintiff Andritz Sundwig GMBH ("Andritz" or "Plaintiff") is a German company that supplies production machinery to steel and aluminum manufacturers. *See* Aff. Deborah Zink at 1, June 17, 2018, ECF No. 4–1. Andritz is the importer of record for the subject merchandise at issue here: "one complete 4-High Temper Mill (Cold Rolling Mill)" and "one complete S6 High Cold Rolling Mill" (collectively, "Cargo"). *Id.* at 2. The Cargo is valued at approximately $39.5 million. *See id.* Plaintiff commenced this action to obtain judicial review of two Emergency Action Notifications ordering the immediate exportation of the Cargo. *See* Original Compl. & Appl. TRO, Temp. Inj. & Permanent Inj., June 17, 2018, ECF No. 4 ("Compl."). Before the court is Plaintiff's Application for Temporary Restraining Order, *see* Appl. TRO, June 17, 2018, ECF No. 5 ("Pl.'s Mot."), and Defendant's cross-motion to dismiss for lack of subject matter jurisdiction under USCIT Rule 12(b)(1). *See* Teleconference at 0:21:30–0:23:17, June 20, 2018, ECF No. 22. For the rea-

sons explained below, the court denies Plaintiff's motion, grants Defendant's cross-motion, and dismisses this action for lack of subject matter jurisdiction.

## BACKGROUND

The U.S. Department of Agriculture ("USDA") Animal and Plant Health Inspection Service ("APHIS") and the Department of Homeland Security ("DHS") are responsible for enforcing the Plant Protection Act, 7 U.S.C. §§ 7701 et seq.[1] APHIS and DHS have the authority to regulate certain animal-and plant-related issues, including wood packaging material used for the importation of goods into the United States. If the wood packaging material is not properly treated and marked, then a port inspector may order immediate re-exportation. *See* 7 C.F.R. § 319.40–3(b)(3) (2018).[2]

The Cargo at issue in this case arrived in the United States on June 8, 2018, listed on two bills of lading numbered BBCH1222001AH01 and BBCH1222001AH02. *See* Compl. ¶¶ 9, 13. Andritz received Emergency Action Notification ("EAN") 96081 on June 11, 2018 in relation to Bill of Lading BBCH1222001AH01. *See id.*¶ 12. Plaintiff received EAN 96733 in relation to Bill of Lading BBCH1222001AH02 on June 13, 2018. *See id.*¶ 13. EAN 96733 states, in relevant part:

> U.S. DEPARTMENT OF AGRICULTURE
> ANIMAL PLANT HEALTH INSPECTION SERVICE
> PLANT PROTECTION AND QUARANTINE
> **EMERGENCY ACTION NOTIFICATION**
>
> . . . .
>
> Under sections 411, 412, and 414 of the Plant Protection Act (7 USC 7711, 7712, and 7714) . . . , you are hereby notified, as owner or agent of the owner of said carrier, premises, and/or articles, to apply remedial measures for the pest(s), noxious weeds, and/or article(s) specified . . . in a manner satisfactory to and under the supervision of an Agriculture Officer.
>
> . . . .
>
> A contaminant was found on this shipment. The shipment must be re-exported or destroyed.
>
> . . . .
>
> Cargo and/or solid wood packing material (SWPM) in this shipment are infested with live pests.

[1] All further citations to the U.S. Code are to the 2012 edition.

[2] All further citations to the Code of Federal Regulations are to the 2018 edition.

Emergency Action Notification 96733, June 17, 2018, ECF No. 5–2 ("June 13 EAN"). Officers at the Port of Houston found *Siricida e*present in the packing material. *See id.*; *see generally* 19 C.F.R. § 340.2(a) (listing *Siricida e*as an organism that are or contain plant pests). Due to the discovery of these insects, both EANs required Andritz to either destroy or re-export the subject merchandise within seven days. *See* June 13 EAN; *see also* Compl. ¶¶ 12–13.

Andritz filed a protest with U.S. Customs and Border Protection ("Customs") on June 15, 2018 and requested an accelerated disposition in the matter pursuant to 19 C.F.R § 174.22. *See* Protest, June 17, 2018, ECF No. 5–2. Plaintiff commenced this action on June 17, 2018. *See* Summons, June 17, 2018, ECF No. 1; Compl.

Andritz asserts two claims against the Government in its complaint. *See* Compl. ¶¶ 28–33. Plaintiff's first count seeks "judicial review of the denial of its protest of the EANs made pursuant to 19 U.S.C. § 1514(c), and the effective immediate exportation of the Cargo" by Customs. *See id.* ¶ 29. Plaintiff's second claim asks for "a declaratory judgment that the EANs are invalid and vacated. . . ." *See id.* ¶ 31. Andritz requests that the court require separation of the Cargo from the wood packing material and allow Andritz to fumigate the Cargo. *See id.* Andritz filed its Application for Temporary Restraining Order on June 17, 2018. *See* Pl.'s Mot.

## DISCUSSION

Before discussing Plaintiff's Application for Temporary Restraining Order on the merits, the court must first determine whether it possesses subject matter jurisdiction over this action. The court will examine subject matter jurisdiction for the purposes of both Plaintiff's and Defendant's motions.

The U.S. Court of International Trade, like all federal courts, is one of limited jurisdiction and is "presumed to be 'without jurisdiction' unless 'the contrary appears affirmatively from the record.'" *DaimlerChrysler Corp. v. United States*, 442 F.3d 1313, 1318 (Fed. Cir. 2006) (quoting *King Iron Bridge & Mfg. Co. v. Otoe Cty.*, 120 U.S. 225, 226 (1887)). The party invoking jurisdiction must "allege sufficient facts to establish the court's jurisdiction," *id.* (citing *McNutt v. Gen. Motors Acceptance Corp. of Ind.*, 298 U.S. 178, 189 (1936)), and therefore "bears the burden of establishing it." *Norsk Hydro Can., Inc. v. United States*, 472 F.3d 1347, 1355 (Fed. Cir. 2006). The Court is empowered to hear civil actions brought against the United States pursuant to the specific grants of jurisdiction enumerated under 28 U.S.C. § 1581(a)–(i). The court must draw all reasonable inferences in Plaintiff's (the non-movant's) favor when deciding Defendant's motion

to dismiss. *See Henke v. United States*, 60 F.3d 795, 797 (Fed. Cir. 1995).

Plaintiff pleads jurisdiction on the basis of 28 U.S.C. § 1581(a), *see* Compl. ¶ 3,[3] which grants this Court "exclusive jurisdiction of any civil action commenced to contest the denial of a protest, in whole or in part, under section 515 of the Tariff Act of 1930."[4] 28 U.S.C. § 1581(a). The Tariff Act establishes a process for the administrative review of protests. The statute directs Customs to assess the protests in a timely manner. 19 U.S.C. § 1515. If a party requests accelerated disposition of a protest, Customs has thirty days to render a final decision. *See id.*; *see also* 19 C.F.R. § 174.22. A party may protest specific actions taken by Customs by statute, including:

> [A]ny clerical error, mistake of fact, or other inadvertence, whether or not resulting from or contained in an electronic transmission, adverse to the importer, in any entry, liquidation, or reliquidation, and, decisions of the Customs Service, including the legality of all orders and findings entering into the same, as to—
>
> (1) the appraised value of merchandise;
>
> (2) the classification and rate and amount of duties chargeable;
>
> (3) all charges or exactions of whatever character within the jurisdiction of the Secretary of the Treasury;
>
> (4) **the exclusion of merchandise from entry or delivery or a demand for redelivery to customs custody under any provision of the customs laws**, except a determination appealable under section 1337 of this title;
>
> (5) the liquidation or reliquidation of an entry, or reconciliation as to the issues contained therein, or any modification thereof, including the liquidation of an entry, pursuant to either section 1500 of this title or section 1504 of this title;
>
> (6) the refusal to pay a claim for drawback; or

[3] Plaintiff's complaint also asserts 28 U.S.C. § 1331 as an alternative basis for jurisdiction, *see* Compl. ¶ 4, but does not reiterate this statement in its application for a temporary restraining order. *See* Pl.'s Mot. 2 (citing only 28 U.S.C. § 1581(a) for court's jurisdiction over this action). To the extent Plaintiff continues to plead 28 U.S.C. § 1331, its allegation is improper. That provision grants the district courts with original subject matter jurisdiction over "all civil actions arising under the Constitution, laws, or treaties of the United States." 28 U.S.C. § 1331. This Court is one of limited jurisdiction by statute, and therefore Plaintiff's invocation is erroneous.

[4] All further citations to the Tariff Act of 1930, as amended, are to the relevant provisions of Title 19 of the U.S. Code.

(7) the refusal to reliquidate an entry under subsection (d) of section 1520 of this title.

19 U.S.C. § 1514(a) (emphasis added).

Although this case potentially involves "the exclusion of merchandise from entry" under subsection (4), it is not a decision by Customs made "under any provision of the customs laws." Andritz's underlying cause of action does not stem from its protest, but rather the EANs. The EANs themselves list USDA as the supervisory agency and cite to the Plant Protection Act and regulations promulgated thereunder. The EANs represent one aspect of the agency's efforts to enforce the Plant Protection Act and to safeguard "the agriculture, environment, and economy of the United States." 7 U.S.C. § 7701. Because the protest does not involve the exclusion of merchandise pursuant to customs laws, but rather agricultural laws, it is not a proper protest according to 19 U.S.C. § 1514(a) and is not reviewable by this Court.

Plaintiff further raised 28 U.S.C. § 1581(i)(4) as a potential avenue for jurisdiction over this matter. Subsection (i) provides for the Court's residual jurisdiction, and encompasses the "administration and enforcement with respect to matters referred to" in the statute. 28 U.S.C. § 1581(i)(4). As stated before, subsection (a) is not available to Plaintiff because its cause of action primarily relates to the enforcement of agricultural laws, not customs laws. The court concludes further that none of the other jurisdictional bases present in 28 U.S.C. § 1581 are applicable. Therefore, Plaintiff may not utilize 28 U.S.C. § 1581(i)(4) as a basis for jurisdiction in this matter.

Claims originating from the Plant Protection Act are properly filed in the U.S. district courts. *See* 7 U.S.C. § 7736(a) ("The United States district courts . . . are vested with jurisdiction in all cases arising under this chapter."). As stated before, the U.S. Court of International Trade is a court of limited jurisdiction, and may only hear cases pursuant to specific statutory grants of authority. It is clear that under the applicable provisions of the Plant Protection Act, jurisdiction does not lie with the U.S. Court of International Trade. Therefore, this court is not the proper forum for Plaintiff's claims. Because this Court does not have subject matter jurisdiction over Plaintiff's cause of action to the extent that it challenges the EANs and enforcement of the Plant Protection Act, the court does not reach the merits of Plaintiff's motion and dismisses the case.

## CONCLUSION

For the aforementioned reasons, the court concludes it does not have subject matter jurisdiction over Plaintiff's cause of action at this time.

28 U.S.C. § 1631 allows the court to transfer an action if it finds that "there is a want of jurisdiction" and "if it is in the interest of justice." 28 U.S.C. § 1631. The court determines here that it does not have subject matter jurisdiction. Given the extenuating circumstances that Plaintiff faces with the immediate re-exportation of its merchandise, the court finds that it is in the interest of justice to transfer the case to the U.S. District Court for the Southern District of Texas. Accordingly, upon consideration of Plaintiff's and Defendant's motions, and all other papers and proceedings in this action, it is hereby

**ORDERED** that Plaintiff's Application for Temporary Restraining Order is denied; and it is further

**ORDERED** that Defendant's Cross-Motion to Dismiss for Lack of Subject Matter Jurisdiction is granted; and it is further

**ORDERED** that this case is transferred to the U.S. District Court for the Southern District of Texas.

Dated: June 20, 2018
New York, New York

*/s/ Jennifer Choe-Groves*
JENNIFER CHOE-GROVES, JUDGE

Slip Op. 18–75

SOC TRANG SEAFOOD JOINT STOCK COMPANY et al., Plaintiffs and Consolidated Plaintiff, and CA MAU SEAFOOD JOINT STOCK COMPANY, Plaintiff-Intervenor, v. UNITED STATES, Defendant, and AD HOC SHRIMP TRADE ACTION COMMITTEE, Defendant-Intervenor and Consolidated Defendant-Intervenor.

Before: Claire R. Kelly, Judge
Consol. Court No. 16–00205

[Sustaining in part and remanding in part the U.S. Department of Commerce's final determination in the tenth administrative review of certain frozen warmwater shrimp from the Socialist Republic of Vietnam.]

Dated: June 21, 2018

*Matthew Robert Nicely*, *Daniel Martin Witkowski*, and *Julia K. Eppard*, Hughes Hubbard & Reed LLP, of Washington, DC, argued for plaintiffs, Soc Trang Seafood Joint Stock Company a/k/a Stapimex; Trong Nhan Seafood Company Limited; Sao Ta Foods Joint Stock Company a/k/a Fimex VN a/k/a Saota Seafood Factory; Nha Trang Seafoods Group: Nha Trang Seaproduct Company a/k/a NT Seafoods Corporation a/k/a Nha Trang Seafoods -F.89 Joint Stock Company a/k/a NTSF Seafoods Joint Stock Company; Viet Foods Co., Ltd.; UTXI Aquatic Products Processing Corporation a/k/a Hoang Phuong Seafood Factory a/k/a Hoang Phong Seafood Factory; Camau Frozen Seafood Processing Import Export Corporation a/k/a Camau Seafood Factory No. 4; Ngoc Tri Seafood Joint Stock Company; Investment Commerce Fisheries Corporation; Quang Minh Seafood Co., Ltd.; Phuong Nam Foodstuff Corp.; Minh Cuong Seafood Import Export Frozen Processing Joint Stock Company; Minh Hai Joint-Stock Seafoods Processing Company; Cadovimex Seafood Import-Export and Processing Joint Stock Company; Can Tho Import Export Fishery Limited Company; Danang Seaproducts Import Export Corporation a/k/a Danang Seaproducts Import-Export Corporation a/k/a Seaprodex Danang a/k/a Tho Quang Co. a/k/a Tho Quang Seafood Processing and Export Company a/k/a Frozen Seafoods Factory No. 32; Vietnam Clean Seafood Corporation; Viet I-Mei Frozen Foods Co., Ltd.; Kim Anh Company Limited a/k/a Kim Anh Co., Ltd.; Viet Hai Seafood Co., Ltd. a/k/a Vietnam Fish One Co., Ltd.; Thuan Phuoc Seafoods and Trading Corporation; Bac Lieu Fisheries Joint Stock Company; Nha Trang Fisheries Joint Stock Company; Thong Thuan Company Limited a/k/a T&T Co., Ltd.; Cuulong Seaproducts Company; Camau Seafood Processing and Service Joint Stock Company; Quoc Viet Seaproducts Processing Trading and Import-Export Co., Ltd.; C.P. Vietnam Corporation; and Minh Hai Export Frozen Seafood Processing Joint-Stock Company, and for plaintiff-intervenor Ca Mau Seafood Joint Stock Company a/k/a Seaprimexco Vietnam.

*Jonathan Michael Freed*, Trade Pacific, PLLC, of Washington, DC, argued for consolidated plaintiff, Mazzetta Company LLC. With him on the brief were *Robert George Gosselink* and *Jarrod Mark Goldfeder*.

*Kara Marie Westercamp*, Trial Attorney, Commercial Litigation Branch, Civil Division, U.S. Department of Justice, of Washington, DC, argued for defendant. With her on the brief were *Patricia M. McCarthy*, Assistant Director, *Jeanne E. Davidson*, Director, and *Chad A. Readler*, Principal Deputy Assistant Attorney General. Of Counsel on the brief was *James Henry Ahrens II*, Attorney, Office of the Chief Counsel for Trade Enforcement and Compliance, U.S. Department of Commerce, of Washington, DC.

*Nathaniel Jude Maandig Rickard*, Picard, Kentz & Rowe, LLP, of Washington, DC, argued for defendant-intervenor and consolidated defendant-intervenor, Ad Hoc Shrimp Trade Action Committee. With him on the brief was *Meixuan (Michelle) Li*.

## *OPINION AND ORDER*

**Kelly, Judge:**

This consolidated action is before the court on two motions for judgment on the agency record challenging various aspects of the U.S. Department of Commerce's ("Department" or "Commerce") final determination in the tenth administrative review of the antidumping duty ("ADD") order covering certain frozen warmwater shrimp from the Socialist Republic of Vietnam ("Vietnam"). *See* Pls. & Pl.-Intervenor's Rule 56.2 Mot. J. Agency R., June 5, 2017, ECF No. 38; Consol.-Pl.'s Rule 56.2 Mot. J. Agency R., June 5, 2017, ECF No. 39; *see also Certain Frozen Warmwater Shrimp From [Vietnam]*, 81 Fed. Reg. 62,717 (Dep't Commerce Sept. 12, 2016) (final results of [ADD] administrative review, 2014–2015) ("*Final Results*") and accompanying Certain Frozen Warmwater Shrimp from [Vietnam]: Issues and Decision Mem. for the Final Results, A 552–802, (Sept. 6, 2016), ECF No. 19–2 ("Final Decision Memo"); *Certain Frozen Warmwater Shrimp From [Vietnam]*, 70 Fed. Reg. 5,152 (Dep't Commerce Feb. 1, 2005) (notice of amended final determination of sales at less than fair value and [ADD] order) ("*ADD Order*").

Plaintiffs Soc Trang Seafood Joint Stock Company a/k/a Stapimex et al., foreign producers and exporters of the subject merchandise, commenced this action pursuant to section 516A(a)(2)(B)(iii) and 516A(d) of the Tariff Act of 1930, as amended, 19 U.S.C. § 1516a(a)(2)(B)(iii) and 1516a(d) (2012).[1] *See* Summons, Oct. 7, 2016, ECF No. 1; Compl., Oct. 28, 2016, ECF No. 8.[2] Plaintiff-Intervenor, Ca Mau Seafood Joint Stock Company a/k/a Seaprimexco Vietnam, intervened as of right, *see* Order, Mar. 1, 2017, ECF No. 27, and, together with the above named Plaintiffs, the court refers to these parties as "Respondents."

The Respondents challenge four aspects of Commerce's final determination. *See* Pls. & Pl.-Intervenor's Mem. Supp. Rule 56.2 Mot. J. Agency R., June 5, 2017, ECF No. 38–2 ("Respondents' Br."). First, the Respondents challenge as not in accordance with law and unsupported by substantial evidence Commerce's differential pricing analysis. *Id.* at 7–35. Second, the Respondents challenge Commerce's selection of surrogate value data sources to value head and shell byproducts, frozen shrimp, and ice. *Id.* at 35–43. Third, the Respondents challenge Commerce's decision to deny a byproduct offset for

[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.

[2] The action was consolidated with an action filed by Mazzetta which challenges aspects of the same final determination. *See* Order, Feb. 3, 2017, ECF No. 23.

revenue from excess or scrap packaging. *Id.* at 43–45. Fourth, the Respondents challenge as not in accordance with law and unsupported by substantial evidence Commerce's calculation of the all-others separate rate. *Id.* at 45–46.

Mazzetta Company, LLC ("Mazzetta"), an importer of subject merchandise, challenges two aspects of Commerce's final determination. *See* Mem. Consol.-Pl. [Mazzetta] in Supp. Mot. J. Agency R. Pursuant Rule 56.2, June 5, 2017, ECF No. 39–1 ("Mazzetta Br."). First, Mazzetta argues that Commerce improperly omitted from the record documentation and memoranda memorializing the events that it claims led to the rescission of Commerce's review of Minh Phu Seafood Corporation, Minh Qui Seafood Co., Ltd., Minh Phat Seafood Co., Ltd., and Minh Phu Hau Giang Seafood Joint Stock Company (collectively, "Minh Phu Group" or "MPG"). *See id.* at 22–25; *see also* [ADD] Administrative Review of Certain Frozen Warmwater Shrimp from [Vietnam]: Selection of Respondents for Individual Examination at 7, PD 71, bar code 3273103–01 (Apr. 29, 2015) ("Resp't Selection Memo").[3] Second, Mazzetta challenges as not in accordance with law and unsupported by substantial evidence Commerce's calculation of the all-others separate rate. *See* Mazzetta Br. at 25–43.

For the reasons that follow, the court sustains Commerce's application of the differential pricing analysis and calculation of the all-others rate, and Commerce's surrogate value data selections for head and shell byproduct and ice. The court also determines that Commerce fulfilled its statutory duty to maintain a complete and accurate administrative record. However, the court remands Commerce's surrogate value data selection for frozen shrimp, and Commerce's decision to deny an offset for packaging scrap revenue for further explanation or reconsideration consistent with this opinion.

## BACKGROUND

Commerce initiated this tenth administrative review covering subject imports entered during the period of review ("POR"), February 1, 2014 through January 31, 2015. *See Initiation of Antidumping and Countervailing Duty Administrative Reviews*, 80 Fed. Reg. 18,202, 18,204 (Dep't Commerce Apr. 3, 2015). Commerce subsequently selected MPG and Soc Trang Seafood Joint Stock Company ("Stapimex") as mandatory respondents in this review. *See* Resp't Selection Memo at 9. Because Vietnam is a nonmarket-economy ("NME"), Commerce "begins with a rebuttable presumption that all

[3] On December 6, 2016, Defendant submitted indices to the public and confidential administrative records underlying Commerce's final determination. These indices are located on the docket at ECF No. 19–3–4. All further references in this opinion to administrative record documents are identified by the numbers assigned by Commerce in these indices.

companies within Vietnam are subject to government control." Final Decision Memo at 76. Based on this presumption, Commerce assigns all exporters of the subject merchandise in a NME country a single antidumping duty rate. *Id.* However, if an exporter can demonstrate the absence of government control, Commerce will calculate for it a separate rate. *Id.* Companies, other than the mandatory respondents, who are able to demonstrate the absence of government control are assigned the separate all-others rate. *Id*. Commerce has a practice of calculating the separate rate in the same manner as the all-others rate in investigations provided for in 19 U.S.C. § 1673d(c)(5). *See* Final Decision Memo at 62–63; *see also Albemarle Corp. & Subsidiaries v. United States*, 821 F.3d 1345, 1352–53 (Fed. Cir. 2016). Accordingly, the separate all-others rate is "an amount equal to the weighted average of the estimated weighted-average dumping margins established for exporters and producers individually investigated, excluding any zero and de minimis margins, and any margins determined entirely on the basis of facts available." *Id.* at 63.

Commerce published its preliminary results on March 10, 2016. *See Certain Frozen Warmwater Shrimp From [Vietnam]*, 81 Fed. Reg. 12,702 (Dep't Commerce Mar. 10, 2016) (preliminary results of [ADD] administrative review and partial rescission of review; 2014–2015) ("*Prelim. Results*") and accompanying Decision Mem. for Preliminary Results of [ADD] Administrative Review: Certain Frozen Warmwater Shrimp from [Vietnam]; 2014–2015, A-552–802, PD 312, bar code 3446491–01 (Mar. 3, 2016) ("Prelim. Decision Memo"). Commerce preliminarily calculated weighted-average dumping margins of 2.86% for MPG, 4.78% for Stapimex, and 3.56% for all-other separate rate respondents. *Prelim. Results*, 81 Fed. Reg. at 12,703. Commerce applied its differential pricing analysis and determined that 78.00% of Stapimex's U.S. sales passed its Cohen's d test, that the Average-to-Average ("A-to-A") methodology could not account for the price differences, and that application of the Average-to-Transaction ("A-to-T") methodology to all of Stapimex's U.S. sales was appropriate to calculate Stapimex's weighted-average dumping margin. Prelim. Decision Memo at 21. In the preliminary determination, Commerce also applied its differential pricing analysis to MPG and determined that 55.10% of MPG's U.S. sales passed its Cohen's d test, that the A-to-A methodology could not account for the price differences, and applied the A-to-T methodology to MPG's U.S. sales that passed the Cohen's d and the A-to-A methodology to the U.S. sales that did not. *Id.* at 20–21.

On July 22, 2016, Commerce rescinded its review of MPG, one of the mandatory respondents.[4] *See Certain Frozen Warmwater Shrimp From [Vietnam]*, 81 Fed. Reg. 47,758 (Dep't Commerce July 22, 2016) (partial rescission of [ADD] administrative reviews (2014–2015; 2015–2016) and compromise of outstanding claims) ("*Rescission Notice*"). Following the rescission, the Respondents and Mazzetta submitted supplemental briefing to Commerce, arguing that Commerce should continue to rely on the weighted-average dumping margins calculated for both Stapimex and MPG to calculate the all-others rate. *See* [Enclosed] Suppl. Case Br. on Behalf of VASEP & its Non-Mandatory Resp't Members at 1–5, PD 348, bar code 3498415–01 (Aug. 16, 2016); [Mazzetta] Additional Briefing at 2–8, PD 349, bar code 3498417–01 (Aug. 16, 2016). In its final determination, Commerce continued to calculate a weighted-average dumping margin of 4.78% for Stapimex. *Final Results*, 81 Fed. Reg. at 62,718. However, as a result of the rescission, no rate was calculated for MPG and Commerce assigned Stapimex's rate as the all-others rate. *See id.* The court held oral argument on the issues raised by this action on April 30, 2018. *See* Oral Arg., Apr. 30, 2018, ECF No. 68.

## JURISDICTION AND STANDARD OF REVIEW

The court has jurisdiction pursuant to 19 U.S.C. § 1516a(a)(2)(B)(iii) and 28 U.S.C. § 1581(c) (2012), which grant the court authority to review actions contesting the final determination in an administrative review of an antidumping duty order. The court will uphold Commerce's determination unless it is "unsupported by substantial evidence on the record, or otherwise not in accordance with law." 19 U.S.C. § 1516a(b)(1)(B)(i).

## DISCUSSION

### I. Application of Commerce's Differential Pricing Analysis

The Respondents challenge Commerce's differential pricing analysis as contrary to law and not supported by substantial evidence. *See* Respondents' Br. at 13–35. Specifically, they argue that Commerce's application of the differential pricing analysis does not identify whether a price difference is significant, *see id.* 13–22, does not effectuate the statutory purpose of 19 U.S.C. § 1677f-1(d)(B)(1)(i), *id.* at 22–31, and that Commerce unreasonably excludes the test sales from

[4] All parties who initially requested review of MPG withdrew their requests and requested that Commerce rescind its review of MPG. *See Rescission Notice*, 81 Fed. Reg. at 47,758. The parties' requests to rescind were submitted after the applicable 90-day deadline passed. *See id.* Commerce found it was reasonable to extend the deadline, and rescinded its review of MPG. *See id.*

the comparison group. *See id.* 31–35. Defendant argues that Commerce's application of the differential pricing analysis is settled law and its application is supported by substantial evidence. *See* Def.'s Resp. Opp'n Pls.' Rule 56.2 Mots. J. Agency R. at 31–39, Nov. 21, 2017, ECF No. 51 ("Def.'s Resp. Br."). For the following reasons, Commerce's application of the differential pricing analysis is in accordance with law, is supported by substantial evidence and is sustained.

In investigations, Commerce ordinarily uses the A-to-A methodology to calculate dumping margins.[5] *See* 19 U.S.C. § 1677f-1(d)(1)(A); 19 C.F.R. § 351.414(c)(i) (2015).[6] However, Commerce may use the alternative A-to-T methodology to calculate weighted-average dumping margins where: (i) Commerce finds a pattern of export prices for comparable merchandise that differ significantly among purchasers, regions, or periods of time, and (ii) Commerce explains why such differences cannot be taken into account using the standard A-to-A methodology. 19 U.S.C. § 1677f-1(d)(1)(B)(i)–(ii). Commerce has, through practice, adopted the same basis for applying its A-to-T methodology in administrative reviews. *See JBF RAK LLC v. United States*, 790 F. 3d 1358, 1364 (Fed. Cir. 2015).[7] The statute is silent as to how Commerce is to determine whether a pattern of significant price differences exists. However, the Statement of Administrative Action ("SAA"), which is "an authoritative expression by the United States concerning the interpretation and application" of the Uruguay Rounds Agreement Act, provides guidance. 19 U.S.C. § 3512(d). In relevant part, the SAA states that

> the reluctance to use an average-to-average methodology has been based on a concern that such a methodology could conceal "targeted dumping." In such situations, an exporter may sell at a dumped price to particular customers or regions, while selling at higher prices to other customers or regions. . . . New section 777A(d)(1)(B) provides for a comparison of average normal values to individual export prices or constructed export prices in

[5] Under the A-to-A methodology, Commerce compares the weighted-average of the normal value of the merchandise to the weighted-average of the export prices (or constructed export prices) for comparable merchandise. *See id.* Although the transaction-to-transaction methodology ("T-to-T"), which is "a comparison of the normal values of individual transactions to the export prices of individual transactions," is also a statutorily preferred method (under 19 U.S.C. § 1677f1(d)(1)(A)(ii)), Commerce's regulations provide that T-to-T will be employed only in rare cases, "such as when there are very few sales of subject merchandise and the merchandise sold in each market is identical or very similar or is custom-made." 19 C.F.R. § 351.414(c)(2).

[6] Further citations to Title 19 of the Code of Federal Regulations are to the 2015 edition.

[7] The Court of Appeals for the Federal Circuit has held Commerce's application of the alternative A-to-T method in administrative reviews to be reasonable. *See JBF*, 790 F. 3d at 1364.

> situations where an average-to-average or transaction-to-transaction methodology cannot account for a pattern of prices that differ significantly among purchasers, regions, or time periods, *i.e.*, where targeted dumping may be occurring. Before relying on this methodology, however, Commerce must establish and provide an explanation why it cannot account for such differences through the use of an average-to-average or transaction-to-transaction comparison. In addition, the Administration intends that in determining whether a pattern of significant price differences exist. Commerce will proceed on a case-by-case basis, because small differences may be significant for one industry or one type of product, but not for another.

Uruguay Round Agreements Act, Statement of Administrative Action, H.R. Doc. No. 103 316, vol. 1, at 842–43 (1994), reprinted in 1994 U.S.C.C.A.N. 4040, 4177–78.

The statute affords Commerce discretion in determining whether a pattern of significant price differences exists. *See Fujitsu General Ltd.*, 88 F.3d 1034, 1039 (Fed. Cir. 1996); *Torrington Co. v. United States*, 68 F.3d 1347, 1351 (Fed. Cir. 1995). Nonetheless, the court must address whether Commerce's methodological choice is reasonable and determine that Commerce's conclusions are supported by substantial evidence. *See Motor Vehicle Mfrs. Ass'n of U.S. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 48–49 (1983) ("[A]n agency must cogently explain why it has exercised its discretion in a given manner."); *see Smith-Corona Grp. v. United States*, 713 F.2d 1568, 1571 (Fed. Cir. 1983), *cert. denied*, 465 U.S. 1022 (1984); *Fujitsu Gen. Ltd.*, 88 F.3d at 1039 (granting Commerce significant deference in determinations "involv[ing] complex economic and accounting decisions of a technical nature"); *Ceramica Regiomontana, S.A.* v. United States, 10 CIT 399, 404–05, 636 F. Supp. 961, 966 (1986), *aff'd*, 810 F.2d 1137, 1139 (Fed. Cir. 1987).

Commerce determines whether a pattern of significant price differences exists among purchasers, regions, or periods of time with the differential pricing analysis. *See* Final Decision Memo at 8. First, Commerce applies what it refers to as the "Cohen's d test," which measures the degree of price disparity between two groups of sales. *See id.* at 8–9. Commerce calculates the number of standard deviations by which the weighted-average net prices of U.S. sales for a particular purchaser, region, or time period (the "test group") differ from the weighted-average net prices of all other U.S. sales of com-

parable merchandise (the "comparison group").[8] *See id.* at 9. The result of this calculation is a coefficient. *See id.* To arrive at the coefficient, Commerce divides the difference in the means of the net prices of the test group and comparison group by the pooled standard deviation.[9] *See id.* at 19 n.68 (reproducing the formula). The coefficient is the number of standard deviations by which the weighted-average of the comparison group and the test group differ.[10] *See* Prelim. Decision Memo at 19. A group of sales with a coefficient equal to or greater than 0.8 is said to "pass" the test, which signifies to Commerce that a significant pattern of price differences exists within that group of sales. *See id.*; Final Decision Memo at 9. Commerce then relies on the "ratio test" to measure the extent of significant price differences. *See* Final Decision Memo at 8. The "ratio test" compares the combined value of sales that passed the Cohen's d test with the value of all sales. *See* Prelim. Decision Memo at 19–20. If the value of sales that passed the test accounts for 66% or more of a respondent's total sales, that indicates to Commerce that the pattern of significant price differences warrants application of the A-to-T method to all sales. *See id.* However, if the value of sales that passed the Cohen's d test is less than 66%, but more than 33%, Commerce takes a hybrid approach, applying the A-to-T method to the sales that passed its Cohen's d test and applying the A-to-A method to all other sales. *See id.* Alternatively, Commerce will apply the A-to-A method to all sales if 33% or less of a respondent's total sales passed its Cohen's d test. *Id.* at 20. Finally, Commerce applies the "meaningful difference" test, pursuant to which Commerce evaluates whether the difference be-

[8] As Commerce explained,

> Purchasers are based on the reported consolidated customer codes. Regions are defined using the reported destination code (*i.e.*, zip code) and are grouped into regions based upon standard definitions published by the U.S. Census Bureau.
>
> Time periods are defined by the quarter within the period of review based upon the reported date of sale. For purposes of analyzing sales transactions by purchaser, region, and time period, comparable merchandise is defined using the product control number and all characteristics of the U.S. sales, other than purchaser, region, and time period, that the Department uses in making comparisons between [export price] and normal value for the individual dumping margins.

Prelim. Decision Memo at 19. To calculate a coefficient for a particular test group (all sales of the comparable merchandise to a specific purchaser, region, or time period), the test group and comparison group (all other sales of the comparable merchandise) must each have at least two observations and the sales quantity for the comparison group must account for at least five percent of the total sales quantity of the comparable merchandise. *See id.*

[9] The pooled standard deviation is derived using the simple average of the variances in the net prices within the test and comparison groups. *See* Final Decision Memo at 9, 19 n.67 (reproducing the formula for calculating the pooled standard deviation).

[10] Commerce quantifies the extent of the differences by one of three thresholds: "small" "medium," or "large." Prelim. Decision Memo at 19. A coefficient falling in the "large" threshold is equal to or greater than 0.8. *Id.*

tween the weighted-average dumping margins calculated by the A-to-A method is "meaningfully" different than the weighted-average dumping margins calculated by the A-to-T method.[11] *Id.* at 21.

Commerce's differential pricing analysis, as applied, constitutes a reasonable methodology for identifying patterns of prices that differ significantly and is therefore in accordance with law. As applied by Commerce, this tool measures "the extent to which the net prices to a particular purchaser, region, or time period [i.e., the test group] differ significantly from the net prices of all other sales of comparable merchandise [i.e., the base or comparison group]."[12] Prelim. Decision Memo at 8; *see* Final Decision Memo at 8–9.

Further, it is reasonable for Commerce to apply its differential pricing analysis to determine whether a pattern exists for an individual exporter based on the exporter's purchasers, regions, or time period. The SAA specifically speaks to individual exporters' behavior that may result in masked targeted dumping and suggests that the methodology constructed by Commerce can look for patterns in individual exporter's actions. *See* SAA at 843, 1994 U.S.C.C.A.N. at 4178. Moreover, the SAA's explanation that "Commerce will proceed on a case-by-case" to determine whether the price differences are significant, *see* SAA at 843, 1994 U.S.C.C.A.N. at 4178, does not mandate that Commerce amend the test at every application. Instead, it is enough that the resulting methodology is able to detect differences of significant variances across a variety of cases.

The Respondents claim that the SAA demonstrates Congress' intent for Commerce to "tailor" its analysis to the different industry or product under investigation or review, and to not indiscriminately apply the same test across all cases. *See* Respondents' Br. at 24.[13] The Respondents point to nothing in the statute that requires Commerce

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[11] A difference is meaningful if:

> 1) there is a 25 percent relative change in the weighted-average dumping margins between the average-to-average method and the appropriate alternative method where both rates are above the de minimis threshold, or 2) the resulting weighted-average dumping margins between the average-to-average method and the appropriate alternative method move across the de minimis threshold.

Prelim. Decision Memo at 20.

[12] The Court of Appeals for the Federal Circuit and this Court have addressed, in detail, the reasonableness of the steps underlying the differential pricing analysis as applied by Commerce. *See Apex Frozen Foods Private Ltd. v. United States*, 144 F. Supp. 3d 1308, 1313–35 (2016), *aff'd*, 862 F.3d 1337 (Fed. Cir. 2017); *Apex Frozen Foods Private Ltd. v. United States*, 208 F. Supp. 3d 1398 (2017); *see also Tri Union Frozen Prods., Inc. v. United States*, 40 CIT __, __, 163 F. Supp. 3d 1255, 1303 (2016).

[13] The Respondents also argue that Commerce's use of "small," "medium," and "large" thresholds without consideration of context is warned against by experts on Cohen's d. *See* Respondents' Br. at 24–26. Respondents' invocation of critiques regarding the proper

to construct such a test. In this regard, the Respondents also argue that Commerce's determination is not supported by substantial evidence. *See id.* at 27–30. However, the Respondents' arguments are derivative of their contrary to law challenges. Specifically, they argue that Commerce's final determination is not supported by substantial evidence because the statute requires Commerce to consider information regarding a specific product or industry in running the differential pricing analysis, and Commerce's analysis does not. Commerce, however, was not required to consider industry-wide information and the Respondents' argument does not demonstrate that what Commerce did was unreasonable.

The Respondents also argue that Commerce's differential pricing analysis does not demonstrate that the price differences are of "practical" significance. *See* Respondents' Br. at 15–19. Specifically, the Respondents contend that the threshold categories of "small," "medium," and "large" are arbitrary because the differences they quantify are not informed by industry trends.[14] *See id.* Here, the Respondents placed on the record, and addressed directly in their brief to the agency, documents evidencing volatilities in the shrimp and seafood prices in Vietnam.[15] *See, e.g.*, VASEP Submission of Factual Info. on Differential Pricing at Ex. 35, PD 274, bar code 3308867–05 (Sept. 25, 2015); VASEP Submission of Factual Info. on Differential Pricing at

application of the Cohen's d test are unpersuasive. First, the fact that Commerce has adopted a methodology based upon a statistical tool known as Cohen's d, and chooses to refer to this methodology as Cohen's d, does not diminish the discretion granted to Commerce by Congress. Congress has granted Commerce the discretion to construct a methodology to determine if there is a pattern of export prices for comparable merchandise that differ significantly among purchasers, regions, or periods of time. The relevant question is not whether the use of the "small," "medium," and "large" thresholds are warned against by experts on Cohen's d, but whether these thresholds are permitted by statute and reasonable choices to effectuate the goals of the statute. The Respondents do not explain why Commerce's present application of the differential pricing analysis is unlawful or unreasonable. Instead, the Respondents make arguments that propose an alternative way of fulfilling the statutory goals.

[14] The Respondents use a hypothetical to illustrate why Commerce's analysis does not account for "practical" significance in the price differences it identifies. *See* Respondents' Br. at 18–19. The hypothetical involves two companies—A and B, each making ten sales between test and base customers. *See id.* Pursuant to their hypothetical, eight of the ten sales company A makes between the test and base customers are at the same price, as compared to six of the ten sales company B makes. *Id.* at 18. Based on the sales prices the Respondents assigned to the two companies, the difference in means for [company] B's sales is seven times larger than the difference in means for [company] A's sales." *Id.* However, in applying Commerce's analysis, only company A would be considered to have differential pricing. *Id.* at 19. Commerce addressed like hypotheticals in the final determination and rejected them because the Respondents' calculations conflated the standard deviation with the pooled deviation. *See* Final Decision Memo at 18. Commerce's analysis is reasonable.

[15] The Respondents contend that the identified record evidence provides context necessary to understand why the price variances were not significant. *See* Respondents' Br. at 27–30. They argue that some of Stapimex's sales correlate to periods in the shrimp industry that normally experience price fluctuations, and that if Commerce accounted for these industry-wide fluctuations, it would not have found sales occurring during those periods of time to be

Exs. 37–42, 44–45, PD 276–77, bar codes 3308867–07–08 (Sept. 25, 2015); Case Br. [to the Agency] on Behalf of [the] Respondents at 29–33, PD 330, bar code 3463452–01 (Apr. 25, 2016). The Respondents contend that Commerce's failure to address industry-specific data rendered the agency unable to evaluate whether a coefficient of 0.8 or higher (Commerce's threshold for a "large" price difference) was practically significant. *See* Respondents' Br. at 27–28. The Respondents' argument is unpersuasive because it assumes that Commerce is required to take into account pricing trends in the shrimp and seafood industries. However, as explained above, Commerce's application of the differential pricing analysis to individual exporters, without consideration of the industry at large, is a reasonable way of assessing whether a pattern of significant price differences exists.[16]

The Respondents argue that Commerce's methodology unreasonably focuses on internal variances within a respondent's prices. *See* Respondents' Br. at 13–15. To illustrate their argument, the Respondents provide three sets of numbers for which there is a standard deviation of 1.58, but which represent a 0.158%, 1.58%, and 15.8% deviation from the mean as to their respective number sets. *Id.* at 14. The Respondents contend that Commerce's analysis "completely overlook[s]" such "differences in magnitude." *Id.* In the final determination, Commerce explained that its differential pricing analysis is reasonable because it looks at price variances in the context of the two means. *See* Final Decision Memo at 20. Specifically, Commerce explained that, "[w]hen there is little variation in prices, then a small difference in the mean prices between the two groups may be significant where it would not be significant if the variation in prices were greater." *Id.* Commerce's explanation addresses the Respondents' challenge. Commerce's methodology evaluates whether the price variance is significant as compared to the actual prices at issue, and not as compared to some other set of prices. The statute allows Commerce

differentially priced. *Id.* at 28. By recognizing the fluctuations, the Respondents contend, Commerce would have found that only 49.7% of Stapimex's sales passed the Cohen's d and would have instead applied the hybrid A-to-T and the A-to-A methodologies. *Id.* However, in contending that Commerce should look for patterns in price fluctuations within an industry, the Respondents are merely proposing an alternative methodology. The Respondents do not demonstrate that Commerce's methodology is unreasonable.

[16] The Respondents also argue that the "meaningful difference" test does not negate the arbitrary results of the Cohen's d test. *See* Respondents' Br. at 20–22. Specifically, they contend that the results of the test are arbitrary because the Cohen's d test and the ratio test do not reasonably identify whether prices differ significantly. *Id.* at 20–22. The Respondents' argument is premised on the false assumption that Commerce's methodology yields arbitrary results by not considering the industry more broadly. *See id.* at 20–22; *see also id.* at 15–17. The challenge fails because Commerce is not required to consider industry-wide data in its analysis. Further, Commerce sufficiently explains that in applying the "meaningful difference" test Commerce is not only making a determination of whether the variance in U.S. prices is significant, but also that the variance in prices is meaningful as it relates to the U.S. price and the normal value. *See* Final Decision Memo at 20–21.

to look at individual pricing behavior. *See* 19 U.S.C. § 1677f-1(d)(B)(1)(i). As a result, it is reasonable for Commerce to determine whether the price variance is significant relative to a respondent's own pricing behavior in the United States market.

The Respondents also argue that Commerce's exclusion of test group sales from the comparison group sales is not in accordance with law because Commerce's methodology leads to distortions in the dumping comparison and alters what constitutes "normal" pricing behavior. *See* Respondents' Br. at 31–35; *see also* Pls. & Pl.Intervenor's Reply Supp. Rule 56.2 Mot. J. Agency R. at 5, Jan. 22, 2018, ECF No. 59 ("Respondents' Reply"). In the final determination, Commerce explained that including test group sales in the comparison group "would result in the sales prices of purchasers, regions or time periods being compared to themselves." Final Decision Memo at 37. Commerce's explanation is reasonable. Respondents' argument presents an alternative methodology, but does not demonstrate that there is anything unreasonable with the way Commerce approaches the test and comparison groups.

## II. Memoranda Regarding the WTO Dispute Settlement Agreement Discussions

Mazzetta argues that Commerce failed to place on the administrative record documents memorializing ex parte discussions from a World Trade Organization ("WTO") dispute settlement agreement reached between the governments of Vietnam and the United States ("WTO Settlement Agreement").[17] *See* Mazzetta's Br. at 22–25. Defendant argues that the WTO proceedings do not constitute ex parte meetings because they were not conducted "pursuant" to the tenth administrative review. Def.'s Resp. Br. at 27. Defendant contends that Commerce is only required to produce and place upon the record information it obtains pursuant to the review and "not any information obtained by Commerce during the period of time coterminous with the initiation and conclusion of the review." *Id.* at 29 (citing 19 U.S.C. § 1516a(b)(2)(A); 19 C.F.R. § 351.104(a)(1)). The Defendant-Intervenor argues that Mazzetta is improperly seeking to enlarge the administrative record, which it cannot do in a USCIT Rule 56.2 motion, *see* Def.-Intervenor Ad Hoc Shrimp Trade Action Comm.'s Resp. Pl.'s & Pl.-Intervenor's & Consol. Pl.'s Mots. J. Agency R. Under USCIT Rule 56.2 at 11–16, Nov. 21, 2017, ECF No. 50 ("Def.-

[17] The Respondents do not challenge Commerce's decision not to supplement the administrative record, *see* Respondents' Br. at 45 n.15. They do challenge the calculation of the all-others rate and incorporate by reference Mazzetta's arguments on the separate rate issue. *See* id. at 45– 46; *see also* Respondents' Reply at 22.

Intervenor's Resp. Br."), and that Commerce's decision to rescind and its calculation of the all-others rate is supported by substantial evidence on the record before the court.[18] *Id.* at 19–27. For the reasons that follow, the court will not require Commerce to place any additional information on the record.

The applicable statute provides that Commerce

> shall maintain a record of any ex parte meeting between—
>
> (A) interested parties or other persons providing factual information in connection with a proceeding, and
>
> (B) the person charged with making the determination, or any person charged with making a final recommendation to that person, in connection with that proceeding,
>
> if information relating to that proceeding was presented or discussed at such meeting. The record of such an ex parte meeting shall include the identity of the persons present at the meeting, the date, time, and place of the meeting, and a summary of the matters discussed or submitted. The record of the ex parte meeting shall be included in the record of the proceeding.

19 U.S.C. § 1677f(a)(3).[19]

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[18] Mazzetta argues that Commerce's failure to put ex parte communications on the record renders Commerce's determination contrary to law, unsupported by substantial evidence and inherently unfair. *See* Mazzetta Br. at 22–25. Mazzetta asks the court to remand this case to Commerce and order Commerce to supplement the record with the ex parte information and provide parties an opportunity to comment. *Id.* at 23. The Defendant-Intervenor's argument that Mazzetta's request is procedurally improper implies that Mazzetta should have moved for supplementation prior to filing a USCIT Rule 56.2 motion with this Court, and indeed failed to so move before the agency. *See id.* at 12–15. The Defendant-Intervenor is therefore arguing exhaustion. *See id.* at 15–16. Defendant also argues that Mazzetta failed to exhaust this argument at the agency level and merely asserted, in a footnote, that the record did not contain the WTO Settlement Agreement. *See* Def.'s Resp. Br. at 27. However, the issue of whether the WTO meetings constituted ex parte meetings that triggered a statutory requirement to disclose is a pure question of law and the court may, in its discretion, determine that the argument did not need to be exhausted before Commerce. *See Agro Dutch Indus. Ltd. v. United States*, 508 F.3d 1024, 1029 (Fed. Cir. 2007) (noting that "the Court of International Trade has developed and refined a pure legal question exception to the exhaustion requirement in trade cases," and finding that the Court did not abuse its discretion in applying that exception in that case). Further, following the publication of the *Rescission Notice*, Mazzetta sought to raise the issue of discussions at the WTO, supplementation, and to challenge the basis for the rescission, *see* Certain Frozen Warmwater Shrimp from Vietnam—Notice of Appearance & Request for Additional Opportunity to Comment at 1–3, PD 341, bar code 3490533 (July 25, 2016), and was explicitly told that it could not do so. *See* Certain Warmwater Shrimp from [Vietnam]: Request [from Commerce] for Additional Briefing, PD 345, bar code 3497142–01 (Aug. 11, 2016). Therefore, the court will not preclude Mazzetta from making any arguments concerning the need to supplement the record here.

[19] Commerce's regulation further provides that the agency is to "include in the official record [of each ADD and countervailing duty proceeding] all factual information, written argument, or other material developed by, presented to, or obtained by [Commerce] during the course of a proceeding that pertains to the proceeding," including "government memoranda

To trigger the disclosure requirements of 19 U.S.C. § 1677f(a)(3), there must be a meeting (i) between "persons providing factual information in connection with a proceeding . . . and the person charged with making the determination" and (ii) "information relating to that proceeding [must be] presented or discussed at such [a] meeting." 19 U.S.C. § 1677f(a)(3).[20] Parties cannot rely upon speculation that ex parte communications occurred, but must establish that a reasonable basis exists to believe that the administrative record is incomplete. *See Sachs Auto. Prod. Co. v. United States*, 17 CIT 290, 292–93 (1993); *Saha Thai Steel Pipe Co. v. United States*, 11 CIT 257, 261–62, 661 F.Supp. 1198, 1202–03 (1987); *see also CSC Sugar LLC v. United States*, 42 CIT __, __, Slip Op. 18–64 at 8 (June 1, 2018) (taking judicial notice of a newspaper article to find a "reasonable basis to believe [that] the record [wa]s incomplete.").

Commerce was not required to place memoranda relating to the WTO dispute negotiations proceedings on the record.[21] Here, Mazzetta argues that Commerce met with "persons," specifically, the government of Vietnam. *See* Mazzetta's Br. at 23–24. However, Mazzetta incorrectly states that Commerce relied upon the "meetings and agreement" as "justification for rescinding the review of Minh Phu Group[.]" *See id.* at 23. Commerce did not rely upon the "meetings and agreement" as "justification for rescinding the review of Minh Phu Group." The sole basis for rescinding the review was that rescission was sought by all the parties who had requested review. *See Rescission Notice*, 81 Fed. Reg. at 47,758. In fact, the regulations providing for rescission do not require any rationale for rescission

pertaining to the proceeding, memoranda of ex parte meetings, determinations, notices published in the Federal Register, and transcripts of hearings." 19 C.F.R. § 351.104(a)(1).

[20] The administrative record of this action includes two letters that specifically reference a connection between the WTO Settlement Agreement and this review. *See* [Attached] Letter from the Deputy Minister of the Ministry of Industry and Trade of [Vietnam] to Commerce, PD 352, bar code 3503503–01 (Aug. 29, 2016) ("GOV Letter to Commerce"); Letter from Commerce to the Deputy Minister of the Ministry of Industry and Trade of [Vietnam] at Attach. I, PD 366, bar code 3506156–01 (Sept. 7, 2016) ("Commerce's Letter to the GOV"). These letters indicate that the WTO settlement negotiations cleared the path for the tenth administrative review to be rescinded as to MPG. *See* GOV Letter to Commerce ("As you know, [MPG] has been exempted from the pending 10th administrative review (AR10) of the [ADD] Order on Certain Frozen Warmwater Shrimp from Vietnam, pursuant to our settlement."); Commerce's Letter to the GOV (explaining that "the Minh Phu Group was no longer under review as a result of our settlement agreement" and noting that, "[t]o the extent that our settlement (which allowed for the rescission of AR10 with respect to the Minh Phu Group) affects companies who were not parties to the settlement, counsel for your government and the Minh Phu Group did not raise such concerns in any of our discussions.").

[21] Mazzetta also argues that Commerce should have placed the WTO Settlement Agreement on the record. *See* Mazzetta Br. at 22–25. The WTO Settlement Agreement reached is the culmination of meetings Mazzetta contends are ex parte and served to justify the rescission of review of MPG. *Id.* The statute does not require the agency to place on the record the WTO Settlement Agreement itself. *See* 19 U.S.C. § 1677f(a)(3).

other than that rescission was requested.[22] Although Commerce stated that the parties sought the rescission because of the settlement that was reached at the WTO, Commerce did not base its decision to rescind on the substance of that settlement agreement. Instead, Commerce concluded that, "because all parties that requested a review of the Minh Phu Group have withdrawn their requests, the Department is rescinding the review with respect to the Minh Phu Group . . . ." *Id.*

The only decision that Mazzetta's argument implicates is Commerce's decision to extend the deadline to request rescission of the review. The rationale given by each of the parties seeking an extension, and by Commerce granting the extension was that "[a] mutually satisfactory resolution of these disputes was not effectuated within 90 days of the date of publication of the notice of initiation of the requested review."[23] *Rescission Notice*, 81 Fed. Reg. at 47,758. There is no claim that Commerce based its decision to extend the deadline on the contents of the WTO Settlement Agreement or the discussions leading up to it. The relevant factor, as stated by the parties seeking an extension to submit a request to rescind the review, and by Commerce in granting the extension, was the timing of the settlement at the WTO, not the resulting settlement's substance. *Id.* The record is therefore complete as to why Commerce granted the parties' requests, and Mazzetta has failed to set forth facts to establish a reasonable basis for determining that the record is incomplete. Mazzetta assumes that the substance of the WTO Settlement Agreement led to the rescission, and therefore concludes that there must have been ex parte discussions that would have affected Commerce's decision. Mazzetta's assumption is simply incorrect, since nothing more is

[22] Pursuant to 19 C.F.R. § 351.213(d)(1), when there is a withdrawal of a request for review

> [t]he Secretary will rescind an administrative review under this section, in whole or in part, if a party that requested a review withdraws the request within 90 days of the date of publication of notice of initiation of the requested review. The Secretary may extend this time limit if the Secretary decides that it is reasonable to do so.

19 C.F.R. § 351.213(d)(1).

[23] Commerce extended the deadline for parties to request rescission because the parties in their requests provided the following rationale for why an extension was warranted. The parties state that granting a request to withdraw a review request

> will assist in the implementation of a resolution to *United States – Anti-dumping Measures of Certain Shrimp from Viet Nam (DS429)* and *United States Anti dumping Measures of Certain Shrimp from Viet Nam (DS404)*that is mutually satisfactory to the United States and Vietnamese Governments. A mutually satisfactory resolution of these disputes was not effectuated within 90 days of the date of publication of the notice of initiation of the requested review.

[MPG]'s Withdrawal of AD Review Request at 2–3, PD 335, bar code 3484285–01 (July 6, 2016); Domestic Producers' Partial Withdrawal of Request for Review at 3–4, PD 336, bar code 3484291–01 (July 6, 2016); Am. Shrimp Processors Ass'n Partial Withdrawal of Request for Review at 3, PD 337, bar code 3484301–01 (July 6, 2016).

required for a rescission other than a request. *See generally* 19 C.F.R. § 351.213(d)(1). Therefore, Mazzetta has only speculated that "information relating to [the] proceeding was presented or discussed" at the WTO.

## III. The Rescission of MPG's Review and the Calculation of the All-Others Rate

Mazzetta challenges Commerce's calculation of the all-others rate, on the grounds that Commerce's decision to rescind the review as to MPG was contrary to law and not supported by substantial evidence,[24] and that, even if it was proper to rescind the review as to MPG, Commerce should nonetheless have still used MPG's rate from the preliminary determination in calculating the all-others rate. *See* Mazzetta's Br. at 25–43; *see also* Reply Br. Consol.-Pl. [Mazzetta] in Supp. Mot. J. Upon. Agency R. Pursuant to Rule 56.2 at 1–8, Jan. 22, 2018, ECF No. 58. Defendant argues that Commerce's decision to rescind was reasonable, consistent with past practice, and supported by substantial evidence because it was based on the same grounds proffered by the parties requesting rescission.[25] Def.'s Resp. Br. at 23–26. Further, Defendant argues that Commerce's calculation of the all-others rate was based on a permissible interpretation of the statute and that Mazzetta wrongfully attempts to read into the statute a representativeness requirement. *See id.* at 17–23. For the reasons that follow, Commerce's decisions to rescind the administrative review of MPG and to calculate the all-others rate using solely Stapimex's rate are sustained.

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[24] Mazzetta also argues that Commerce's decision to rescind is contrary to law because the dispute being resolved at the WTO related to the fourth administrative review of the *ADD Order*, was in no way connected to the pending tenth administrative review, and because section 129 proceedings do not empower Commerce to modify, amend, or rescind pending determinations. Mazzetta's Br. at 36–38. However, the section 129 implementation notice only modified the results of the fourth administrative review as to MPG and revoked the *ADD Order*, in part, on MPG's entries made on or after July 18, 2016. *See See Certain Frozen Warmwater Shrimp From [Vietnam],* 81 Fed. Reg. 47,756, 47,757 (Dep't Commerce July 22, 2016) (notice of implementation of determination under section 129 of the Uruguay Round Agreements Act and partial revocation of the [ADD] order). The effect of the section 129 implementation notice on the separate rate respondents did not itself modify, amend, or rescind this review.

[25] Defendant also argues that Mazzetta failed to exhaust its challenge to the *Rescission Notice* before the agency. *See* Def.'s Resp. Br. at 24. Mazzetta responds that Commerce cannot raise exhaustion as a defense because Commerce restricted the supplemental briefing solely to how the all-others rate should be calculated. *See* Respondents' Reply at 7–8; *see also* Certain Warmwater Shrimp from [Vietnam]: Request [from Commerce] for Additional Briefing, PD 345, bar code 3497142–01 (Aug. 11, 2016). The court agrees with Mazzetta.

### A. Rescission

Pursuant to regulation, Commerce "will rescind an administrative review . . ., in whole or in part, if a party that requested a review withdraws the request within 90 days of the date of publication of notice of initiation of the requested review." *See* 19 C.F.R. § 351.213(d)(1). The agency may extend this 90-day deadline for rescission if it "decides that it is reasonable to do so."[26] *Id.* Here, all requests to review MPG were withdrawn more than 90 days after the publication of the notice of initiation of this review. *See Rescission Notice*, 81 Fed. Reg. at 47,758. In the *Rescission Notice*, Commerce explained that the parties had reported that a "mutually satisfactory resolution" of two WTO disputes did not occur within 90-days of initiation of the tenth review and that rescission would aid the United States and Vietnamese governments in resolving those WTO matters.[27] *Id.* The requesting parties explained that they could not foresee the need to rescind in the first 90-days of this review and that a rescission of the review would aid in implementation of the WTO Settlement Agreement. *See* [MPG]'s Withdrawal of AD Review Request, PD 335, bar code 3484285–01 (July 6, 2016); Domestic Producers' Partial Withdrawal of Request for Review, PD 336, bar code 3484291–01 (July 6, 2016); Am. Shrimp Processors Ass'n Partial Withdrawal of Request for Review, PD 337, bar code 3484301–01 (July 6, 2016). Commerce explained that, under these circumstances, it found it reasonable to extend the rescission deadline and that, because all requests to review MPG had been withdrawn, the agency would rescind the review as to MPG.[28] *Id.* Commerce's regulations allow for rescission, in whole or in part, when the party requesting

[26] Commerce had previously interpreted 19 C.F.R. § 351.213(d)(1) as requiring a showing of "extraordinary circumstances," but the Court of Appeals for the Federal Circuit recently held that interpretation to be "an incompatible departure from the clear meaning of the regulation," *Glycine & More, Inc. v. United States*, 880 F.3d 1335, 1345 (Fed. Cir. 2018), confirming that, to extend the period in which a review request may be withdrawn, Commerce must only determine that extending the time to withdraw the request would be reasonable.

[27] Mazzetta argues that, contrary to Commerce's claims, Commerce does not have a practice for calculating an all-others rate when a review is rescinded. *See* Mazzetta Br. at 34–35. However, in the final determination, Commerce was not specifically referring to a practice for calculating an all-others rate when there is a late rescission. Final Decision Memo at 64. Instead, Commerce explained that it has a practice for calculating an all-others rate when there is only one respondent remaining. *Id.*

[28] Mazzetta argues that in rescinding the review of MPG, Commerce deviated from its more than 14-year practice of denying late rescission requests, if Commerce had already "expended significant resources." *See* Mazzetta Br. at 37 (quoting Issues & Decision Mem. for the 2010– 2011 Admin. Review of Folding Metal Tables & Chairs from the People's Republic of China at 2– 3, A-570–868, (June 27, 2012), *available at* https://enforcement.trade.gov/frn/summary/PRC/2012–16458–1.pdf (last visited June 18, 2018). Nevertheless, even given the fact that the requests to rescind were submitted almost five months after Commerce

review withdraws its request. *See* 19 C.F.R. § 351.213(d)(1). Here, all requests to review MPG were withdrawn, and Mazzetta points to nothing to undermine the reasonableness of Commerce's decision to extend the deadline to request rescission or to rescind.[29] Commerce's decision is in accordance with law and is supported by substantial evidence.

### B. Calculation of the All-Others Rate

Mazzetta argues that, even if it was proper to rescind the review as to MPG, Commerce should have included MPG's rate from the preliminary determination in its calculation of the all-others rate, rather than basing the all-others rate solely on the rate calculated for Stapimex, the remaining respondent.[30] *See* Mazzetta's Br. at 25–43. In an antidumping investigation or administrative review, if it is not "practicable" for Commerce to review or investigate each known exporter or producer, Commerce may limit its examination to a "reasonable number of exporters or producers" and determine weighted-average dumping margins only for those selected. 19 U.S.C. § 1677f-1(c)(2). The statute provides Commerce with two options for examination in such cases: it can either select "exporters and producers accounting for the largest volume of the subject merchandise from the exporting country that can be reasonably examined," 19 U.S.C. § 1677f-1(c)(2)(B), or examine a statistically representative "sample of exporters, producers, or types of products[.]" 19 U.S.C. § 1677f-1(c)(2)(A). The SAA explains that when Commerce employs the latter sampling method, it will "select the most representative sample at the early stages of the investigation or review," based on the information known to Commerce at that point in time. *See* SAA at 873, 1994 U.S.C.C.A.N. at 4201 (emphasis omitted). By practice, Commerce calculates a rate for the separate rate applicants pursuant to

issued its preliminary determination, based on the circumstances of this case and Commerce's explanation, Commerce's actions are reasonable.

[29] Mazzetta also argues that Commerce's decision to rescind should be invalidated because Commerce unreasonably failed to consider the adverse effect the rescission would have on the separate rate applicants. *See* Mazzetta Br. at 38–41. Mazzetta argues that cases like *Arcelormittal Dofasco* call on Commerce to consider "all the relevant circumstances" when deciding a party's rescission request. *Id.* at 39 (quoting *Arcelormittal Dofasco Inc. v. United States*, 33 CIT 71, 78, 602 F. Supp. 2d 1330, 1336 (2009)). However, in *Arcelormittal Dofasco*, the court found Commerce's reason for refusing to extend the deadline to request rescission to be inadequate. *See Arcelormittal Dofasco*, 33 CIT at 76–78, 602 F. Supp. 2d at 1335–36. By contrast, here, Commerce explained why it extended the deadline, *see Rescission Notice*, 81 Fed. Reg. at 47,758, and Commerce's explanation supports its decision to rescind the review as to MPG.

[30] The Respondents incorporate by reference Mazzetta's arguments on the separate rate issue, *see* Respondents' Br. at 45–46, but not Mazzetta's arguments challenging Commerce's decision to rescind the review of MPG. *See* Respondents' Reply at 22 n.9.

19 U.S.C. § 1673d(c)(5). *See Albemarle Corp. & Subsidiaries v. United States*, 821 F.3d 1345, 1352–53 (Fed. Cir. 2016). Section 1673d(c)(5) provides a method to calculate the all-others rate and states that the all-others rate shall be the weighted average of the individually investigated exporter's and producer's dumping margins, excluding any margins that are de minimis, zero or determined entirely by application of an adverse inference. *See* 19 U.S.C. § 1673d(c)(5).[31]

In the final determination, Commerce explained its practice to assign to the separate rate respondents the all-others rate pursuant to 19 U.S.C. § 1673d(c)(5)(A). *See* Final Decision Memo at 62–63. Here, following the rescission of the review as to MPG, only one mandatory respondent, Stapimex, remained under review. Commerce explained that, as neither 19 U.S.C. § 1673d(c)(5)(A) nor 19 U.S.C. § 1677f-1(c)(1) address how Commerce is to calculate a rate for the separate rate respondents following either the rescission of a review or when only one mandatory respondent is examined, it followed its practice and assigned as the all-others rate the only remaining calculated rate that was neither de minimis nor the result of applying an adverse inference. *Id.* at 63–64. Further, Commerce explained that, prior to rescinding the review, it did not calculate a final dumping margin for MPG and only had before it MPG's sales and factors of production ("FOP") data that was collected and verified for the preliminary determination. *Id.* at 64. Accordingly, it assigned Stapimex's rate, the only remaining above de minimis rate, as the all-others rate. *See id.* at 63–64.

Commerce reasonably based the all-others rate on the rate of the only remaining respondent in the review, Stapimex. Nothing in the statutory framework requires Commerce to calculate the all-others rate using multiple rates nor precludes Commerce from relying on just one rate. Mazzetta argues that, because 19 U.S.C. § 1677f-1(c) and 19 U.S.C. § 1673d(c)(1)(B), (c)(5) consistently use the plural "exporters" and "producers" to refer to the individually investigated respondents, the all-others rate must be based on the rates of multiple respondents. *See* Mazzetta Br. at 26–27. Under the largest volume exception, however, Commerce may choose to investigate only one exporter or producer, in which case there would not be multiple established rates. *See* 19 U.S.C. § 1677f1(c)(2). The statute simply provides for the possibility of Commerce having multiple established

[31] The SAA instructs that where the margins for all individually investigated exporters and producers are zero, de minimis, or solely the result of Commerce using an adverse inference, Commerce should calculate the all-others rate using "any reasonable method" and outlines the "expected method[.]" SAA at 873, 1994 U.S.C.C.A.N. at 4201. However, the SAA also provides that if the "expected method" calculates an average "not reasonably reflective" of the dumping margins of the not individually investigated respondents, Commerce may calculate the all-others rate "us[ing] other reasonable methods." *Id.*

rates at the end of a given investigation or review; it does not necessitate the calculation of an all-others rate using multiple respondents' rates at the end of every investigation or review. Further, the language of 19 U.S.C. § 1673d(c)(5)(B) that guides Commerce's actions when an established rate is zero, de minimis, or based entirely on an adverse inference, likewise uses the plural "exporters and producers." It is nevertheless possible that, if any one or all three of those circumstances occur, Commerce can be left with only one respondent. Mazzetta's construction of the statute, however, would imply that Commerce could not rely on just one respondent's rate, while in fact the statute envisions cases when that may happen.

Mazzetta also argues that the statutory framework requires the resulting all-others rate to be representative, which requires it to be based on multiple rates, where available. *See* Mazzetta's Br. at 27–29. The all-others rate here is representative. As explained above, the SAA directs Commerce to narrow its review or investigation to respondents able to provide a representative sample. *See* SAA at 872–73, 1994 U.S.C.C.A.N. at 4200–01. Mazzetta does not challenge the original selection of mandatory respondents for the tenth administrative review. It is not an unforeseeable occurrence for Commerce, at the end of an investigation or administrative review, to be left with only one respondent. The loss of a respondent does not automatically mean that the resulting all-others rate is not representative. If that was the case, the exception in 19 U.S.C. § 1673d(c)(5)(B) would not exist.[32]

## IV. Commerce's Analysis of Specific Surrogate Values

The Respondents challenge Commerce's surrogate value data selections for head and shell byproduct, frozen shrimp, and ice. *See* Respondents' Br. at 35–43. Defendant refutes all of these challenges and

[32] In this regard, Mazzetta also argues that Stapimex's rate is not representative of the separate rate respondents. *See* Mazzetta Br. at 31–33. Mazzetta notes that MPG's U.S. sales were valued using the hybrid differential pricing methodology, while all of Stapimex's U.S. sales were valued using the A-to-T comparison methodology. *Id.* at 31–32. However, other than generally claiming that the separate rate respondents have "varied business practices," Mazzetta points to no record evidence corroborating its claims that imports of the separate rate respondents are dissimilar to those of Stapimex. The fact that Stapimex engaged in different business practices than MPG and sold to different customer bases does not support the conclusion that the separate rate applicants' selling behavior is inapposite to Stapimex's or render Commerce's determination unreasonable.

At oral argument, Mazzetta also argued that 19 U.S.C. § 1673(c)(5) requires Commerce to calculate the all-others rate based on the rates of all respondents that Commerce investigated. *See* Oral Arg. at 00:29:52–00:30:01, 00:30:07–00:30:25. Here, Mazzetta contends, aside from calculating the final weighted-average dumping margin, the review of MPG was complete. *Id.* at 00:26:40–00:26:46. Defendant responded that the rate has to be established, meaning that it was assigned to the respondent. *See* Oral Arg. at 00:38:55–00:39:00. Defendant's interpretation of the statute is not unreasonable.

argues that Commerce's final determination should be sustained in all respects. *See* Def.'s Resp. Br. at 39–41, 42–52. For the reasons that follow, the court sustains Commerce's surrogate value selections for head and shell byproduct and ice. However, the court remands Commerce's surrogate value data selection for frozen shrimp for further explanation and consideration.

### A. Legal Framework

In antidumping proceedings involving NMEs,[33] Commerce generally calculates normal value using the FOPs used to produce the subject merchandise and other costs and expenses. 19 U.S.C. § 1677b(c)(1). Commerce will value respondents' FOPs using the "best available information regarding the values of such factors in a market economy country or countries considered to be appropriate by [Commerce]." 19 U.S.C. § 1677b(c)(1)(B). To the extent possible, Commerce uses FOPs from market economy countries that are: "(A) at a level of economic development comparable to that of the nonmarket economy country, and (B) significant producers of comparable merchandise." 19 U.S.C. § 1677b(c)(4). Commerce's regulatory preference is to "value all factors in a single surrogate country." 19 C.F.R. § 351.408(c)(2).

Commerce's methodology for selecting the best available information evaluates data sources based upon their: (1) specificity to the input; (2) tax and import duty exclusivity; (3) contemporaneity with the period of review; (4) representativeness of a broad market average; and (5) public availability. *See* Import Admin., U.S. Dep't Commerce, Non-Market Economy Surrogate Country Selection Process, Policy Bulletin 04.1 (Mar. 1, 2004), *available at* http://ia.ita.doc.gov/policy/bull04–1.html (last visited June 18, 2018); Final Decision Memo at 54–55. Commerce uses the same methodology to calculate the surrogate value of byproducts generated during the production process, and offsets production costs incurred by a respondent by the value of those byproducts. *See* Final Decision Memo at 46–47, 50; *see also Tianjin Magnesium Int'l Co., v. United States*, 34 CIT 980, 993, 722 F. Supp. 2d 1322, 1336 (2010); *Guangdong Chems. Imp. & Exp. Corp. v. United States*, 30 CIT 1412, 1422–23, 460 F. Supp. 2d 1365, 1373–74 (2006).

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[33] The term "nonmarket economy country" means any foreign country that Commerce 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." 19 U.S.C. § 1677(18)(A). In such cases, Commerce must "determine the normal value of the subject merchandise on the basis of the value of the factors of production utilized in producing the merchandise . . . [together with other costs and expenses]." 19 U.S.C. § 1677b(c)(1).

### B. Head and Shell Byproducts

The Respondents challenge Commerce's use of the Indian Global Trade Atlas ("GTA") import data for subheading 0508.00.50, Harmonized Tariff Schedule ("HTS"), to value head and shell byproducts, and argue that Commerce should have instead used Bangladeshi UN Comtrade import data covering HTS 0508.00. *See* Respondents' Br. at 35–39; *see also* Final Decision Memo at 57–59; [Petitioner's] [Surrogate Value] Comments at 2, Ex. 2, PD 232, bar code 3297256–01 (Aug. 10, 2015) ("Indian GTA Shell & Head data"); [VASEP] [Surrogate Value] Submission at Ex. 3, PD 235, bar code 3297559–02 (Aug. 10, 2015) ("Bangladeshi UN Comtrade Shell & Head data"). Defendant contends that Commerce's decision to use Indian GTA Shell & Head data to value head and shell byproduct is supported by substantial evidence and is in accordance with law. *See* Def.'s Resp. Br. at 48–52. The court agrees with Defendant.

Commerce's decision to use Indian GTA Shell & Head data to value head and shell byproduct is supported by substantial evidence. Commerce found the Indian GTA Head & Shell data to be contemporaneous, publicly available, representative of a broad market average, and tax and duty exclusive. Final Decision Memo at 57–58. Commerce also explained that the Bangladeshi UN Comtrade Head & Shell data valued the whole shrimp at a lower cost than its waste byproduct, i.e., the shell and head. *Id.* at 58. Although the Respondents claim that Commerce should not have defaulted to rejecting the Bangladeshi UN Comtrade Shell & Head data for HTS 0508.00 over capping it because the byproduct value exceeded that of the whole, *see* Respondents' Br. at 38, Commerce's decision to reject the data is within its discretion.

The Respondents also argue that Commerce did not adequately explain its reasoning for rejecting the Bangladeshi data. *See* Respondents' Br. at 36–37; *see also* Respondents' Reply at 20–22. Specifically, they challenge Commerce's explanation that it was unable to evaluate the appropriateness of the Bangladeshi UN Comtrade Head & Shell data because it lacked a written description, yet relied on Bangladeshi UN Comtrade data for a different HTS category of the same level of descriptiveness to value ice.[34] *See* Respondents' Br. at

[34] The Respondents also argue that because Commerce has recognized the UN Comtrade as a reliable data source, has relied on it in this review to value ice, and has run searches on its website, it is disingenuous for it to claim that it was unable to evaluate whether the Bangladeshi UN Comtrade Head & Shell data was appropriate here. *See* Respondents' Br. at 36. The Respondents' comparison to Commerce's valuation of ice is not persuasive. The choice before Commerce as to valuation of ice was not analogous to Commerce's choice for valuation of head and shell byproduct. The UN Comtrade data provided to Commerce to value ice did have a written description, and was chosen over another Bangladeshi source

36–37; *see also* Respondents' Reply at 20–22. However, Commerce's reasoning for rejecting the Bangladeshi UN Comtrade Head & Shell data is not based solely on a missing description. In the final determination, Commerce explained that it had before it a six-digit Bangladeshi UN Comtrade Head & Shell HTS number and an eight-digit Indian GTA Head & Shell HTS number, and that without a written description it "logically" determined that the latter was more specific than the former. Final Decision Memo at 58. Further, as explained above, Commerce exercised its discretion and rejected the data source because the relative value of the byproduct exceeded the value of the main input, i.e., whole shrimp.[35]

### C. Frozen Shrimp

The Respondents challenge as contrary to law and unsupported by substantial evidence Commerce's valuation of the frozen shrimp input using Bangladeshi UN Comtrade data for HTS 0306.13. *See* Respondents' Br. 39–41. Defendant argues that Commerce's use of the Bangladeshi data is reasonable and constitutes the best available information to value the input because the data is from the primary surrogate country. Def.'s Resp. Br. at 42–44. The court remands Commerce's determination because Commerce has failed to explain why it is reasonable to default to data from the primary surrogate country when that data is not contemporaneous and the record includes a more specific data source.

In the final determination, Commerce valued respondents' frozen warmwater shrimp input using Bangladeshi UN Comtrade data for HTS 0306.13, covering "Shrimps & prawns, whether/not in shell, frozen." *See* Final Decision Memo at 46–48. There were just two potential surrogate values on the record for this input: the Bangladeshi UN Comtrade data and the Indian GTA data. *Id.* at 46. Commerce explained that, since both the Bangladeshi UN Comtrade data and the Indian GTA data on the record are from basket categories, the agency would rely on the Bangladeshi data because it is from the

which, because it represented the experience of one Bangladeshi shrimp processor, did not represent a broad market average. *See* Final Decision Memo at 53–54.

[35] The Respondents also ask the court to take notice of the 89% reduction in value of respondents' byproduct as a result of Commerce using a different Indian GTA HTS category in the ninth administrative review of the *ADD Order*, as compared to the HTS category used in this review. *See* Respondents' Reply at 22. They contend that the valuation difference constitutes a "dramatic change" that should not be allowed. *Id.* Commerce addressed the variances in the HTS category selected, specifically remarking that the record developed in the tenth administrative review did not contain the data used in the ninth administrative review. Final Decision Memo at 59. The court will not evaluate the data Commerce chose to rely upon in this review as compared to data placed on the record in an earlier review. Each review stands on its own. *See E.I. DuPont de Nemours & Co. v. United States*, 22 CIT 19, 32–33 (1998).

primary surrogate country. *See id.* at 47. Commerce justified its use of the Bangladeshi data, which is not contemporaneous, over the Indian data, which is contemporaneous, by emphasizing its preference for data from the primary surrogate country. *See id.* At oral argument, Defendant and Defendant-Intervenor further explained that, in choosing between two basket categories, where both data sets are equally non-specific, primary surrogate country data is preferred. *See* Oral Arg. at 02:03:28–02:04:03.

Commerce's selection of the Bangladeshi data was not reasonable in light of evidence that it is from a far less specific category than the Indian data. The Bangladeshi UN Comtrade data for HTS 0306.13 covers, "Shrimps & prawns, whether/not in shell, frozen." Surrogate Values for the Prelim. Results at Ex. 3e, PD 313, bar code 344649601 (Mar. 3, 2016). Forty-one percent of shipments covered by this data are from coldwater regions, even though coldwater shrimp is not used in the production of warmwater shrimp in Vietnam. *See id.* By comparison, the Indian GTA data for HTS 0306.17 covers "Shrimps & prawns, Frozen, Other Than Cold-Water" and is limited to warmwater shrimp. [Certain Frozen Warmwater Shrimp from Vietnam—ASPA's Surrogate Value] Comments at Ex. 1, PD 232, bar code 3297256–01 (Aug. 10, 2015).

Commerce has not explained why the Bangladeshi UN Comtrade data constitutes the best available information, in light of the record evidence that a percentage of the Bangladeshi UN Comtrade data includes coldwater shrimp. Commerce does not address the record evidence regarding the percentage of coldwater shrimp, except to say that "the nature of the underlying data of the countries included within the import statistics do not impact the Department's requirement to select the best available information on the record to value purchased semi-processed frozen shrimp with a frozen shrimp [surrogate value]." Final Decision Memo at 48. Further, by emphasizing that it prefers surrogate country data when the two HTS categories are basket categories, *see id.* at 47, Commerce simply restates a regulatory preference without supporting its decision with record evidence. Commerce has not explained why this preference is reasonable in light of evidence that the two data sets are not equally specific. Commerce's decision to value frozen shrimp using Bangladeshi UN Comtrade data is not reasonable based on this record, and is remanded to the agency for reconsideration or further explanation consistent with this opinion.

### D. Ice

The Respondents challenge Commerce's selection of Bangladeshi UN Comtrade data covering HTS 2201.90 to value the respondents' ice input because it was not specific to the input, and argue that Commerce should have instead valued the input using ice cost data generated by Apex Foods Limited in 2013–2014 ("Apex 2013–2014 data"). *See* Respondents' Br. at 42–43; *see also* [VASEP] [Surrogate Value] Submission Ex. 4, PD 235, bar code 3297559–02 (Aug. 10, 2015). Defendant argues that Commerce's selection is in accordance with law and is supported by substantial evidence. *See* Def.'s Resp. Br. at 45–48. The court agrees with Defendant.

In the final determination, Commerce explained that Bangladeshi UN Comtrade Ice data constitutes the best information available to value ice because it is specific to respondents' input, publicly available, representative of a broad market average, and tax and duty exclusive. *See* Final Decision Memo at 53–55. Commerce acknowledged that the Bangladeshi UN Comtrade Ice data was not contemporaneous, but explained that it was nevertheless "superior" to the Apex 2013–2014 data which represented only the experience of a single shrimp producer in Bangladesh. *Id.* at 54.

The Respondents challenge Commerce's reliance on the Bangladeshi UN Comtrade Ice data because that HTS category includes a "patently inapplicable input data (i.e., snow)" and is not contemporaneous. Respondents' Br. at 42. However, Commerce explained that respondents did not contend that the ice covered by the Bangladeshi UN Comtrade data is different from the ice utilized by Stapimex and did not provide Commerce with "an HTS number for the specific ice that Stapimex purchased," instead "offer[ing] a single financial statement upon which to rely for an ice [surrogate value]." Final Decision Memo at 55 (citation omitted). The Respondents have not explained why the Bangladeshi UN Comtrade Ice data is not specific to the ice input. Further, without more, the court cannot say that the selection of a source representing a broad market average, rather than a source specific to a single company, is unreasonable.[36]

[36] The Respondents also argue that Commerce has, in the past, relied on price quotes over industry wide data, citing the remand redetermination issued by Commerce following *Catfish Farmers of America v. United States*, 38 CIT __, Slip Op. 14–146 (Dec. 14, 2014) in support of this argument. *See* Respondents' Br. at 43; *see also* Final Results of Redetermination Pursuant to [Court Order in Slip Op. 14–146] at 13, A-552–801, (June 26, 2015) *available at* https://enforcement.trade.gov/remands/14–146.pdf (last visited June 18, 2018) ("Catfish Farmers of America Remand Redetermination"). However, Catfish Farmers of America Remand Redetermination is inapposite. In its remand redetermination, Commerce explained that because fish waste byproduct was not traded internationally, using import statistics would overinflate the surrogate value. Catfish Farmers of America Remand

## V. Commerce's Denial of an Offset for Packaging Scrap

The Respondents challenge Commerce's decision to deny an offset for packaging scrap revenue and contend that the excess or scrap packaging should have been treated as all other byproducts. *See* Respondents' Br. at 43–45. Defendant argues that, in light of Commerce's discretion in this area and the fact that packaging scrap is not directly derived from the production of the subject merchandise, Commerce's decision was reasonable and lawful. *See* Def.'s Resp. Br. at 52–54. The court remands Commerce's decision because Commerce has not explained why its practice is reasonable.

Pursuant to the relevant statute, in an NME Commerce will calculate the normal value of a given product by valuing "the factors of production utilized in producing the good[.]" 19 U.S.C. § 1677b(c)(1)(A)–(B). The statute, however, does not direct how Commerce is to determine which products qualify for the byproduct offset and no regulation exists to fill the gap. In such a situation, Commerce has the discretion to set the standards by which items qualify for a byproduct offset, so long as Commerce's selection satisfies the overall purpose of the ADD statute, to calculate accurate dumping margins and is reasonable. *See Rhone Poulenc, Inc. v. United States*, 899 F.2d 1185, 1191 (Fed. Cir. 1990); *see also QVD Food Co. v. United States*, 658 F.3d 1318, 1323 (Fed. Cir. 2011).

In the final determination, Commerce declined to grant a byproduct offset for packaging materials that either contained the raw materials used to produce the subject merchandise or were purchased, but not used, to pack the subject merchandise. *See* Final Decision Memo at 67–68. Commerce explained that it denied the offset because pursuant to its practice an offset is granted only for byproducts that are generated in relation to, or as a result of, the production of the subject merchandise.[37] *See id.* Commerce, however, does not offer an explanation for why its practice is reasonable and justifies its denial of the byproduct offset by reiterating its practice, citing to prior determinations where the practice was applied, and stating that the excess/scrap packaging at issue is not a byproduct. *See id.* The court reviewed the prior determinations to which Commerce cites, however,

Redetermination at 12–13. Here, there is no comparable concern and again, the Respondents have not explained why Bangladeshi UN Comtrade Ice data is not specific to the ice input.

[37] The Defendant and the Defendant-Intervenor likewise argue that Commerce's decision was reasonable because pursuant to Commerce's practice packaging scrap is not a byproduct generated in the production of the subject merchandise and that Commerce has the discretion to impose such a practice. *See* Def.'s Resp. Br. at 53–54; Def.-Intervenor's Resp. Br. at 41–43. However, neither the Defendant nor the Defendant-Intervenor identify Commerce's rationale for its practice.

none of these determinations explain why the practice was adopted or why it is reasonable in light of the relevant statute.[38]

The statutory language does not exclude the possibility that scrap packaging would be utilized in the production of a good. The statute calculates the normal value of a good based on the factors of production involved in producing the subject merchandise. *See* 19 U.S.C. § 1677b(c)(1)(A)–(B). Presumably, the value of the factor of production at issue here includes its packaging. Commerce may have a rationale for excluding packaging as a byproduct, but that rationale is not reasonably discernable and Commerce has not stated it.[39] Therefore, Commerce's decision to deny an offset for excess/scrap packaging is remanded to the agency for reconsideration or further explanation consistent with this opinion.

## CONCLUSION

For the foregoing reasons, the court remands Commerce's surrogate value data selection for frozen shrimp, and sustains the *Final Results* in all other respects. Accordingly, it is

**ORDERED** that Commerce's decision to value frozen shrimp using Bangladeshi UN Comtrade data for HTS 0306.13 is remanded for reconsideration or further explanation consistent with this opinion; and it is further

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[38] The determinations Commerce cites do confirm that a practice exists which Commerce applies to determine whether a given item is a byproduct, however, none of the determinations explain why the practice is reasonable or its origins. *See, e.g.*, Steel Wire Garment Hangers from the People's Republic of China [("PRC")]: Issues and Decision Memorandum for the Final Results of the First [ADD] Administrative Review at 20, A-570–918, (May 9, 2011), *available at* http://ia.ita.doc.gov/frn/summary/prc/2011–11871–1.pdf (last visited June 18, 2018) (explaining that Commerce has a practice of granting offsets for products "generated in the production of the subject merchandise," but not why the practice is reasonable or the origins of the practice); Issues and Decision Memorandum for the Final Determination of the [ADD] Investigation: Prestressed Concrete Steel Wire Strand [] From the [PRC] at 17, A-570–945, (May 14, 2010), *available at* http://ia.ita.doc.gov/frn/summary/prc/2010–12310–1.pdf (last visited June 18, 2018) (similarly explaining the parameters upon which an offset would be granted, without explaining the reasonableness of Commerce's practice); *Certain Cut-to-Length Carbon Steel Plate From the [PRC]*, 62 Fed. Reg. 61,964, 61,997 (Dep't Commerce Nov. 20, 1997) (final determination of sales at less than fair value) (similarly explaining that Commerce has a "policy" pursuant to which it grants a byproduct offset, but not explaining the reasonableness of the policy itself); Issues and Decision Memorandum for the Final Determination in the [ADD] Investigation of Multilayered Wood Flooring from the [PRC] at 86, A-570–970, (Oct. 11, 2011), *available at* http://ia.ita.doc.gov/frn/summary/prc/2011–26932–1.pdf (last visited June 18, 2018) (articulating Commerce's policy as offsetting scrap generated in the production process, if evidence supports the conclusion that the claimed scrap has commercial value, but likewise not explaining why such a practice is reasonable).

[39] There are two types of packaging materials at issue here— packaging materials which contained the raw materials used to produce the subject merchandise, and packaging materials that were purchased to contain the subject merchandise, but which were not used. *See* Final Decision Memo at 67. In the final determination, Commerce did not distinguish between the two types of packaging materials. However, on remand, Commerce may decide to do so.

**ORDERED** that Commerce's decision to deny an offset for excess/scrap packaging is remanded for reconsideration or further explanation consistent with this opinion; and it is further

**ORDERED** that Commerce shall file its remand redetermination with the court within 60 days of this date; and it is further

**ORDERED** that the parties shall have 30 days thereafter to file comments on the remand redetermination; and it is further

**ORDERED** that the parties shall have 30 days to file their replies to comments on the remand redetermination.

Dated: June 21, 2018
New York, New York

*/s/ Claire R. Kelly*
CLAIRE R. KELLY, JUDGE

Slip Op. 18–76

LA MOLISANA S.P.A, Plaintiff, v. UNITED STATES, Defendant, and NEW WORLD PASTA CO. AND DAKATA GROWERS PASTA CO., Defendant-Intervenors.

Before: R. Kenton Musgrave, Senior Judge
Court No. 16–00047

[Sustaining remand results on 18th administrative review of certain pasta from Italy.]

Dated: June 21, 2018

*David J. Craven*, Travis & Rosenberg, of Chicago, IL, for the plaintiff.

*Elizabeth A. Speck*, Senior Trial Counsel, Commercial Litigation Branch, Civil Division, U.S. Department of Justice, of Washington, DC, for the defendant. On the brief were *Chad A. Readler*, Acting Assistant Attorney General, *Jeanne E. Davidson*, Director, and *Reginald T. Blades, Jr.*, Assistant Director. Of Counsel was *Natan P.L. Tuban*, Attorney, Office of the Chief Counsel for Trade Enforcement and Compliance, U.S. Department of Commerce.

*Paul C. Rosenthal* and *David C. Smith*, Kelley Drye & Warren LLP, of Washington, DC, for the defendant-intervenors.

## OPINION AND ORDER

**Musgrave, Senior Judge:**

This opinion concerns the results of remand of the 18th administrative review ("AR") of the antidumping duty order on certain pasta from Italy pursuant to the prior opinion on the matter. *See* Slip Op. 17–111 (Aug. 23, 2017).[1] Familiarity with that decision is here presumed. To the International Trade Administration, U.S. Department of Commerce ("Commerce" or "Department"), two issues were remanded: (1) whether Commerce failed to provide meaningful opportunity for addressing the agency's differential pricing analysis; and (2) whether Commerce erred in requiring the plaintiff La Molisana S.P.A ("La Molisana" or "LM") to report its pasta sales product shapes in conformity with the existing identities and categories of shapes on Commerce's pasta shape classification list. On remand Commerce reconsidered the record and arguments presented by La Molisana on both issues.

[1] *See also Certain Pasta From Italy: Final Results of Antidumping Administrative Review; 2013–2014*, 81 Fed. Reg. 8043 (Feb. 17, 2016), and the accompanying issues and decision memorandum, PDoc 228, as amended by *Certain Pasta From Italy: Amended Final Results of Antidumping Duty Administrative Review; 2013–2104*, 8l Fed. Reg. 12690 (Mar. 10, 2016).

## I

The "Final Results of Redetermination Pursuant to Court Remand" ("Redetermination"), now on the record (R-PDoc 3), addressed La Molisana's arguments with respect to the differential pricing issue as raised in its administrative case brief, PDoc 208 (Oct. 6, 2015), and via response to La Molisana's comments on the draft remand results, R-PDoc 2 (Nov. 1, 2017), by noting that the *Apex Frozen Foods* decisions' upholding[2] of the application of zeroing when using the average-to-transaction comparison methodology of 19 U.S.C. §1677f-1(d)(1)(B) disposed of La Molisana's methodological arguments, and with respect to La Molisana's seasonality-of-product argument the Redetermination states that there was no analysis or evidence on the record to support it. The Redetermination also notes that the court had recently found no statistical error inherent when the entire population of respondents' sales in the United States market is analyzed for differential pricing and held the use of "widely accepted thresholds" for the Cohen's *d* coefficient not arbitrary. Redetermination at 13–16, noting *Xi'an Metals & Minerals Import & Export Co. v. United States,* 41 CIT ___, ___, 256 F. Supp. 3d 1346, 1364 (2017).

In its comments here, La Molisana continues to believe that differential pricing analysis is nothing more than "zeroing in a disguise and that ultimately it will be found to be a violation of the United States' WTO obligations"[3], but since the issue has been upheld in other cases La Molisana offers no further comment on the Redetermination. Suffice it to state at this point that substantial evidence and law support the Redetermination on this issue.

## II

With respect to the issue of shape classification, La Molisana in its administrative case brief had requested reclassification of several specialty cuts, coded as category "6" in Commerce's shape list, to be reclassified as regular short cuts, coded as "5," solely on the basis of its own production line speeds. *See* PDoc 208. On remand, Commerce maintains that its prior final results are correct in denying La Molisana's request. Redetermination at 5.

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[2] *Apex Frozen Foods v. United States*, 862 F.3d 1322 (Fed. Cir. 2017) (7th Review); *Apex Frozen Foods v. United States*, 862 F.3d 1327 (Fed. Cir. 2017) (8th Review).

[3] That is debatable, as it was arguably *that* organization that violated *its* obligations to *this* country over this country's extant methodology of zeroing when the WTO — and the Antidumping Agreement in particular — came into being. *See*, *e.g.*, Roger P. Alford, *Reflections on US—Zeroing: A Study in Judicial Overreaching by the WTO Appellate Body*, 45 Colum. J. Transnat'l L. 196 (2006). *Cf. Xi'an Metals*, 41 CIT at __ n.10, 256 F. Supp. 3d at 1360 n.10 *with Catfish Farmers of America v. United States,* 38 CIT ___, ___, Slip Op. 14–146 at 38 (2014).

The Redetermination states that Commerce has a statutory duty to uphold a stable and consistent model match methodology; that the model match methodology for this antidumping proceeding was developed during the original investigation and refined during the subsequent three administrative reviews, and that its long-standing practice is that once a model-match methodology has been established, it will not modify that methodology in subsequent proceedings unless there are compelling reasons to do so;[4] that reclassification of shapes must be supported by industry-wide and not company-specific technical information; that company-specific information in support of a modification of the shape list must relate to a *new* shape classification; and that allowing company-specific shape *re*classifications would render the model-match criteria unpredictable, volatile, and inconsistent. *Id*. at 5–13, 19–31. Commerce's main concern in this regard appears to be the potential for manipulation of U.S. market and home market product sales, resulting in less accurate price-to-price comparisons in the dumping margin. *See id*. at 13, 29.

In accordance therewith, Commerce found on remand that La Molisana had not presented any industry changes that would warrant shape reclassification, and that the information La Molisana did place on the record was insufficient to warrant shape reclassification. *Id*. at 5, 19–20. Specifically, the Redetermination points out that only six out of the 20 shapes for which La Molisana sought reclassification appear in La Molisana's product catalogue in the LM Shape Exhibits, and that La Molisana had not provided descriptions or pictures for 14 of the 20 shapes for which it had requested reclassification.[5] Redetermination at 4. La Molisana's comments disagree that information is "missing" from the record, as the issue here is only the throughput rate, not whether a cut is short or long, *e.g.*, R-PDoc 2 at 2–3, but be that as it may, the administrative position expressed in the Redetermination is that the information on the record does not support

[4] Redetermination at 7, paraphrasing *Fagersta Stainless AB v. United States*, 32 CIT 889, 894, 577 F. Supp. 2d 1270, 1276 (2008) ("[o]nce Commerce has established a model-match methodology in an antidumping [proceeding], it will not modify that methodology in subsequent [segments] unless there are 'compelling reasons' to do so"). "Compelling reasons" means "compelling and convincing evidence" that the existing model-match criteria "are not reflective of the merchandise in question," that there have been changes in the relevant industry, or that "there is some other compelling reason present which requires a change." *Id*. (citation omitted). *See also, e.g., Notice of Final Results of Antidumping Duty Administrative Review: Certain Pasta from Italy*, 78 Fed. Reg. 9364 (Feb. 8. 2013) ("AR15"), and accompanying issues and decision memorandum ("I&D Memo") at cmt 1, and *Notice of Final Results of Antidumping Duty Administrative Review: Certain Pasta from Italy*, 67 Fed. Reg. 300 (Jan 3. 2002) ("AR4"), and accompanying I&D Memo at cmt 19, both of which the parties here discuss in the context of their respective positions.

[5] *See* LM Resp. to Sections B & C of the Initial Questionnaire ("IQ") (Dec. 2, 2014), CDocs 38–54, at Exs. B-1 & C-1; *see also* LM Resp. to Sec. A of the IQ (Nov. 5, 2015), PDocs 34–39, at Ex. A-13(a).

reclassification regardless, as the information is company-specific (*e.g.*, production speed), and, as mentioned, Commerce's policy is only to consider company-specific information when it relates to new shapes not already on the existing shape classification list. Commerce then reiterated that all of La Molisana's proposed reclassifications pertained to shapes that were already identified on the shape list. *E.g.*, Redetermination at 5 ("all of the shapes that La Molisana sought to reclassify are on the Department's shape list").

As Commerce points out, *Prodotti Alimentary Meridionali, S.R.L. v. United States*, 27 CIT 547, 548–50 (2003) ("*PAM*"), upheld the shape model match methodology as reasonable. *PAM* considered argument over two shapes, short cuts and soup cuts (or soupettes), that were listed on the shape list as category 5 and category 7, respectively, and that were "produced on the same machine." *PAM* at 548. Because their production speeds were "very similar", the *PAM* plaintiff requested Commerce to "merge" the two product categories. That was effectively an "industrywide" request, but Commerce declined. Because the same pasta shapes could be produced on different machines, the court agreed with Commerce that the similarities in machine type used should not be determinative. Further, "[e]ven if certain products are produced on the same machines at similar speeds, that does not necessarily establish that they are the same product, even if they might be used in a similar manner." *Id.* at 549. Therefore, the *PAM* plaintiff had "not demonstrated a flaw in the model match methodology which requires its amendment." *Id*.

Although it was in the context of the record presented thereat that *PAM* held the model-match methodology reasonable, and the matter at bar is the inverse of that case, the result here is ultimately the same. Commerce's position is that AR15's acknowledgment of the 75 percent throughput rate to distinguish pasta shape for specialty long and short pasta cuts was only a part of the description of the development of the model-match methodology in the original investigation and its refinement in subsequent reviews, which circumstance "does not indicate that it is [only] production speed, [as opposed to] sales characteristics, [that] distinguishes special and regular cuts, as La Molisana claims" nor does it "validate La Molisana's use of its line speeds to reclassify shapes that are already on the Department's shape list." Redetermination at 12. Commerce also contends La Molisana's description of AR4's acceptance of reclassifying the certain pasta shapes considered therein is inaccurate, as that administrative review considered shapes that were not already listed on the shape

classification list. *See* Def's Resp. to Comments at 9–10, quoting Redetermination at 24 (quoting AR4 I&D Memo at cmt 18).[6]

The first contention obscures that La Molisana's focus is solely upon the 75 percent production speed demarcation; the other three considerations of the shapes methodology are not relevant to that argument. *Cf. New World Pasta Co. v. United States*, 28 CIT 290, 309 n.22, 316 F. Supp. 2d 1338, 1355 n.22 (2004) ("line speed is a shorthand for shape"). The second contention is imprecise.[7] The defendant intervenors provide a rather fuller response, in contending that AR4 "wrongly" implied pasta shapes might be re-classified based on a company's own line speed, wherein Commerce explicitly stated: "For those cuts which PAM believed were specialty cuts yet the Department considered a regular cut (or vice versa), [PAM] provided the line

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[6] *Inter alia*:

> We have developed a list of pasta cuts and their corresponding shapes in which standard and specialty cuts are segregated based on line speed. However, we understand that there may be discrepancies between the shape category list we provide respondents in the questionnaire and their own production which would result in a different classification of certain cuts or the manufacturer may produce certain cuts not listed by the Department. Therefore, the instructions to the questionnaire specifically state that if the respondent sold any pasta cuts which the Department does not list, the respondent should provide a description and picture of the pasta type, the production line on which it is produced, the standard production capacity of that line (*e.g.*, pounds per hour), and the line speed, for the pasta type in question.
>
> In its questionnaire response, we noted that there were certain cuts which PAM added to its production which were either not listed by the Department or PAM considered the cut to be a shape different than the one listed by the Department (i.e., PAM classified a cut to be a standard cut whereas the Department categorized it as a specialty cut). Therefore, we specifically requested from PAM the company-specific line speed data necessary to classify those cuts in question. PAM submitted the line speed data and contended that certain shapes should be classified as a specialty rather than standard (or vice versa). We accepted the shape classifications that PAM claimed based upon the PAM line speed data that it provided.

AR4 I&D Memo at cmt. 18.

[7] Noted here, in AR15 Commerce described a certain respondent's characterization of AR4 as "inaccurate" through the following explanation:

> In the fourth review, the Department verified the physical differences, cost differences, and throughput rate differences between the Teflon-die production technology and the older, more traditional bronze-die production technology for Ferrara products. . . . The Department had not previously reviewed the differences between these two production technologies in prior reviews where the model match methodology was developed. In the final results of the fourth review, *the Department allowed Ferrara to use a five-digit CONNUM, instead of a four-digit CONNUM* [,] *to account for the differences between bronze-die pasta and Teflon-die pasta for purposes of model matching*. . . . However, all companies used the same shape codes in the CONNUMs. Thus, in the reviews cited by Granoro, the change accepted by the Department was based on the differences between bronze die and Teflon-die production methods *and outcomes*. Although we found that the *physical* and *cost* differences of products produced using these two different methods *merited separate treatment*, this was not a change to the reported variables used to create the CONNUM that we use for model matching purposes.

*Id*. (italics added).

speed data. We reviewed this information and accepted the revised shape classification as provided by PAM." AR4 I&D Memo at cmt 19. *Cf. also* notes 6 & 7. The court expresses no opinion on the "correctness" of AR4, but the defendant intervenors are themselves correct in arguing that AR4 apparently stands apart from every other review by inclusion of this language. The court thus agrees that AR4 cannot be construed to amount to an administrative practice. *Cf. Huvis Corp. v. United States*, 31 CIT 1803, 1811, 525 F. Supp. 2d 1370, 1378–79 (2007) (more than two instances required for a specific administrative action to evolve into a practice), citing *Shandong Huarong Machinery CO. v. United States*, 30 CIT 1269, 1293 n.23, 435 F. Supp. 2d 1261, 1282 n.23 (2006).

In the final analysis, La Molisana's comments here, on *PAM* and on AR4 and AR15, do not persuade that the results of redetermination can be concluded unsupported by substantial evidence on the record and not in accordance with law under the "reasonableness" standard of reviewing Commerce's methodologies. *See, e.g., Apex Frozen Foods Private Ltd. v. United States*, 862 F.3d 1337, 1350 (Fed. Cir. 2017); *JBF RAK LLC v. United States*, 790 F.3d 1358, 1364 (Fed. Cir. 2015). La Molisana does not dispute the "industry-wide" shape classification list itself, and it further agrees that a "stable and consistent model-match methodology" is desirable. Its argument is simply for recognition of the purported fact that certain of its shapes, which appear on the shape classification list as having been produced at line speeds corresponding to "special" cut categories or designations, had actually been produced at line speeds corresponding with "standard" (or regular) cut line speed categories or designations. *See, e.g.*, LM Comments at 2–3 ("[t]hat application of this methodology means that a particular shape might be classified one way for one producer and another way for another producer does not mean that the methodology has changed — it simply means that the underlying facts changed, and [that] the methodology produced a different result); *id*. at 5 ("[t]here may be 'discrepancies between the shape category list we provide respondents in the questionnaire and their own production which would result in a different classification of certain cuts' ") (quoting AR4 I&D Memo at cmt 18; emphasis removed).

Unfortunately for La Molisana, Commerce's policy is firm with respect to company-specific requests for reclassification of shapes already identified on the shape list. Of course, costs are a metaphysical aspect of the physical characteristics of a good — they are undoubtedly what drove the "dividing line" of the shape list between

regularand specialty cuts for model matching purposes in the first place[8] — and Commerce acknowledges that slower line speeds have higher manufacturing costs associated with them. Hence, insistence that certain shapes remain within the respective categories associated with slower "specialty" line speeds when record evidence supports actual production of those shapes at higher "standard" cut line speeds might seem to imply that the determination is unsupported by substantial evidence of record. Nonetheless, as indicated, La Molisana's argument is contrary to Commerce's stated policy, and the court must defer to Commerce's concerns regarding the potential for manipulation. La Molisana argues Commerce's reasoning faulty, *i.e.*, that

> with respect to the other items that make up the control number, volitional decisions by the Pasta Manufacturer enter into whether or not a product is assigned a specific code. The quality code is impacted by the decision by the producer as to the specific blend of wheat used (or even by the label placed on the bag), the additive code by the decision whether or not to use an additive, and the enrichment code by the decision whether or not to use an enrichment. Each of these is based on a volitional choice by the producer. To the extent that line speed is a volitional choice, it is no different than any of these other criteria. In fact, even the "shape code" would be "subject to manipulation" by the simple step of giving the existent product a "new name" and seeking its classification based on company specific line speeds. (Elbow Macaroni, the exemplar for "standard short", could be renamed L-Bro Macaroni and thus have its classification reconsidered.)
>
> More critically, the reason that product is divided between Special and Standard cuts is the reality that special cuts are costlier to manufacture. (*See* 4th POR I&D at Issue 18. ) Slowing down the line speed would result in a higher cost of production. It is axiomatic that a producer will, therefore, operate at the fastest production speed to minimize the costs of production. A specialty cut, because of the slower line speed, will have a higher cost, as reflected in the Section D data and will be sold at a higher price as reflected in the Section B and C data.

LM Comments at 7–8 (italics added).

[8] *See, e.g.*, AR15 I&D Memo at cmt 1 (describing the use of a 75 percent throughput rate to distinguish pasta shape for specialty long and short pasta cuts in the original investigation).

All of which may well be true. But it is insufficient to address Commerce's concerns regarding the potential for manipulation, via company-specific reclassifications of existing shape categories on the shape list, of U.S. market sales and home market sales comparisons. Commerce might just as readily have concluded the pasta shapes for which La Molisana sought reclassification to be "new" shapes due to line speed, *cf*. note 7, but the court cannot reweigh the evidence or substitute judgment therefor. *See, e.g., Usinor v. United States,* 28 CIT 1107, 1111, 342 F. Supp. 2d 1267, 1272 (2004). In short, La Molisana does not persuade the remand results are erroneous.

### *Conclusion*

After considering the arguments on the results of redetermination, La Molisana does not persuade that the Redetermination is unsupported by substantial evidence on the record or otherwise not in accordance with law. Judgment will enter accordingly.

**So ordered.**

Dated: June 21, 2018
New York, New York

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

Slip Op. 18–77

HYUNDAI STEEL COMPANY, Plaintiff, v. UNITED STATES, Defendant, ARCELORMITTAL USA LLC, STEEL DYNAMICS, INC., CALIFORNIA STEEL INDUSTRIES, INC., AK STEEL CORPORATION, UNITED STATES STEEL CORPORATION, AND NUCOR CORPORATION, Defendants-Intervenors.

Before: Jane A. Restani, Judge
Court No. 16–00161

[Commerce's remand results in an investigation of Corrosion-Resistant Steel Products from the Republic of Korea are affirmed.]

Dated: June 22, 2018

*J. David Park, Andrew Treaster, Daniel Wilson, Henry Almond*, and *Sylvia Yun Chu Chen*, Arnold & Porter Kaye Scholer LLP, of Washington, DC, for the plaintiff.

*Elizabeth Speck*, Commercial Litigation Branch, Civil Division, U.S. Department of Justice, of Washington, DC, for the defendant. Of counsel on the brief was *James Ahrens II*, Office of Chief Counsel for Trade Enforcement and Compliance, U.S. Department of Commerce, of Washington, DC.

*Grace Kim, Joshua Morey, Kathleen Cannon, Paul Rosenthal*, and *R. Alan Luberda*, Kelley Drye & Warren, LLP, of Washington, DC, for defendant-intervenor ArcelorMittal USA LLC.

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*Stephen Jones*, and *Daniel Schneiderman*, King & Spalding, LLP, of Washington, DC, for defendant-intervenor AK Steel Corporation.

*Thomas Beline*, and *Sarah Shulman*, Skadden Arps Slate Meagher & Flom, LLP, of Washington, DC, for defendant-intervenor United States Steel Corporation.

*Alan Price, Adam Teslik, Christopher Weld, Cynthia Galvez, Derick Holt, Laura El-Sabaawi, Maureen Thorson, Stephanie Bell, Tessa Capeloto, Timothy Brightbill*, and *Usha Neelakantan*, Wiley Rein, LLP, of Washington, DC, for defendant-intervenor Nucor Corporation.

**Restani, Judge:**

Before the court are the United States Department of Commerce ("Commerce")'s *Final Results of Redetermination Pursuant to Remand*, A-580–878, POI 04/01/2014–03/31/2015 (Dep't Commerce May 11, 2018) ("*Remand Results*"), concerning Commerce's antidumping duty ("AD") investigation regarding Corrosion-Resistant Steel Products ("CORE") from the Republic of Korea ("Korea"). Hyundai Steel Co. ("Hyundai") requests the court sustain Commerce's *Remand Results*; United States Steel Co. ("U.S. Steel") requests the court issue a second remand for Commerce to adjust its calculations. For the reasons stated below, Commerce's *Remand Results* are sustained.

## BACKGROUND

The court assumes all parties are familiar with the facts of the case as discussed in *Hyundai Steel Co. v. United States*, 282 F. Supp. 3d

1332, 1336–39 (CIT 2018) ("*Hyundai I*"). For the sake of convenience, the facts relevant to this remand are summarized herein. Following Commerce's investigation into possible sales of CORE from Korea at less than fair value, having exchanged several questionnaires and responses regarding Hyundai's further manufactured sales data, *see, e.g., Hyundai Steel's Response to the Department's Request for Section E and Additional Sales Data*, A-580–878, POI 04/01/2014–03/31/2015, at 1–9 (Dep't Commerce Nov. 2, 2015); *Second Supplemental Questionnaire to Sections B&C, and First Supplemental to Further Manufacturing*, A-580–878, POI 04/01/2014–03/31/2015, Attach. 1, at 1–2 (Dep't Commerce Nov. 19, 2015), Commerce identified several problems with Hyundai's responses, *Issues and Decision Memorandum for the Final Affirmative Determination in the Antidumping Duty Investigation of Certain Corrosion-Resistant Steel Products from the Republic of Korea*, A 580–878, POI 04/01/2014–03/31/2015, at 7–17, 31–33 (Dep't Commerce May 24, 2016) ("*Final Det. I&D Memo*"). Citing these problems, Commerce applied an adverse inference to facts otherwise available ("AFA") when calculating cost data for, *inter alia*, Hyundai's sales of skelp, sheets, and blanks ("SSBs"). *Final Det. I&D Memo*, at 14–17. Commerce assigned Hyundai an overall dumping margin of 47.8 percent *ad valorem*. *Final Determination of Sales at Less than Fair Value and Final Affirmative Determination of Critical Circumstances*, 81 Fed. Reg. 35,303, 35,304 (Dep't Commerce June 2, 2016), *as amended by Certain Corrosion-Resistant Steel Products from India, Italy, the People's Republic of China, the Republic of Korea and Taiwan: Amended Final Affirmative Antidumping Determination for India and Taiwan, and Antidumping Duty Orders*, 81 Fed. Reg. 48,390, 48,393 (Dep't Commerce July 25, 2016).

Thereafter, Hyundai raised various challenges before the U.S. Court of International Trade, and the court upheld Commerce's AD order in all but one respect. *See generally Hyundai I*, 282 F. Supp. 3d at 1339–52. Holding that Commerce had unlawfully applied AFA without first providing Hyundai an opportunity to explain or correct deficiencies in its SSB data, the court remanded the matter for Commerce to provide such an opportunity and recalculate Hyundai's AD margin as appropriate. *Id.* at 1347–49, 1352. On remand, Commerce issued a supplemental questionnaire, to which Hyundai responded, answering Commerce's questions regarding specific aspects of its earlier SSB data. *Supplemental Remand Questionnaire on Sheet, Skelp, and Blanks*, A-580–878, POI 04/01/2014–03/31/2015, at Attach. 1 (Dep't Commerce Feb. 22, 2018) ("Remand Supp. Q."); *Hyundai Steel's Supplemental Questionnaire Response*, A-580–878, POI

04/01/2014–03/31/2015, at Ex. 1 (Dep't Commerce Mar. 16, 2018). Commerce issued its remand results on May 11, 2018, recalculating Hyundai's dumping margin at 7.89 percent *ad valorem*. *Remand Results*, at 1–2.

## JURISDICTION AND STANDARD OF REVIEW

The court has jurisdiction pursuant to 28 U.S.C. § 1581(c). The court upholds Commerce's final results in an AD investigation unless "unsupported by substantial evidence on the record, or otherwise not in accordance with law[.]" 19 U.S.C. § 1516a(b)(1)(B)(i) (2006).

## DISCUSSION

On remand, having assessed Hyundai's response to Commerce's supplemental questionnaire, Commerce concluded that Hyundai's "response remedies the major deficiencies in its previous further manufacturing responses with respect to SSBs. Specifically, Hyundai has sufficiently explained the inconsistencies and previously unexplained changes that plagued the data it submitted with respect to its SSB sales during the investigation." *Remand Results*, at 6. Commerce accordingly adjusted Hyundai's further-manufacturing expenses for SSBs and, using the data from Hyundai's December 29, 2015, databases, recalculated Hyundai's AD margin. *Id.*; *see generally Hyundai Steel's Response to the Department's Supplemental Section E Questionnaire*, A–580–878, POI 04/01/2014–03/31/2015 (Dep't Commerce Dec. 29, 2015). U.S. Steel contends that Commerce erred in recalculating Hyundai's AD margin, and should have continued to apply AFA. *United States Steel Corporation's Comments Upon the Remand Redetermination Filed by the U.S. Department of Commerce*, ECF No. 85, at 2–9 (June 1, 2018) ("U.S. Steel Remand Comments").

Commerce may apply an adverse inference in certain situations where it has resorted to "facts otherwise available." *See* 19 U.S.C. § 1677e(b) (2015). As the court stated in *Hyundai I*, under 19 U.S.C. § 1677e(a) Commerce shall use "facts otherwise available" where: "(1) necessary information is not available in the record; or (2) an interested party (a) withholds requested information; (b) fails to timely provide information in the form requested; (c) significantly impedes proceedings; or (d) provides information which cannot be verified under 19 U.S.C. § 1677m(i)." *Hyundai I*, 282 F. Supp. 3d at 1343. Recourse to "facts otherwise available" is subject to the requirement that Commerce promptly notify respondent of the deficiency and, to the extent practicable, provide respondent an opportunity to remedy or explain it. 19 U.S.C. § 1677e(a); 1677m(d).

U.S. Steel argues that the supplemental questionnaire constituted such an opportunity to explain deficiencies in Hyundai's December 29

SSB data, and that aspects of Hyundai's March 16 responses still required recourse to "facts otherwise available." U.S. Steel Remand Comments, at 4–8. It first contends that after Hyundai's March 16 response, its December 29 database remained generally unverifiable. *Id.* at 5.

On remand, Commerce's supplemental questionnaire did allow Hyundai to explain the issues with its previously submitted SSB sales data, in accordance with 19 U.S.C. § 1677m(d). At U.S. Steel's behest, furthermore, Commerce subjected both Hyundai's March 16 response and its December 29 database to verification. *Request for Verification of Hyundai Steel's Further Manufacturing Submission*, A–580–878, POI 04/01/2014–03/31/2015, at 1 (Dep't Commerce Mar. 22, 2018); *Verification of the Further Manufacturing Response of Hyundai Steel Company in the Remand to the Antidumping Duty Investigation of Certain Corrosion-Resistant Steel Products from the Republic of Korea*, A–580–878, POI 04/01/2014–03/31/2015, at 3 (Dep't Commerce May 1, 2018) ("Remand Verification Report"). Neither Commerce's Remand Verification Report, nor its *Remand Results* indicate that Commerce found material aspects of Hyundai's December 29 database unverifiable. U.S. Steel Remand Comments, at 5–6; *Remand Results*, at 11–12; *see generally* Remand Verification Report, at 1–14. That Commerce identified and addressed issues with Hyundai's data is consistent with the purpose of verification. The mere presence of correctable errors does not automatically make the data concerned unverifiable. Prior practice cited by U.S. Steel is consistent with this conclusion. U.S. Steel Remand Comments, at 5–6 (citing *Issues and Decision Memorandum for the Final Results of Antidumping Duty Administrative Review and Partial Rescission of Antidumping Duty Administrative Review: Certain Hot-Rolled Carbon Steel Flat Products from Thailand*, A-549–817, POR 11/01/2005–10/31/2006, at Cmt. 1 (Dep't Commerce June 4, 2008) (applying partial facts available because respondent's yield strength information "could not be fully verified," as it was incorrect for a majority of sales *and* respondent's explanation failed to resolve the discrepancy)).

U.S. Steel next faults Commerce for adjusting its remand calculations to account for issues with Hyundai's data instead of applying AFA. Specifically, U.S. Steel notes the following issues with Hyundai's March 16 report: (1) Hyundai's explanation of how it calculated yield loss was incorrect; and (2) Hyundai's explanation revealed that, in calculating its general and administrative ("G&A") expense ratio, it improperly included management fees and misstated its cost of sales. U.S. Steel Remand Comments, at 6–7; *see also* Remand Verification Report, at 2. U.S. Steel contends that the foregoing rendered Hyun-

dai's yield loss and G&A expense ratio calculations unverifiable. *Id.* at 6.

Regarding yield loss, although Commerce found Hyundai's March 16 explanation unclear, Commerce indicated that the actual methodology used in Hyundai's December 29 database was correct. *Remand Results*, at 11; Remand Verification Report, at 9. On remand, Commerce actually used Hyundai's December 29 methodology in recalculating Hyundai's AD margin. *Remand Results*, at 11; Remand Verification Report, at 9. There are no indicia that Hyundai's yield loss calculations were unverifiable. Commerce identified Hyundai's specific calculation method and reproduced it in recalculating Hyundai's AD margin. Commerce's decision not to resort to "facts otherwise available" in calculating Hyundai's yield loss is thus supported by substantial evidence.

Regarding G&A expense ratios, Commerce notes that it commonly adjusts respondents' ratio calculations. *Remand Results*, at 13 (citing *Issues and Decision Memorandum for the Final Affirmative Determination in the Less than Fair Value Investigation of Certain Hot-Rolled Steel Flat Products from Brazil*, A-351–845, POI 07/01/2014–06/30/2015, at Cmt. 5 (Dep't Commerce Aug. 4, 2016); *Issues and Decision Memorandum for the Final Affirmative Determination in the Less-Than-Fair-Value Investigation of Certain Carbon and Alloy Steel Cut-To-Length Plate from France*, A-427–828, POI 04/01/2015–03/31/2016, at Cmt. 17 (Dep't Commerce Mar. 29, 2017)). Commerce did not find that its adjustments of Hyundai's G&A expense ratio necessitated recourse to "facts otherwise available" in this case, because all the information used in Commerce's calculations was derived from Hyundai's submissions. *Remand Results*, at 10–11. The court finds no reason to disturb Commerce's conclusion, especially considering that Commerce's supplemental questionnaire requested explanations in lieu of revised data. *See* Remand Supp. Q., at Attach. 1; *see also Remand Results*, at 13. Commerce's decision not to utilize "facts otherwise available" is supported by substantial evidence. Thus, Commerce necessarily acted according to law in declining to apply an adverse inference to any of the above.[1]

[1] The government's reply brief on remand implies that Commerce may have resorted to "facts otherwise available" in recalculating the portion of Hyundai's AD margin attributable to SSB sales. *See* Defendant's Response to Comments on Remand Results, ECF No. 87, at 9–10 (June 15, 2018). The government does not clearly explain how Commerce supplemented Hyundai's usable SSB data with "facts otherwise available," *id.* at 6–10, but to the extent this was done, the court holds that Commerce's decision not to apply an adverse inference to such data is supported by substantial evidence. As discussed above, once given

Hyundai argues that Commerce complied with the terms of the remand order. *See Hyundai Steel Company's Comments on Remand Results*, ECF No. 84, at 1–3 (June 1, 2018). The court agrees. Commerce's February 22, 2018, supplemental questionnaire provided Hyundai a sufficient opportunity to explain deficiencies in its SSB data, and Commerce thereafter acted according to law in recalculating Hyundai's AD margin.

## CONCLUSION

For the foregoing reasons, Commerce's *Remand Results* are **SUSTAINED**. Judgment will enter accordingly.

Dated: June 22, 2018
New York, New York

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

an opportunity to explain deficiencies in its SSB data, Hyundai promptly complied, sufficiently explaining its earlier submission such that it could be used in Commerce's recalculations. Overall, Hyundai's conduct during Commerce's investigation was not so egregious as to warrant the application of an adverse inference across the board.

Slip Op. 18–78

NANTONG UNIPHOS CHEMICALS CO., LTD., AND NANJING UNIVERSITY OF CHEMICAL TECHNOLOGY CHANGZHOU WUJIN WATER QUALITY STABILIZER FACTORY, Plaintiffs, v. UNITED STATES, Defendant, and COMPASS CHEMICAL INTERNATIONAL LLC, Defendant-Intervenor.

Before: Jane A. Restani, Judge
Court No. 17–00150

[Commerce's final results in an investigation of 1-Hydoxythylidene-1, 1-Disphosphonic Acid from the People's Republic of China are sustained.]

Dated: June 25, 2018

*David Craven*, Sandler, Travis & Rosenberg, PA, of Chicago, IL, for the Plaintiffs Nantong Uniphos Chemicals Co., Ltd., and Nanjing University of Chemical Technology Changzhou Wujin Water Quality Stabilizer Factory.

*Kelly Krystyniak*, Commercial Litigation Branch, Civil Division, U.S. Department of Justice, of Washington, DC, for the defendant. Of counsel on the brief were *Nikki Kalbing* and *Zachary Simmons*, Office of Chief Counsel for Trade Enforcement and Compliance, U.S. Department of Commerce, of Washington, DC.

*Jeffrey Levin*, Levin Trade Law, P.C., of Bethesda, MD, for Defendant-Intervenor Compass Chemical International LLC.

## *OPINION*

**Restani, Judge:**

In this action challenging a final determination and countervailing duty order issued by the United States Department of Commerce ("Commerce") regarding 1-Hydoxythylidene-1, 1-Disphosphonic Acid ("HEDP") from the People's Republic of China ("PRC"), Nantong Uniphos Chemicals Co., Ltd. ("Nantong") and Nanjing University of Chemical Technology Changzhou Wujin Water Quality Stabilizer Factory ("Wujin") (collectively, "Plaintiffs") request the court hold Commerce's countervailing duty to be unsupported by substantial record evidence or otherwise not in accordance with law. Plaintiffs accordingly request the court remand the final determination with directions to find cross-ownership between Plaintiffs, or to calculate an individual duty rate for Nantong.

## BACKGROUND

Prompted by the petition of Compass Chemical International LLC, a domestic producer, Commerce initiated a countervailing duty ("CVD") investigation of HEDP from the PRC. *1-Hydroxyethylidene-1, 1-Diphosphonic Acid From the People's Republic of China: Initiation*

*of Less-Than-Fair-Value Investigation*, 81 Fed. Reg. 25,377, 25,377 (Dep't Commerce Apr. 28, 2016).[1] The period of investigation ("POI") was July 1, 2015, through December 31, 2015. *Id.* Using POI sales data, Commerce selected the PRC's top two producers or exporters of United States-bound HEDP as mandatory respondents: Wujin and Shandong Taihe Chemicals Co., Ltd. ("Taihe"). *Respondent Selection*, C-570–046, POI 01/01/15 – 12/31/15, at 4 (Dep't Commerce June 8, 2016) ("Respondent Selection Memo"). Nantong was one of seven significant HEDP producers or exporters to submit POI sales volume data, but was not selected. *Id.* at Attach. 1.

Early in the investigation, Wujin identified Nantong as its affiliate. *Response of Nanjing University of Chemical Technology Changzhou Wujin Water Quality Stabilizer Factory to Affiliated Company Portion of Section III*, C-570–046, POI 01/01/15 – 12/31/15, at 1, Ex. CVD-1 and CVD-2 (Dep't Commerce June 22, 2016) ("Wujin Sec. III Response"). Ultimately, Nantong also supplied a full questionnaire response. *See generally Response of Nantong Uniphos Chemicals Co., Ltd to Affiliated Company Portion of Section III*, C-570–980, POI 01/01/2013–12/31/2013 (Dep't Commerce July 18, 2016) ("Nantong Sec. III Response"). Commerce thereafter issued a supplemental questionnaire asking Wujin to explain, *inter alia*, aspects of Nantong and Wujin's corporate structures. *Supplemental Questionnaire for Initial Questionnaire Response*, C-570–046, POI 01/01/15 – 12/31/15, at Attach., p. 1 (Dep't Commerce Aug. 10, 2016) ("Second Supp. Q."). Wujin's response indicated that "all of the requested detail has already been provided" regarding Wujin's ownership of Nantong. *Response to Department's Second Supplemental CVD Questionnaire*, C-570–046, POI 01/01/15 – 12/31/15, at 2 (Dep't Commerce Aug. 15, 2016) ("Second Supp. Q. Response").

In its Preliminary Determination, Commerce found no cross-ownership because Wujin was not a majority shareholder of Nantong and no other evidence indicated Wujin could use Nantong's assets as its own. *Decision Memorandum for the Preliminary Determination*, C-570046, POI 01/01/15 – 12/31/15, at 5–6 (Dep't Commerce Aug. 29, 2016) ("*Prelim. I&D Memo*"). Commerce issued a third supplemental questionnaire, requesting further information on the relationship between Wujin and Nantong. *Department's Third Supplemental CVD Questionnaire*, C-570–980, POI 01/01/2013–12/31/2013, at 3–4 (Dep't Commerce Sept. 9, 2016) ("Third Supp. Q."). Wujin submitted a re-

[1] Hereinafter, citations to administrative record documents will omit the pre-colon "1Hydroxyethylidene-1, 1-Diphosphonic Acid From the People's Republic of China" portion.

sponse, *Wujin Water's Response to Department's Third Supplemental CVD Questionnaire*, C-570–980, POI 01/01/2013–12/31/2013 (Dep't Commerce Sept. 26, 2016) ("Third Supp. Q. Response"), and both Wujin and Nantong were thereafter subject to on-site verification, *see generally Verification of the Questionnaire Responses of Nanjing University of Chemical Technology Changzhou Wujin Water Quality Stabilizer Factory; Nantong Uniphos Chemicals Co., Ltd.; and Changzhou Wujin Fine Chemical Factory Co., Ltd.*, C-570–046, POI 01/01/15 – 12/31/15 (Dep't Commerce Jan. 10, 2017) ("Verification Report"). Having the benefit of these verifications, Commerce's *Final Determination* nevertheless found that Wujin and Nantong were not cross-owned. *Issues and Decision Memorandum for the Final Affirmative Determination*, C-570–046, POI 01/01/15 – 12/31/15, at 11–13 (Dep't Commerce Mar. 20, 2017) ("*Final I&D Memo*"); *see also Final Affirmative Determination*, 82 Fed. Reg. 14,872, 14,873 (Dep't Commerce Mar. 23, 2017) ("*Final Determination*"). Ultimately, Commerce assigned a *de minimis* countervailing duty to Wujin, but assigned Nantong the "All-Others" duty rate: 2.40 percent. *Countervailing Duty Order*, 82 Fed. Reg. 22,809, 22,810 (Dep't Commerce May 18, 2017).[2]

## JURISDICTION AND STANDARD OF REVIEW

The court has jurisdiction pursuant to 19 U.S.C. § 1516a(a) (2012). Commerce's final results in a countervailing duty investigation are upheld unless "unsupported by substantial evidence on the record, or otherwise not in accordance with law." 19 U.S.C. § 1516a(b)(1)(B)(i).

## DISCUSSION

Commerce generally attributes subsidies to goods produced by the company receiving the subsidy. 19 C.F.R. § 351.525(b)(6)(i). Pursuant to Commerce's regulations, however, subsidies received by cross-owned corporations are jointly attributed to subject merchandise produced by both corporations. *See* 19 C.F.R. § 351.525(b)(6)(ii). In practice, both corporations thus receive a single countervailing duty rate. Plaintiffs contend that if Commerce had included Nantong's subsidies in Wujin's subsidy rate calculations, both companies would have been subject to a *de minimis* duty rate. Pl. Br. at 15. In failing to find cross-ownership between Nantong and Wujin, Plaintiffs argue, Commerce failed to properly apply 19 C.F.R. § 351.525(b)(6)(vi). Pl. Br. at 8–13.

This section defines cross-ownership as follows:

[2] Taihe's rate was the only non-*de minimis* rate, or rate not based entirely on facts otherwise available. Thus, the "All-Others" rate is Taihe's rate. *Final Determination*, 82 Fed. Reg. at 14,873.

> Cross-ownership exists between two or more corporations where one corporation can use or direct the individual assets of the other corporation(s) in essentially the same ways it can use its own assets. Normally, this standard will be met where there is a majority voting ownership interest between two corporations or through common ownership of two (or more) corporations.

19 C.F.R. § 351.525(b)(6)(vi). According to the regulatory preamble, the consideration underlying this rule is the merging of corporate interests. *See Countervailing Duties*, 63 Fed. Reg. 65,348, 65,401 (Dep't Commerce Nov. 25, 1998). Regarding shareholding percentages, the preamble indicates:

> Cross-ownership does not require one corporation to own 100 percent of the other corporation. Normally, cross-ownership will exist where there is a majority voting ownership interest between two corporations or through common ownership of two (or more) corporations. In certain circumstances, a large minority voting interest (for example, 40 percent) or a "golden share" may also result in cross-ownership.

*Id.* Common ownership, therefore, is a fact-specific determination and calculating the percentage ownership of a company is not the end of the inquiry.[3] This is reflected in Commerce's practice. *See Issues and Decision Memorandum for the Final Affirmative Determination in the Countervailing Duty Investigation of Melamine from Trinidad and Tobago*, C-274–807, POI 01/01/2013–12/31/2013, at 4 (Dep't Commerce Oct. 30, 2015) ("the agency must look at the facts presented in each case in determining whether cross-ownership exists").

Nantong was established in March 2011. Verification Report, at 4. Wujin acquired its shares of Nantong in November 2014, the same year Nantong began HEDP production. *Wujin Verification Exhibits*, C-274–807, POI 01/01/2013–12/31/2013, at Ex. 15(b) (Dep't Commerce Nov. 14, 2016) ("Verification Exhibits"); Verification Report, at 5. Wujin held these shares at the same level throughout the POI, during which Wujin was Nantong's second-largest shareholder, at [[ ]], the largest shareholder having [[ ]] and the third and final shareholder having [[ ]]. Verification Exhibits, at Ex. 15(b); Verification Report, at 5. During the POI, three Wujin directors sat on

[3] The regulatory preamble expressly distinguishes the "cross-ownership" defined by 19 C.F.R. § 351.525(b)(6)(vi) from the broader concept of "affiliation," found in 19 U.S.C. § 1677(33). 63 Fed. Reg. at 65,401. Affiliation is seen as a lower bar. *Id. See also Beijing Tianhai Indus. Co. v. United States*, 52 F. Supp. 3d 1351, 1366 n.20 (CIT 2015).

Nantong's eight-person board. *Id.* The largest shareholder also had three directors on Nantong's board. Verification Report, at 5. During the POI, Wujin was in the process of shutting down its HEDP production and shifting production to Nantong. Third Supp. Q. Response, at 5. This process was not completed until after the POI. *Id.* at 4–5.

Wujin's shareholder status, the shared directors, and Wujin's post-POI shutdown and subsequent transfer of production were all acknowledged in Commerce's final determination. *Final I&D Memo*, at 11. Commerce found no evidence of majority ownership, veto power, or golden shares, and concluded that two-out-of-three shareholders were needed to direct or control Nantong. *Id.* at 12. In Commerce's view, Wujin thus presented insufficient evidence of cross-ownership. *Id.* Commerce found further evidence of events after the POI to be irrelevant. *Id.*

Plaintiffs now renew their argument that Nantong was cross-owned by Wujin within the meaning of Section 351.525(b)(6)(vi). Section 351.525(b)(6)(vi) couches the cross-ownership inquiry in terms of the power to control, e.g., that Wujin "can use" rather than actually uses Nantong's assets. Logically, actual use predicated upon other shareholders' consent does not necessarily suggest the degree of control necessary to unilaterally use corporate assets.

Taken together, facts adduced by Plaintiffs indicate Wujin had a significant voice at the highest level of Nantong's operations, perhaps even controlling Nantong's sales personnel. Verification Report, at App'x II (showing Nantong and Wujin as having the same sales manager at time of verification). Although, for example, a forty percent minority shareholder might wield *de facto* control over the use or disposition of corporate assets where all other shareholders hold a two percent stake, such power is not clearly found where there are only three minority shareholders, and all hold significant percentage stakes. In Nantong's case, any two shareholders could have directed all but the most fundamental corporate actions without the third shareholder's approval.[4] Considering this, Commerce could, and did, reasonably find that Wujin alone did not control Nantong. *Final I&D Memo*, at 11–13. The background of Nantong's formation bolsters Commerce's conclusion. One could reasonably infer that Wujin invested in Nantong in order to pool its resources with other chemical

[4] Each director held one vote. Nantong Sec. III Response, at Ex. 7. Actions requiring a two-thirds vote of Nantong directors, and which Wujin could thus veto, include: revision of the by laws, increase or decrease in registered capital, merger, split-up, or dissolution. *Id.* Other actions required only a simple majority. *Id.* All board meetings require two-thirds of directors be present. *Id.*

producers. *See* Third Supp. Q. Response, at 4–5. Nantong was a joint venture in which each participant sacrificed a significant degree of control, but enjoyed economies of scale.[5] *See id.* This is so, even if, *arguendo*, the court accounts for Wujin's post-POI transfer of HEDP production to Nantong.[6]

Alternatively, Plaintiffs argue that, because Commerce obtained and verified data necessary to calculate an individual rate for Nantong, Commerce erred in failing to do so. Pl. Br. at 14. Where the total number of producers is too large to calculate a countervailing duty rate for each, Commerce may calculate individual rates for a reasonable number of producers. *See* 19 U.S.C. § 1677f-1(e)(2). Specifically, Commerce may limit its examination to:

> (i) a sample of exporters or producers that the administering authority determines is statistically valid based on the information available to the administering authority at the time of selection, or
>
> (ii) exporters and producers accounting for the largest volume of the subject merchandise from the exporting country that the administering authority determines can be reasonably examined[.]

*Id.* § 1677f-1(e)(2)(i)–(ii). In Commerce's Respondent Selection Memorandum, it chose the latter path. Respondent Selection Memo, at 3. The provision under which Commerce acted did not limit its selection of exporters to "information available . . . at the time of selection." *Compare* 19 U.S.C. § 1677f-1(e)(2)(i) *with* 19 U.S.C. § 1677f-1(e)(2)(ii). Nevertheless, record evidence indicates that, consistent with Section 1677f-1(e)(2)(ii), Wujin accounted for a larger volume of the subject merchandise than did Nantong. Wujin's HEDP sales data indicated that, during the POI, it sold [[ ]] metric tons, [[ ]] of which were exported to the United States. Third Supp. Q. Response, at Ex. CVD3S-7. The next year, Wujin sold [[ ]] metric tons, [[ ]]

[5] In theory, the concept of cross-ownership would also encompass a situation in which Nantong controlled Wujin. *See* 19 C.F.R. § 351.525(b)(6)(ii) (referring simply to "two (or more) corporations with cross-ownership"). This was argued neither during administrative proceedings, nor before the court. The record indicates that Nantong holds no shares of Wujin, and Wujin's largest shareholder holds a [[ ]] stake. Nantong Sec. III Response, at 7; Third Supp. Q. Response, at Ex. CVD3S-3.

[6] The court does not find that Nantong failed to exhaust its administrative remedies regarding this argument, as the relevance of events outside the POI was raised in Nantong's administrative case brief. *Case Brief*, C-570–046, POI 01/01/2015–12/31/2015, at 3 (Dep't Commerce Jan. 24, 2017). As for the relevance of 19 C.F.R. § 351.525(b)(6)(v) in particular, Pl. Br. at 5–6, that provision would not impact the court's reasoning. That subsection concerns the "[t]ransfer of subsidy between corporations with cross-ownership producing different products," 19 C.F.R. § 351.525(b)(6)(v), thus co-ownership is a prerequisite to its application.

of which were exported to the United States. *Id.* By contrast, Nantong's HEDP sales data show [[ ]] metric tons sold and [[ ]] metric tons exported to the United States over the POI. Nantong Sec. III Response, at Ex. 8-a. The following year, Nantong sold [[ ]] metric tons, [[ ]] of which were exported to the United States. *Id.* That Commerce analyzed and verified Nantong's submissions in conjunction with its cross-ownership analysis does not then require that Commerce take the further step of calculating a separate rate for Nantong, least of all when Nantong's 2014 and 2015 export numbers were markedly smaller than those of Wujin. Commerce's decision not to calculate a separate rate for Nantong is accordingly supported by substantial evidence.

## CONCLUSION

In all challenged respects, Commerce's *Final Determination* and Countervailing Duty Order are **SUSTAINED**. Judgment will enter accordingly.

Dated: June 25, 2018
New York, New York

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

Slip Op. 18–79

ATC TIRES PRIVATE LTD. AND ALLIANCE TIRE AMERICAS, INC., Plaintiffs, v. UNITED STATES, Defendant.

Before: Gary S. Katzmann, Judge
Court No. 17–00064

[Plaintiffs' motion for judgment on the agency record is denied, and Commerce's *Final Determination* is sustained.]

Dated: June 25, 2018

*Eric C. Emerson* and *J. Claire Schachter*, Steptoe & Johnson, LLP, of Washington, DC, argued for plaintiffs. With them on the brief was *Christopher G. Falcone*.

*John J. Todor*, Senior Trial Attorney, Commercial Litigation Branch, Civil Division, U.S. Department of Justice, of Washington, DC, argued for defendant. With him on the brief were *Chad A. Readler*, Acting Assistant Attorney General, *Jeanne E. Davidson*, Director, and *Franklin E. White, Jr.*, Assistant Director. Of counsel was *Jessica DiPietro*, Office of the Chief Counsel for Trade Enforcement & Compliance, U.S. Department of Commerce, of Washington, DC.

## *OPINION*

**Katzmann, Judge:**

In this case, the court enters territory rarely traversed by judicial decision — namely the intersection of foreign Special Economic Zone ("SEZ") and Export Oriented Unit ("EOU") programs with American laws that permit levying additional duties on certain imports entering the United States to offset the unfair competitive advantages enjoyed by foreign producers that are subsidized by their respective governments.[1] Plaintiffs ATC Tires Private Ltd. ("ATC") and Alliance Tires Americas, Inc. (collectively, "Alliance")[2] bring this action challenging the Department of Commerce's ("Commerce") final determination in a countervailing duty investigation covering certain new pneumatic off-the-road tires from India that incentives associated with Indian EOU and SEZ programs are countervailable subsidies. *Countervailing Duty Investigation of Certain New Pneumatic Off-the-Road Tires from India: Final Affirmative Determination, and Final Affirmative Critical Circumstances Determination, in Part*, 82 Fed.

[1] The only such judicial decision identified by the parties to the instant litigation is *Essar Steel Ltd. v. United States*, 34 CIT 1057, 721 F. Supp. 2d 1285 (2010). *See also Essar Steel Ltd. v. United States*, Slip Op. 11–10, 2011 WL 238657 (CIT Jan. 25, 2011) (sustaining remanded Commerce determination), *aff'd in part, rev'd in part*, 678 F.3d 1268 (Fed. Cir. 2012).

[2] ATC is the subsidiary that produces the tires in India and Alliance is the collective name for both plaintiffs (ATC and Alliance Tires America, Inc.) in this case, and these terms are used accordingly throughout this opinion.

Reg. 2,946 (Dep't Commerce Jan. 10, 2017) ("*Final Determination*"), P.R. 545, and accompanying Issues and Decision Memorandum (Dep't Commerce Jan. 3, 2017) ("*IDM*"), P.R. 538. Specifically, Alliance argues that Commerce's determination that SEZ and EOU facilities were within the customs territory of India and countervailable is neither supported by substantial evidence nor in accordance with law. The court concludes that Commerce's determination was supported by substantial evidence and in accordance with law.

## BACKGROUND

### A. *Legal Background*

#### *i. Countervailable Subsidies Generally.*

To empower Commerce to offset economic distortions caused by countervailable subsidies and dumping, Congress enacted the Tariff Act of 1930. *Sioux Honey Ass'n v. Hartford Fire Ins. Co.*, 672 F.3d 1041, 1046 (Fed. Cir. 2012). Under the Tariff Act's framework, Commerce may-either upon petition by a domestic producer or of its own initiative—begin an investigation into potential countervailable subsidies and, if appropriate, issue orders imposing duties on the subject merchandise. *Id.*; 19 U.S.C. §§ 1671, 1673.

Commerce determines that a countervailable subsidy exists where a foreign government provides a financial contribution which confers a benefit to the recipient. 19 U.S.C. §1677(5)(B). A "financial contribution" includes "the direct transfer of funds, such as grants, loans, and equity infusions, or the potential direct transfer of funds or liabilities, such as loan guarantees" and "foregoing or not collecting revenue that is otherwise due." 19 U.S.C. § 1677(5)(D)(i)–(ii). A subsidy must also be specific to be countervailable, and an export subsidy is considered specific when it "is, in law or in fact, contingent upon export performance, alone or as 1 of 2 or more conditions [for benefit eligibility]." 19 U.S.C. § 1677(5A)(B).

#### *ii. Special Economic Zones and Export Oriented Units in India.*

At issue in the case are Alliance's production facilities, one operating in an SEZ in Tamil Nadu and one operating in an EOU in Gujarat.[3] Commerce has recognized that an SEZ may be established to manufacture goods and to serve as a free trade and warehousing

[3] Alliance has explained that EOUs operate in the same manner as SEZs. ATC Initial Questionnaire Response at Exhibit 24A. Commerce does not dispute this conclusion, and accordingly the terms are used interchangeably.

area pursuant to India's SEZ Act of 2005. *See Polyethylene Terephthalate Firm, Sheet, and Strip from India*, 80 FR 46,956 (Dep't Commerce Aug. 6, 2015) (Preliminary Results), and accompanying Issues and Decision Memorandum ("Indian PET PDM 2015") at 13, *unchanged by Polyethylene Terephthalate Firm, Sheet, and Strip from India*, 81 FR 7,753 (Dep't Commerce Feb. 16, 2016). As the Government of India has explained: "SEZ/EOU units are designated areas located within India territory for the generation of additional economic activity within the country and for the promotion of exports. By Indian law, companies that operate SEZ/EOU units are entitled to exemptions from customs duties and from various taxes on goods and services that are imported and exported from SEZ/EOU facilities." *Final Determination* at 19–20 (summarizing the Government of India's comments). Companies in an Indian SEZ receive: (1) duty-free importation of capital goods and raw materials, components, consumables, intermediates, spare parts and packing material; (2) purchase of capital goods and raw materials, components, consumables, intermediates, spare parts and packing material without the payment of central sales tax thereon; (3) exemption from the services tax for services consumed within the SEZ; (4) exemption from stamp duty for all transactions and transfers of immovable property and related documents within the SEZ; (5) exemption from electricity duty on the sale or supply to the SEZ facility; (6) certain income tax exemptions; and (7) discounted land within an SEZ. *Id.* To be eligible for these benefits, all goods produced, excluding rejects and domestic sales, must be exported and must achieve a net foreign exchange ("NFE") goal — i.e., export a sufficient quantity of product — calculated cumulatively for a period of five years from the commencement of production. ATC's Resp. to Initial Countervailing Duty Questionnaire at 18–19 (Apr. 21, 2016) ("ATC Initial QR"), P.R. 156–58, 179, C.R. 98, 205, 219.

### B. *Factual and Procedural Background*

On February 10, 2016, Commerce initiated a countervailing subsidy investigation into off-the-road tires from India. *Certain New Pneumatic Off-the-Road Tires From India, The People's Republic of China, and Sri Lanka: Initiation of Less-Than-Fair-Value Investigations*, 81 Fed. Reg. 7,073 (Dep't Commerce), P.R. 54.[4] ATC, a producer of pneumatic off-the road tires in India, was selected as a mandatory

[4] The investigation was initiated in response to a petition filed on behalf of Titan Tire Corporation and the United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied Industrial and Service Workers International Union, AFL-CIO, CLC.

respondent.[5] *Final Determination*; *IDM*. Commerce issued a questionnaire to the Government of India, which was then forwarded to ATC. Letter from Dep't of Commerce to Embassy of India Pertaining to Gov't of India, Respondent Questionnaire (March 2, 2016), P.R. 87. In response, ATC indicated that one of its plants is located in an SEZ governed by the SEZ Act of 2005 and another plant has EOU status. ATC Initial QR at 15–16, 23, Ex. 19. Both plants are exempted from customs duties and various taxes. *Id.*; Gov't of India Resp. to Part II of the Department's Countervailing Duty Questionnaire at 77–78 (Apr. 28, 2016) ("Gov't of India QR"), P.R. 194, C.R. 347. ATC also stated that, under Indian law, the plants are located outside the customs area territory of India. ATC Initial QR at 16–20, 23. ATC explained that companies operating in an SEZ or EOU must meet a certain NFE requirement or be subject to a penalty, and detailed the controls the Government of India imposes on the shipment of merchandise from SEZs to India's domestic tariff area. *Id.* at 17, 19.

Commerce issued its preliminary determination on June 20, 2016. *Certain New Pneumatic Off-the-Road Tires from India*, 81 Fed. Reg. 39,903 (Dep't Commerce), P.R. 464, and accompanying Issues and Decision Memorandum ("*PDM*"), P.R. 455. Commerce preliminarily determined that the SEZ and EOU facilities are within the customs territory of India and these programs are countervailable because: (1) program eligibility is contingent upon export performance; (2) the Government of India had not provided evidence that its record-keeping measures for the program are sufficiently stringent; and (3) the same programs had been found countervailable in previous determinations. *PDM* at 18–23. Commerce consequently considered unpaid duty exemptions on capital goods and raw materials imported under the programs to be interest-free loans—and thus countervailable benefits—made to ATC at the time of importation. *Id.* at 23.

[5] In countervailable subsidy investigations or administrative reviews, Commerce may select mandatory respondents pursuant to 19 U.S.C. § 1677f-1(e)(2), which provides:

> If the administering authority determines that it is not practicable to determine individual countervailable subsidy rates [in investigations or administrative reviews] because of the large number of exporters or producers involved in the investigation or review, the administering authority may—
>
> (A) determine individual countervailable subsidy rates for a reasonable number of exporters or producers by limiting its examination to—
>
> (i) a sample of exporters or producers that the administering authority determines is statistically valid based on the information available to the administering authority at the time of selection, or
>
> (ii) exporters and producers accounting for the largest volume of the subject merchandise from the exporting country that the administering authority determines can be reasonably examined; or
>
> (B) determine a single country-wide subsidy rate to be applied to all exporters and producers.

At verification, the Government of India explained that the SEZ and EOU facilities are "considered to be bonded zones that are outside the domestic tariff area of India (DTA), and that they are both monitored in essentially the same manner." Verification of the Questionnaire Resps. Submitted by the Gov't of India (Oct. 5, 2017) at 2, P.R. 512, C.R. 707. The Government of India described its program monitoring methods as follows. Companies "execute a security bond that allows these companies to import goods without the payment of duties at the time of import" and Indian customs officials monitor imports through a "closed system" initiated by a company notifying "[Indian] Customs of its intent to import capital goods or raw materials." *Id.* "The actual physical goods" are "monitored based on the declaration forms regarding the goods" but "physical inspections [are] not normal." *Id.* The Government of India explained that they did not consider waste and consumption factors or provide for the monitoring of waste and scrap. *Id.* at 3. Customs officials had not audited ATC's manufacturing processes at ATC's SEZ location. *Id.* Exports from SEZs and EOUs are monitored in a similar fashion, and physical inspections are likewise atypical for EOU manufacturing. *Id.* ATC's explanation of the monitoring process was largely the same as the Government of India's description. Verification of the Questionnaire Resps. Submitted by ATC Tires Private Limited (Oct. 6, 2016) at 5 ("ATC Verification Resp."), P.R. 513, C.R. 708.

ATC submitted a case brief on October 17, 2016, arguing that record evidence demonstrated that the SEZ and EOU facilities were located outside the customs territory of India and, therefore, any duties and taxes not paid to the Government of India could not be considered a countervailable benefit provided by the Government of India. ATC Tires Private Limited's Case Brief at 19–28, P.R. 521–22, C.R. 711. The Government of India also argued that Indian law entitles companies not to pay certain customs duties and taxes related to their SEZ and EOU activities. Gov't of India's Case Br. (Oct. 13, 2016), P.R. 517.

In its *Final Determination* and accompanying *IDM*, Commerce continued to find that the SEZ and EOUs were within the customs territory of India and that these programs constituted countervailable subsidies under § 705 of the Tariff Act of 1930 and 19 CFR 351.519(a)(4). *IDM* at 21–25. Specifically, Commerce found that: (1) the NFE requirement and penalty for failing to meet it meant that companies were contingently liable for duties and taxes until the benchmark was met; (2) the Government of India lacked sufficient mechanisms to confirm the use of inputs in exported products, mak-

ing normal allowance for waste, and that there were "systemic record keeping problems"; and (3) this determination was consistent with prior Commerce rulings.

ATC instigated this action challenging Commerce's determination on April 5, 2017. Summ., ECF No. 1. ATC filed its Motion for Judgment on the Agency Record on September 29, 2017, the United States filed its response on December 21, 2017, and ATC filed its reply on January 26, 2018. Pl.'s Br., ECF Nos. 35–36; Def.'s Br., ECF No. 39; Pl.'s Reply, ECF No. 40. This court heard oral argument on June 5, 2018.

## JURISDICTION AND STANDARD OF REVIEW

The Court has jurisdiction over this action pursuant to 28 U.S.C. § 1581(c) and 19 U.S.C. § 1516a(a)(2)(A)(i)(I) and (a)(2)(B)(ii). The standard of review in this action is set forth in 19 U.S.C. § 1516a(b)(l)(B)(i): "[t]he court shall hold unlawful any determination, finding or conclusion found . . . to be unsupported by substantial evidence on the record, or otherwise not in accordance with law."

## DISCUSSION

Of relevance to the instant case, Commerce determined that the SEZ and EOU units are countervailable because there was a financial contribution and a benefit was conferred.[6] *See* 19 U.S.C. §1677(5)(B), (D)(i)–(ii) (discussed at *supra*, p. 2). Alliance contends that Commerce's determination that ATC received a benefit was not supported by substantial evidence or in accordance with law because it applied the wrong standard in determining whether ATC's facilities operate outside India's customs territory. Alliance argues that, because ATC's facilities operated in SEZ/EOU locations outside of the customs territory of India and were exempt from duties and taxes under Indian law, no revenue was foregone by the Government of India as a result of these exemptions and thus no countervailable subsidies were provided. Further, Alliance argues that the Government of India has sufficient monitoring mechanisms in place at SEZ and EOU facilities to ensure that these facilities operate outside the customs territory of India, and that Commerce should not have relied on 19 C.F.R. § 351.519(a)(4) to determine the adequacy of the Government of India's monitoring system. These arguments are not persuasive.

[6] Commerce also determined that the special economic zones are specific: "because eligibility for all [SEZ] benefits is contingent upon export performance, we find that the assistance provided under the program is specific with the meaning of sections [1677(5A)(A) and (B)]". *See PDM* at 23; *IDM* at 23. Alliance does not dispute that determination in its briefing to this court and this issue of specificity is thus not before the court. *See Novosteel SA v. United States*, 284 F.3d 1261, 1274 (Fed. Cir. 2002).

Commerce's determination that revenue was foregone, and a countervailable benefit thus conferred, is supported by substantial evidence. Substantial evidence is "more than a mere scintilla" and amounts to what a "reasonable mind might accept as adequate to support a conclusion." *Downhole Pipe & Equip., L.P. v. United States*, 776 F.3d 1369, 1374 (Fed. Cir. 2015) (quoting *Consol. Edison Co. of N.Y. v. NLRB*, 305 U.S. 197, 229 (1938)). Here, SEZ and EOU activities were exempt from duties and taxes as long as they met the NFE requirement. If the NFE requirement was not met, companies had to pay a penalty to the Government of India. On this basis, Commerce reasonably determined that taxes and duties were applied to goods entering the SEZ and EOUs and that Companies were contingently liable for taxes and duties until the NFE requirement was met. Therefore, when the Government of India did not require companies to pay these taxes and duties which were otherwise owed after meeting the NFE requirement, a benefit was conferred in the form of tax and duty revenue foregone consistent with 19 U.S.C. § 1677(5). *IDM* at 22; *see* 19 U.S.C. § 1677(5)(B), (D)(i)–(ii). *DM* at 22.

Alliance argues that, because the penalty is not explicitly tied to the amount of taxes or duties owed, and is instead potentially tied to the amount a company falls below its NFE requirement, Commerce's determination that revenue is foregone is not supported by substantial evidence. Pl.'s Br. at 22–23. However, Alliance provides no authority for why this distinction matters, let alone why it renders Commerce's conclusion unsupported by substantial evidence. Citing other matters, Alliance also contends that Commerce's determination here is inconsistent with findings that other countries' duty free zones are not countervailable, and is thus arbitrary and capricious.[7] To the contrary, the court concludes that this determination is consistent with Commerce's previous treatment of India's SEZ and EOU programs. *See* Indian PET PDM 2015 at 13; *Polyethylene Terephthalate Firm, Sheet, and Strip from India: Final Results of Countervailing New Shipper Review*, 76 FR 30,910 (Dep't Commerce May 27, 2011) ("Indian PET Film NSR"), and accompanying Issues and Decision Memorandum at 15. Furthermore, the duty free programs in the

[7] *See, e.g.*, *Circular Welded Carbon-Quality Steel Pipe from Vietnam: Final Negative Countervailing Duty Determination*, 77 FR 64,471, and accompanying Issues and Decision Memorandum (Dep't of Commerce Oct. 22, 2012) at 14; *Final Results of Countervailing Duty (CVD) Administrative Review: Circular Welded Carbon Steel Pipes and Tubes from Turkey*, 78 FR 64,916, and accompanying Issues and Decision Memorandum (Dep't of Commerce Oct. 30, 2013) at 21; *Certain Polyethylene Terephthalate Resin from the Sultanate of Oman: Final Negative Countervailing Duty Determination*, 81 FR 13,321, and accompanying Issues and Decision Memorandum (Dep't of Commerce March 4, 2016) at 9–10; *Certain Uncoated Paper From Indonesia: Final Affirmative Countervailing Duty Determination*, 81 FR 3,104, and accompanying Issues and Decision Memorandum (Dep't of Commerce Jan. 7, 2016) at 20–21.

determinations cited by Alliance involved no contingent liability or other evidence of foregone revenue, and are thus distinguishable from the SEZ and EOU programs at issue here. As noted in *Circular Welded Carbon-Quality Steel Pipe from Vietnam*:

> There is no indication that the SEZs we analyzed there were outside the customs territory of India. Rather, we observed in that case that "until an SEZ demonstrates that it has fully met its export requirement, the company remains contingently liable for the import duties," which implies that a duty obligation is incurred when goods enter the SEZ. This is not the situation present in the investigated program in Vietnam.

*Circular Welded Carbon-Quality Steel Pipe from Vietnam: Final Negative Countervailing Duty Determination*, 77 FR 64,471, and accompanying Issues and Decision Memorandum (Dep't Commerce Oct. 22, 2012) ("Vietnam IDM") at 14 (quoting PET Film from India NSR and accompanying IDM at 15).

Commerce's determination that the Government of India lacked sufficient monitoring systems to ensure that the SEZs and EOUs operated outside its customs territory is also supported by substantial evidence and in accordance with law. When import charges are exempted upon export, "a benefit exists to the extent that the exemption extends to inputs that are not consumed in the production of the exported product, making normal allowances for waste, or if the exemption covers charges other than import charges that are imposed on the input." 19 CFR § 351.519(a)(1)(ii). Furthermore,

> [T]he Secretary [of Commerce] will consider the entire amount of an exemption, deferral, remission or drawback to confer a benefit, unless the Secretary determines that:
>
> (i) The government in question has in place and applies a system or procedure to confirm which inputs are consumed in the production of the exported products and in what amounts, and the system or procedure is reasonable, effective for the purposes intended, and is based on generally accepted commercial practices in the country of export; or
>
> (ii) If the government in question does not have a system or procedure in place, if the system or procedure is not reasonable, or if the system or procedure is instituted and considered reasonable, but is found not to be applied or not to be applied effectively, the government in question has carried out an ex-

> amination of actual inputs involved to confirm which inputs are consumed in the production of the exported product, and in what amounts.

19 CFR § 351.519(a)(4).

Here, substantial record evidence supports Commerce's determination that the Government of India lacks an adequate system in place to confirm which inputs, and in what amounts, are consumed in the production of exported products, making normal allowance for waste. *IDM* at 23; Gov't of India Verification Report at 3. In its questionnaire responses, the Government of India stated that its monitoring system for the SEZ and EOU programs does not consider waste and consumption production factors or monitor waste and scrap and physical inspections are atypical. Verification Report at 3. This determination is also consistent with Commerce's prior findings that the Government of India's monitoring system has systemic record-keeping problems. *See* Indian PET Film NSR IDM at 14–15; Indian PET Film PDM 2015 at 13–18.

Alliance does not dispute that the Government of India's monitoring system does not account for production inputs, nor that 19 CFR § 351.519(a)(4) applies to situations where duties exemption programs are conducted within a country's customs territory. Pl.'s Reply at 7–8. Rather, Alliance contends Commerce applied the wrong standard and that its decision is therefore not in accordance with law. According to Alliance, 19 CFR § 351.519(a)(4) does not apply to duty free zones and Commerce should instead consider whether there are "enforcement measures that ensure goods entering the free trade area are accounted for through exportation or entry into the country's customs territory and, in the latter case, appropriate duties are collected." Pl.'s Br. at 12 (quoting *Certain Uncoated Paper From Indonesia: Final Affirmative Countervailing Duty Determination*, 81 FR 3,104, and accompanying Issues and Decision Memorandum (Dep't Commerce Jan. 7, 2016) ("Indonesia IDM") at 22).

This argument is not persuasive. As previously discussed, the Indian SEZ and EOU programs impose contingent duty liability on companies, while the programs in the determinations Alliance cites do not impose such duties. *See, e.g.*, Vietnam IDM at 13–14 (distinguishing the Indian SEZ program from Vietnam's on the basis of contingent duty liability). As such, the SEZ and EOU programs are within the Indian customs territory, and 19 CFR § 351.519(a)(4) applies. *See id.* at 13 ("19 CFR 351.519 addresses situations where duties are otherwise due, i.e., situations in which goods enter the country's customs territory."). Further, Commerce has applied this

same standard to evaluating the Indian SEZ and EOU programs before, so it is hardly inconsistent with precedent to do so again.

Moreover, the monitoring methods found sufficient in determinations applying Alliance's proposed standard were more extensive than those employed by the Government of India here. *See, e.g.*, Vietnam IDM at 14–15 (detailing a rigorous monitoring process that involves physical inspections, evaluation of scrap use, and fraud detection software); *Final Results of Countervailing Duty (CVD) Administrative Review: Circular Welded Carbon Steel Pipes and Tubes from Turkey*, 78 FR 64,916, and accompanying Issues and Decision Memorandum (Dep't Commerce Oct. 30, 2013) at 21 ("[W]e note that the Department has previously examined Turkey's duty drawback system and determined that the [Government of Turkey] has in place and applies a drawback system that ensures that duty exemptions are provided only to products that are consumed in the production of the exported product."); Indonesia IDM at 22–23 (describing a rigorous monitoring process that involved routine record keeping, physical inspections, and periodic audits); *Certain Polyethylene Terephthalate Resin from the Sultanate of Oman: Final Negative Countervailing Duty Determination*, 81 FR 13,321, and accompanying Issues and Decision Memorandum (Dep't Commerce Mar. 4, 2016) at 12 (noting that goods "entering and leaving the zone must be administered by Oman customs in the same manner as merchandise entering and leaving the Port of Salalah itself, as such merchandise is imported into or exported from Oman").

## CONCLUSION

For the reasons stated above, Commerce's determination is supported by substantial evidence and in accordance with law. The court thus denies Alliance's motion and sustains Commerce's *Final Determination*.

**SO ORDERED**.

Dated: June 25, 2018
New York, New York

*/s/ Gary S. Katzmann*
GARY S. KATZMANN, JUDGE