U.S. Customs and Border Protection

Slip Op. 14–116

AMERICAN TUBULAR PRODUCTS, LLC, and JIANGSU CHENGDE STEEL TUBE SHARE CO., LTD., Plaintiffs, v. UNITED STATES, Defendant, and UNITED STATES STEEL CORPORATION, TMK IPSCO, WHEATLAND TUBE COMPANY, and V&M STAR L.P., Defendant-Intervenors.

Before: Richard W. Goldberg, Senior Judge
Court No. 13–00029
PUBLIC VERSION

[The court remands the final results of an administrative review of an antidumping duty order on oil country tubular goods from the People's Republic of China.]

Dated: September 26, 2014

Donald B. Cameron, *Julie C. Mendoza*, *R. Will Planert*, *Brady W. Mills*, *Mary S. Hodgins*, and *Sarah S. Sprinkle*, Morris, Manning & Martin LLP, of Washington, DC, for plaintiffs.

L. Misha Preheim, Senior Trial Counsel, Commercial Litigation Branch, Civil Division, U.S. Department of Justice, of Washington, DC, for defendant. With him on the brief were *Stuart F. Delery*, Assistant Attorney General, *Jeanne E. Davidson*, Director, and *Claudia Burke*, Assistant Director. Of counsel on the brief was *Whitney Rolig*, Office of the Chief Counsel for Trade Enforcement & Compliance, U.S. Department of Commerce, of Washington, DC.

Robert E. Lighthizer, *Jeffrey D. Gerrish*, *Ellen J. Schneider*, and *Luke A. Meisner*, Skadden, Arps, Slate, Meagher & Flom LLP, of Washington, DC, for defendant-intervenor United States Steel Corporation.

Roger B. Schagrin and *John W. Bohn*, Schagrin Associates, of Washington, DC, for defendant-intervenors TMK IPSCO, Wheatland Tube Company, and V&M Star L.P.

OPINION AND ORDER

Goldberg, Senior Judge:

In this case, Jiangsu Chengde Steel Tube Share Co., Ltd. ("Chengde") and American Tubular Products, LLC ("ATP") (collectively, "Plaintiffs") challenge the results of the 2010–2011 review of an antidumping duty order on oil country tubular goods ("OCTG") from the People's Republic of China. *See Certain Oil Country Tubular Goods from the People's Republic of China*, 77 Fed. Reg. 74,644 (Dep't Commerce Dec. 17, 2012) (final admin. review) ("*Final Results*") and accompanying Issues & Decision Mem. ("*I&D Memo*"), as amended by

Certain Oil Country Tubular Goods from the People's Republic of China, 78 Fed. Reg. 9033 (Dep't Commerce Feb. 7, 2013) (amended admin. review).[1]

Plaintiffs argue that the Department of Commerce ("Commerce" or "the agency") made five incorrect decisions in the *Final Results*. These decisions include (1) Commerce's choice of surrogate values for steel billet, one of the inputs into Chengde's OCTG, (2) the decision to deny Chengde a normal value offset for steel scrap produced and sold during the review period, (3) Commerce's surrogate value for ocean freight, (4) Commerce's surrogate value for inland freight, and (5) the decision to classify thread protectors as a direct input into OCTG and not as a packing material. *See generally I&D Memo*. The court remands the first of these decisions for reevaluation but sustains the agency's reasoning on the remaining four topics.

GENERAL BACKGROUND

The U.S. government levies fees on foreign goods sold in the United States for less than their fair value, so long as those sales harm or threaten U.S. domestic industry. *See* 19 U.S.C. § 1673 (2006). Commerce begins calculating these fees—called antidumping duties—by subtracting a foreign product's "export price," or the product's price in the United States, from its "normal value," or the product's price in the exporting country. *See id.* The difference is the goods' "dumping margin." *Id.* § 1677(35)(A).

How Commerce calculates normal value ("NV") depends on whether the exporter makes its wares in a market economy ("ME") or a nonmarket economy ("NME"). For goods made in ME countries, Commerce generally uses the goods' price in the exporting country as NV. *See id.* § 1677b(a)(1)(B)(i). For NME exports, however, the calculus is not so simple. The law presumes that government action distorts both the price of goods made in NME countries and the cost of inputs used to make those goods. *See Blue Field (Sichuan) Food Indus. Co. v. United States*, 37 CIT __, __, 949 F. Supp. 2d 1311, 1317 (2013). To calculate NV for goods made in NME countries, then, the agency assigns each of the goods' inputs an artificial market price or surrogate value. *See* 19 U.S.C. § 1677b(c)(1). Once Commerce finds the total cost of inputs used, it adds an amount for general expenses, profit, containers, and other costs. *Id.* The sum of this equation is the goods' NV.

Naturally, Commerce cannot pack the NV formula with whatever data it wishes. Rather, the law requires that only "the best available

[1] Chengde is a producer and exporter of OCTG. ATP is an importer of OCTG into the United States. *See* Summons, ECF No. 1.

information" be used for surrogate values. *Id.* Ordinarily, Commerce selects surrogate values from ME countries that produce significant amounts of subject merchandise and that are economically comparable to the exporting country. *Id.* § 1677b(c)(4). Commerce also prefers data that are "product-specific, representative of a broad-market average, publicly available, contemporaneous with the [review period], and free of taxes and duties" for use as surrogates. *I&D Memo* at cmt. 1.

To aid these calculations, the parties to a review—including foreign exporters and interested U.S. companies—may submit data. Commerce generally requests data through questionnaires at the outset of a review. *See* 19 C.F.R. § 351.221(b)(2) (2014). Later, if the agency finds it needs more information to complete its work, it may send out supplemental questionnaires. *See id.* § 351.301(a). Commerce then analyzes the data on the administrative record and publishes preliminary results, to which the parties respond with case briefs and rebuttals. *See id.* §§ 351.221(b)(4)(ii), 351.309(c)(1)(ii). Final results are issued after Commerce closes the record to additional information and argument. *See id.* § 351.221(b)(5).

In the present review, Commerce sought to determine dumping margins for OCTG from the People's Republic of China, an NME country. The agency made a number of preliminary decisions that Plaintiffs contested in their case briefs. These included (1) Commerce's choice of surrogate values for steel billet, (2) the decision to deny Chengde an NV offset for steel scrap produced and sold during the review period, (3) Commerce's surrogate value for ocean freight, (4) Commerce's surrogate value for inland freight, and (5) the decision to classify thread protectors as a direct input into the OCTG and not as a packing material. *See I&D Memo* at cmts. 1–2, 7–9. Commerce reaffirmed these decisions in the *Final Results*, and Chengde appealed on January 16, 2013. *See* Summons, ECF No. 1.

JURISDICTION AND STANDARD OF REVIEW

The court has jurisdiction to hear this appeal under 28 U.S.C. § 1581(c). The court will uphold the agency's decisions unless those decisions are "unsupported by substantial evidence on the record, or otherwise not in accordance with law." 19 U.S.C. § 1516a(b)(1)(B)(i).

DISCUSSION

In light of these standards, the court must remand one issue to Commerce: the choice of surrogate values for steel billet. The court sustains the agency on all other counts, including Commerce's denial

of an offset for steel scrap, the choice of surrogate values for ocean and inland freight, and the decision to classify thread protectors as direct inputs.

I. The Surrogate Values for Steel Billet Were Not Based in Substantial Evidence

To begin, the court considers Plaintiffs' claims regarding steel billet, the main ingredient in Chengde's OCTG. Plaintiffs allege that the agency made three wrong decisions when assigning surrogate values for billet: (1) Commerce incorrectly concluded that Chengde used alloy steel billets—not carbon steel billets—to produce most of the OCTG sold during the review period, (2) the agency selected a surrogate value for carbon steel billet that was not specific to the billet Chengde used, and (3) Commerce chose a surrogate value for high-carbon steel billet that was aberrantly expensive. Pls.' Mot. for J. on Agency R. 12–23, ECF No. 39–1 ("Pls.' Br.").

The court finds the first of these decisions was not based in substantial evidence, because Commerce failed to explain why documents proving the chemical makeup of some of Chengde's billet could not also prove the makeup of the remaining billet. The court also remands the third decision at the agency's request.

A. Background

Before tackling the merits, the court must explain how Commerce decided what fraction of Chengde's billet was alloy or carbon steel. The administrative history is complex, so the court provides tables below to summarize the data relevant to the agency's decision making.

At the outset of the review, Commerce asked Chengde to identify the factors of production it used to produce subject OCTG. Chengde responded with proposed surrogate values for its inputs, including a surrogate value for steel billet. Chengde Resp. to Sections C&D Questionnaire ("C&D Resp.") at Ex. D-5, CD IV 19–23 (Nov. 17, 2011), ECF No. 46–3 (May 24, 2013). The surrogate Chengde offered was U.S. Harmonized Tariff Schedule ("HTS") 7224.90.0075, a subheading covering semifinished alloy steel products. *Id.* Chengde also furnished inventory out slips and a monthly steel billet consumption statement to document its billet use. *Id.* at Ex. R-2.

In December 2011, Commerce issued its first supplemental questionnaire. First Supplemental Questionnaire ("First Supp. Q."), CD IV 30 (Dec. 12, 2011), ECF No. 46–3 (May 24, 2013). The questionnaire asked Chengde to state the chemical makeup of its inputs and to provide supporting documents, including sample purchase con-

tracts, invoices, packing lists, and certificates of assay. *Id.* at 6. Chengde answered with a technical description of its inputs and sales contracts from a billet supplier. First Supplemental Resp. ("First Supp. Resp.") at Exs. S14, S1–5, CD IV 36–43 (Jan. 11, 2012), ECF No. 46–3 (May 24, 2013). These data outlined the American Society of Mechanical Engineers ("ASME") specifications for Chengde's billet: SA106C, 28Mn2, and SA210C. These data did not indicate whether Chengde's billet was carbon or alloy steel, however.[2]

Commerce then sent a second supplemental questionnaire asking Chengde to "submit sample product quality certificates and mill test reports/certificates for all control numbers ('CONNUMS') sold during the [review period]." Second Supplemental Questionnaire ("Second Supp. Q.") at 4, CD IV 47 (Feb. 15, 2012), ECF No. 46–3 (May 24, 2013). In reply, Chengde sent its U.S. purchase contracts and the first pages of ten mill certificates, which listed the chemical properties of OCTG sold during the review period. Second Supplemental Resp. ("Second Supp. Resp.") at Exs. S2–13, S2–14, CD IV 50–58 (Mar. 15, 2012), ECF No. 46–3 (May 24, 2013). Each page from the mill certificates corresponded to a discrete U.S. sales contract for a single type of OCTG, but only part of the total OCTG sold was sampled. All OCTG specifically tested in the mill certificates was made of carbon steel.[3]

Table 1 shows the amount of OCTG sampled and sold under each U.S. sales contract during the review period. Henceforth, the court refers to the [[ ]] percent of OCTG specifically tested in the certificates as the "sampled OCTG." The remaining [[ ]] percent of OCTG sold is referred to as the "unsampled OCTG."

[2] In its Section A response, Chengde furnished a brochure detailing the chemical properties of ASME SA210C steel. Chengde Resp. to Section A Questionnaire at Ex. A-19, CD IV 14–18 (Oct. 20, 2011), ECF No. 463 (May 24, 2013). Commerce found the brochure was inconclusive regarding whether SA210C is alloy or carbon steel. *See I&D Memo* at cmt. 1.

[3] Chengde also sent the agency a few more billet sales contracts. Second Supp. Resp. at Ex. S2-15.

Table 1: OCTG Sampled in Mill Certificates[4]						
U.S Sale Number	**Contract Number**	**Model**	**CONNUM**	**Weight Sampled in Mill Certificate (MT)**	**Total Weight Sold (MT)**	**Percent Sampled (%)**
1	[[ ]]	[[ ]]	1	[[ ]]	[[ ]]	[[ ]]
2	[[ ]]	[[ ]]	2	[[ ]]	[[ ]]	[[ ]]
3	[[ ]]	[[ ]]	3	[[ ]]	[[ ]]	[[ ]]
4	[[ ]]	[[ ]]	4	[[ ]]	[[ ]]	[[ ]]
5	[[ ]]	[[ ]]	5	[[ ]]	[[ ]]	[[ ]]
6–7	[[ ]]	[[ ]]	6	[[ ]]	[[ ]]	[[ ]]
8–10	[[ ]]	[[ ]]	5	[[ ]]	[[ ]]	[[ ]]
11–13	[[ ]]	[[ ]]	6	[[ ]]	[[ ]]	[[ ]]
14	[[ ]]	[[ ]]	7	*Not sampled*	[[ ]]	0.00
15	[[ ]]	[[ ]]	8	*Not sampled*	[[ ]]	0.00
16	[[ ]]	[[ ]]	9	*Not sampled*	[[ ]]	0.00
17	[[ ]]	[[ ]]	6	[[ ]]	[[ ]]	[[ ]]
18–19	[[ ]]	[[ ]]	6	[[ ]]	[[ ]]	
TOTAL				**[[ ]]**	**[[ ]]**	**[[ ]]**

After issuing yet another questionnaire, Commerce published its preliminary results. *Certain Oil Country Tubular Goods from the*

[4] Table 1 is based on Attachment A to Defendant-Intervenor United States Steel Corporation's brief. Mem. in Opp'n to Pls.' Mot. for J. on Agency R., ECF No. 72. The data in the chart come from Chengde's mill certificates, its U.S. sales contracts, and a sales database from the third supplemental response. *See* Second Supp. Resp. at Exs. S2–13, S2–14; Third Supplemental Resp. at Ex. S3–12, CD IV 60–65 (May 2, 2012), ECF No. 46–3 (May 24, 2013). Furthermore, each numeral in the chart's CONNUM column corresponds to a unique control number or product identifier, as outlined in Attachment A to U.S. Steel's brief.

People's Republic of China, 77 Fed. Reg. 34,013 (Dep't Commerce June 8, 2012) (prelim. admin. review) ("*Preliminary Results*"). As a surrogate value for steel billet, Commerce used Indonesian Global Trade Atlas ("GTA") import data for alloy steel. Prelim. Factor Valuation Mem. ("Prelim. Factor Mem.") at Attach. 1, PD II 114 (May 30, 2012), ECF No. 46–2 (May 24, 2013). Apparently, Commerce had either ignored or rejected any data hinting that Chengde's OCTG was made of carbon steel.

Between the *Preliminary Results* and the case briefs, the parties submitted additional data. First, in an administrative protective order ("APO") application, ATP sent Commerce a Customs and Border Protection ("CBP") entry summary that classified OCTG sold under contract [[ ]] as carbon steel. APO Appl. at Attach. 1, CD IV 69 (Jul. 16, 2012), ECF No. 463 (May 24, 2013). The United States Steel Corporation ("U.S. Steel"), a Defendant-Intervenor on appeal, also submitted rebuttal data including website screenshots. U.S. Steel Surrogate Value Rebuttal at Exs. J–K, PD II 130 (July 16, 2012), ECF No. 46–2 (May 24, 2013). The screenshots showed that Chengde's model P110 steel tubes—the type of OCTG sold under contracts [[ ]]—were made of alloy steel.

Plaintiffs then submitted case briefs contesting Commerce's surrogate value for steel billet. *See* ATP Revised Case Br. ("ATP Case Br.") at 3–13, CD IV 73 (Aug. 3, 2012), ECF No. 46–3 (May 24, 2013); Chengde Revised Case Br. ("Chengde Case Br.") at 1–9, PD II 144 (Aug. 2, 2012), ECF No. 46–2 (May 24, 2013). In both of those briefs, Plaintiffs argued that Chengde made a mistake in its initial response, accidentally classifying its billet as alloy steel instead of carbon steel. To correct this error, they asked Commerce to value billet under HTS 7207.19, a subheading covering semifinished products of iron or non-alloy steel. Chengde Case Br. 1–2; *see also* ATP Case Br. 3–4. In Plaintiffs' view, Chengde's mill certificates proved that all the OCTG sold during the review period was carbon steel. Plaintiffs also argued that the Indonesian GTA data were unfit as surrogate values for carbon steel billet. *See* Chengde Case Br. 3–9. In their estimation, prices under Indonesian HTS 7207.19 seemed aberrantly high and not specific to Chengde's inputs, especially when judged against alternative Ukrainian data. *Id.*

At the end of the administrative marathon, Commerce concluded that most of Chengde's billet was made of alloy steel. *See* Final Analysis Mem. at 2, CD IV 80 (Dec. 5, 2012), ECF No. 46–3 (May 24, 2013). In support, the agency relied on Chengde's initial questionnaire response, which claimed that all its billet inputs were alloy

steel. *I&D Memo* at cmt. 1. Commerce also cited the billet consumption statement, inventory out slips, and website data to prove that the preponderance of Chengde's billet was alloy steel. *Id.*

Even so, Commerce held that part of Chengde's billet was carbon steel for two reasons. First, Commerce found that finished OCTG has the same chemical properties as raw billet. *Id.* No one disputes this finding on appeal. Second, Commerce said Chengde's mill certificates proved that all sampled OCTG was made of carbon steel. *Id.* The agency thus concluded that [[ ]] percent of Chengde's billet was made of carbon steel. Final Analysis Mem. at 2. Commerce also adopted the Indonesian GTA data to value carbon steel billet over Plaintiffs' objections. *I&D Memo* at cmt. 1.

Table 2 summarizes record data respecting the chemical makeup of Chengde's billet.

Table 2: Record Evidence Regarding Steel Billet

No.	Data Name	Source	Date Submitted	Description
1	Chengde Company Brochure	Section A Resp., Ex. A-19	Oct. 20, 2011	Describes the chemical properties of SA210C steel.
2	Surrogate Value Spreadsheet	C&D Resp., Ex. D-5	Nov. 17, 2011	Classifies billet under HTS 7224.90.0075 (alloy steel items) and specifications SA106C, 28Mn2, and SA210C.
3	Steel Billet Consumption Statement	C&D Resp., Ex. R-2	Nov. 17, 2011	Shows that Chengde consumed steel billet of specifications SA210C, 28Mn2, and others during the review period.
4	Inventory-Out Slips	C&D Resp., Ex. R-2	Nov. 17, 2011	Shows that Chengde consumed steel billet of specifications SA210C, 28Mn2, and others during the review period.

Table 2: Record Evidence Regarding Steel Billet				
No.	**Data Name**	**Source**	**Date Submitted**	**Description**
5	Description of Factors of Production	First Supp. Resp., Ex. S1–4 (S1–15)	Jan. 11, 2012	Classifies billet under specifications SA106C, 28Mn2, and SA210C.
6	Billet Sales Contracts	First Supp. Resp., Ex. S1–4 (S1–15)	Jan. 11, 2012	Shows billet of specifications [[ ]] purchased in November 2009 and March 2010.
7	Mill Test Certificates	Second Supp. Resp., Ex. S2–13	Mar. 15, 2012	Shows sample chemical data for OCTG sold under contracts [[ ]].
8	Billet Sales Contracts	Second Supp. Resp., Ex. S2–15	Mar. 15, 2012	Shows billet of specification SA210C and SA106C purchased during the review period.
9	CBP Entry Summary	APO Appl., Attach. 1	July 16, 2012	Classifies goods shipped in contract [[ ]] under HTS 7304.29.2030, or seamless tube of iron or nonalloy steel.
10	Chengde Website	U.S. Steel Surrogate Value Rebuttal Data, Exs. J-K	July 16, 2012	Shows model P110 steel tube made of alloy steel; calls Chengde's J/K55, L80, and P110 tubing "alloy steel pipe."

B. The Decision to Value Most of Chengde's Billet as Alloy Steel Was Unsubstantiated in Evidence

Plaintiffs first challenge the decision to value most of Chengde's billet as alloy steel. Pls.' Br. 12–18. In their view, Chengde's mill certificates proved that not only some, but all the billet consumed

during the review period was carbon steel. Commerce, by contrast, argues that any OCTG not specifically sampled in the mill certificates was alloy steel. Def.'s Resp. to Pls.' Rule 56.2 Mot. for J. on Agency R. 13–18, ECF No. 66 ("Gov't Br."). But neither argument is entirely correct.

On one hand, the record does not support Plaintiffs' claim that all billet consumed to make OCTG was carbon steel. That is because Chengde furnished no mill certificates to prove that the goods sold under contracts [[ ]] were made of carbon steel. *See supra* Table 1 nos. 14–15. On the contrary, a website screenshot showed that model P110 tubing—the item sold in these contracts—contained 0.8 to 1.10 percent chromium by weight. *See supra* Table 2 no. 10 at Ex. J; *see also* Mem. in Opp'n to Pls.' Mot. for J. on Agency R. 14 n.13, ECF No. 72 ("U.S. Steel Br."). Normal steel becomes alloy steel if it contains more than 0.3 percent chromium, and Chengde's P110 exceeded this threshold. *See* HTS ch. 72 n.1(f). Commerce thus had a simple choice to make. It could rely on Chengde's unsupported suggestion that the billet used to manufacture P110 tubing was carbon steel, or it could credit firm record data showing that P110 tubing is made of alloy steel. The agency reasonably chose the latter course in the *Final Results*.

On the other hand, Commerce was too quick to conclude that all unsampled OCTG was made of alloy steel billet. Although it reasonably relied on Chengde's mill certificates to find the sampled OCTG was carbon steel, Commerce never explained why unsampled OCTG sold in the same contracts as sampled OCTG was not also carbon steel. *See I&D Memo* at cmt. 1; *supra* Table 2 no. 7. Plaintiffs describe how the mill certificates tend to prove the unsampled OCTG was made of carbon steel:

> Chengde provided sample mill test certificates for 16 of the 19 U.S. sales made during the period of review. Each sale consisted of only one product. Those 16 U.S. sales accounted for 10 of the 13 purchase contracts and six of the nine specific OCTG products (control numbers, or "CONNUMs") applicable to the [review period].

Pls.' Br. 12 (internal citations omitted). Furthermore, "[a]ll of those mill certificates indicated the products were carbon steel." *Id.* Taken together, this evidence suggests that OCTG not specifically sampled—yet commercially identical to sampled OCTG—was made of carbon steel. In fact, the agency itself suggested that testing a fraction of Chengde's products could prove the chemical makeup of unsampled OCTG. First Supp. Q. 6 (requesting certificates of assay

for inputs, but only for first purchase during review period); Second Supp. Q. 4 (requesting sample product quality certificates for each type of OCTG sold). Nevertheless, the *Final Results* treated OCTG sampled in the mill certificates as if it were unrepresentative of the chemical makeup of unsampled OCTG. The agency never explained why this might be the case. *See I&D Memo* at cmt. 1. This omission rendered Commerce's decision unsubstantiated in evidence.

Commerce also failed to consider the CBP entry summary submitted with ATP's APO application. *See supra* Table 2 no. 9. That document classified OCTG sold in contract [[ ]] under HTS 7304.29.2030, a subheading covering seamless tube of iron or nonalloy (i.e., carbon) steel. It was unreasonable for Commerce to ignore this evidence yet conclude that the billet used to make these goods was alloy steel.

Furthermore, the agency used flawed data to prove that most of the unsampled OCTG was alloy steel. *See I&D Memo* at cmt. 1. Consider, for example, Chengde's inventory out slips and billet consumption statement. *See supra* Table 2 no. 3–4. Although these data imply that Chengde consumed alloy billet to make tubes generally, the documents do not reveal whether Chengde used alloy billets to make the OCTG now under review. *See* Pls.' Br. 17.

Nor do the websites clearly show that all the unsampled OCTG was alloy steel. Admittedly, Chengde's online advertising calls grade J/K55, L80, and P110 tubing "alloy steel pipe." *See supra* Table 2 no. 10 Ex. K. The websites also show that certain types of pipe contain alloy metals. *See id.* at Ex. J. But these online data may not describe subject goods. One website's entry for L80 pipe, for instance, describes a product that does not fall under the OCTG antidumping order. *See* Pls.' Br. 16 (noting website says L80 pipe contains 13 percent chromium); *Certain Oil Country Tubular Goods from the People's Republic of China*, 75 Fed. Reg. 28,551, 28,553 (Dep't Commerce May 21, 2010) (amended final determ.) ("*OCTG Order*") (excluding OCTG with 10.5 percent or more chromium by weight from order). It was unreasonable for Commerce to rely on these data—yet disregard the mill certificates and entry summary—to decide that the unsampled OCTG was alloy steel.

Citing *Timken v. United States*, 434 F.3d 1345 (Fed. Cir. 2006), U.S. Steel counters that Chengde failed to disprove its initial position, i.e., that the billet was alloy steel. U.S. Steel Br. 16–17. But this argument incorrectly shifts scrutiny from Commerce to the Plaintiffs. In *Timken*, a respondent used dubious evidence to show that its home market sales were mislabeled, and Commerce fairly explained why respondent's proof failed. *See* 434 F.3d at 1349–50. Here, by contrast, the agency did not fully confront Chengde's arguments and data

regarding carbon steel billet. Although Commerce found that Chengde's mill certificates were "a reliable basis on which to determine the chemical composition" of sampled OCTG, the agency never told why those data were not equally useful to prove the properties of unsampled OCTG. *I&D Memo* at cmt. 1. *Timken* does not plug this hole in Commerce's reasoning.[5]

On remand, Commerce need not reconsider the chemical makeup of billet used to manufacture the OCTG sold in contracts [[ ]]. *See supra* Table 1 nos. 14–15. Chengde offered no evidence that these goods were made of carbon steel, and the agency reasonably found that this OCTG consisted of alloy billet. Commerce must reevaluate the chemical composition of OCTG sold in contracts [[ ]], however. *See id.* at nos. 1–13, 17–19. In particular, the agency must explain whether Chengde's mill certificates prove the chemical properties of OCTG not specifically tested in those certificates. *See supra* Table 2 no. 7. The agency must also assess whether Chengde's entry summary proves that the OCTG in contract [[ ]] was carbon steel. *See supra* Table 1 no. 16; Table 2 no. 9. Then Commerce must recalculate the percentage of Chengde's billet that was alloy steel or carbon steel in accordance with this analysis.

C. The Indonesian Surrogates Were Reasonably Specific to Chengde's Carbon Steel Billets

Plaintiffs next challenge Commerce's surrogate values for carbon steel billet, calling them insufficiently specific to Chengde's actual inputs. *See* Pls.' Br. 18–19. In its review, the agency used Indonesian GTA data from HTS subheadings 7207.19 and 7207.20 to value high- and low-carbon steel billet. *I&D Memo* at cmt. 1. Nevertheless, the record shows that six Indonesian OCTG producers either made a different type of OCTG than Chengde, or used semifinished steel pipe

[5] Defendant-Intervenors raise other arguments, but the court rejects them outright. *See* U.S. Steel Br. 15 (claiming chemical composition of OCTG varied within single mill certificate); *id.* (claiming Chengde furnished mill certificate pages on "selective" basis); *id.* at 17–18 (noting Chengde drew its initial classification of alloy steel billet from investigation that also involved carbon steel billet). Commerce used none of these arguments below, so the parties cannot try them on appeal. *See SEC v. Chenery Corp.,* 318 U.S. 80, 95 (1943) ("[A]n administrative order cannot be upheld unless the grounds upon which the agency acted in exercising its powers were those upon which its action can be sustained.").

The parties also debate whether the ASME specifications for Chengde's billet—SA210C, SA106C, and 28Mn2—reveal the chemical makeup of the input. *See, e.g.*, Pls.' Br. 13. The court finds no record data defining the chemical properties of SA106C and 28Mn2, however, and Chengde's company brochure shows SA210C can be either alloy or carbon steel. *See supra* Table 2 no. 1. The court thus agrees with Commerce that these data did not prove the type of billets Chengde used to make OCTG. *See I&D Memo* at cmt. 1.

rather than raw billet during production. *See* Pls.' Br. 18–19; Domestic Interested Parties' Surrogate Country Comments at Ex. 1, PD II 51 (Dec. 19, 2011), ECF No. 462 (May 24, 2013); U.S. Steel Surrogate Country Comments at Ex. A, PD II 55 (Jan. 6, 2012), ECF No. 46–2 (May 24, 2013). In Chengde's view, this proves that "the Indonesian import data [do] not include any imports of the type of billets used for [Chengde's] OCTG production." Pls.' Br. 19.

Doubtless, if a surrogate does not value an item similar to an exporter's input, this could distort the exporter's dumping margin. *See Blue Field*, 37 CIT at __, 949 F. Supp. 2d at 1328. Yet Plaintiffs marshaled no concrete data to show that imports under Indonesian HTS 7207.19 and 7207.20 are different from the billet Chengde used to produce subject OCTG. *See id.* (holding exporter bears *de facto* burden to show surrogate not specific). And Chengde's inference—in essence, that Indonesia does not import carbon steel billet because domestic OCTG manufacturers do not use it in their production—rests on an assumption that only OCTG producers consume steel billet. Chengde has not shored up this assumption with record evidence. As such, the court cannot hold that Commerce's carbon steel surrogates were not specific to Chengde's inputs.[6]

D. On Remand, Commerce May Determine Whether the Indonesian Surrogate Data Were Aberrational

Finally, Plaintiffs argue that Commerce's surrogate for high-carbon steel billet was aberrantly high. In their brief, Plaintiffs note that high-carbon steel billet prices on the London Metals Exchange were far lower than prices under Indonesian HTS 7207.20. *See* Pls.' Br. 22. They also argue that Indonesian steel high-carbon prices seem too expensive when compared to low-carbon prices from the same country. *Id.* at 19–20. Thus Plaintiffs would use Ukrainian data to value carbon steel billet. *See id.* at 21. Defendant-Intervenors, by contrast, argue that Commerce's high-carbon steel billet surrogate was reasonable compared to similar data from comparable economies. *See* U.S. Steel Br. 23–24; Mem. of Def.-Intervenors TMK IPSCO, Wheatland Tube Co., and V&M Star L.P. 9–10, ECF No. 66.[7]

[6] Plaintiffs also claim that HTS 7207.19 and 7207.20 are "basket" categories that cover products other than billets. Reply Br. 10–11. But Plaintiffs did not make this claim in their lead brief. *See* Pls.' Br. 18–19. Hence the argument was waived. *See Novosteel SA v. United States*, 284 F.3d 1261, 1273–74 (Fed. Cir. 2002).

[7] Plaintiffs argued in their lead brief that Ukrainian HTS data with ten-digit breakouts were both more specific than the Indonesian data and not aberrational. Pls.' Br. 19–22. Yet pursuant to the court's order on Defendant's motion to strike, the ten-digit data were stricken from Plaintiffs' brief. Opinion and Order, ECF No. 58 (Aug. 6, 2013). Accordingly, the court does not consider whether the Indonesian data are aberrational or less specific than Ukrainian ten-digit breakout data.

Independent of these arguments, Commerce found on appeal that its surrogates for high- and low-carbon steel billet were unreliable. This is so because the *I&D Memo* "analyzed the import values [for carbon steel billet] submitted by U.S. Steel, which differed from the import values Commerce actually used in calculating the *Final Results*." Gov't Br. 19. The agency requests a voluntary remand to determine "whether the surrogate value for carbon non-alloy steel billets was aberrational." *Id.*

The law permits voluntary remand when the agency "believes that its original decision is incorrect on the merits and it wishes to change the result." *SKF USA Inc. v. United States*, 254 F.3d 1022, 1029 (Fed. Cir. 2001). That is certainly the case here. Given alleged flaws in the Indonesian values, and given the agency's desire to reconsider its choice, the court remands the high- and low-carbon steel billet surrogates to Commerce to reconsider whether they are the best available information on the record compared to other carbon steel billet surrogate data.

II. Commerce's Denial of a Byproduct Offset Was Based in Substantial Evidence

Plaintiffs next allege that Commerce wrongly withheld a byproduct offset for the scrap Chengde produced and sold during the review period. The court finds, however, that Chengde did not carry its burden to clinch the offset. The court thus declines to remand the issue.

A. Background

Under 19 U.S.C. § 1677b(c)(1), Commerce finds the NV of NME goods by tallying the cost of inputs used to make the merchandise, then adding an amount for profit and other expenses. Pursuant to this calculus, Commerce must decide the "quantities of raw materials employed" to produce subject goods. 19 U.S.C. § 1677b(c)(3)(B). Not all raw materials employed in production become part of the finished product, however. In recognition of this fact—and though not required to do so by law—Commerce subtracts or "offsets" from NV the revenue an exporter earns from selling manufacturing byproducts or scrap. *See Arch Chems., Inc. v. United States*, 33 CIT 954, 956 (2009).

Commerce requires two data points from exporters before it will grant the offset. First, the exporter must document how much byproduct it made when producing subject merchandise. *See id.* Second, the exporter must show either that the byproduct was resold or that the scrap has commercial value and reentered the production process. *Id.* Exporters usually prove their entitlement to the offset by furnishing documents that measure the amount of scrap produced and sold

during the review period. Nevertheless, if an exporter does not record scrap production, the exporter may still claim the offset if it "reasonably link[s]" the amount of scrap sold during the review period to the amount produced during the same time. *See Drawn Stainless Steel Sinks from the People's Republic of China*, 78 Fed. Reg. 13,019 (Dep't Commerce Feb. 26, 2013) (final determ.) and accompanying Issues & Decision Mem. ("*Stainless Steel Sinks*") at cmt. 9. By demanding this proof, Commerce excludes scrap made during prior review periods from the offset formula, and ensures that NV reflects the actual cost of making subject goods.

In its first questionnaire, Commerce asked Chengde whether it made or sold any byproduct during the review period. Initial Antidumping Questionnaire ("Initial Q.") at E-9, PD II 32 (Sept. 19, 2011), ECF No. 46–2 (May 24, 2013). Chengde reported that it produced steel scrap, but added that it recorded only scrap sales—not production—on its company books. C&D Resp. at D-14, D-15. Because it did not track scrap production, Chengde proposed an offset ratio dividing the total scrap it sold by the amount of "green tubes" it made, whether or not those tubes became subject OCTG. *Id.* at D-15, D-16, Ex. D-13.

In both the *Preliminary Results* and *Final Results*, Commerce denied Chengde a scrap offset. Prelim. Factor Mem. at 4; *I&D Memo* at cmt. 2. Though Chengde claimed that the amount of scrap it produced and sold were the same, Commerce found Chengde had not supported this conclusion "with evidence such as inventory ledgers or inventory out slips." *I&D Memo* at cmt. 2. Thus Commerce found that Chengde had not carried its burden to secure the offset. *Id.*

B. Discussion

Plaintiffs allege Commerce committed a raft of errors when it denied Chengde a scrap offset. First, they claim the agency has granted scrap offsets based on data similar to the information Chengde presented below. Pls.' Br. 23–25. Second, Plaintiffs argue that Commerce could not deny the offset before pointing out deficiencies in Chengde's questionnaire responses. *Id.* at 27–28. And third, Plaintiffs claim that Commerce needed to explain why Chengde's data were inadequate to secure the offset. *Id.* 26–29. None of these arguments persuade.

The reason Commerce denied the scrap offset is simple: Chengde failed to meet the agency's well-settled prerequisites to secure the deduction. As discussed above, the law neither requires nor forbids byproduct offsets. *See Arch Chems.*, 33 CIT at 956; *Guangdong Chems. Imp. & Exp. Corp. v. United States*, 30 CIT 1412, 1422, 460 F. Supp. 2d 1365, 1373 (2006). In this vacuum of legal guidance, Com-

merce has chosen to offset scrap revenue only if respondents prove the amount of scrap they made during the review period. But here, Chengde voiced that it could not corroborate its scrap production. C&D Resp. at D-14 ("Jiangsu Chengde does not account for the quantity of steel scrap generated in the production process."). Nor did it corroborate that its scrap production and sales were the same during the review period. The agency was not required to grant Chengde the offset when it lacked the information needed to do so accurately. *See Taian Ziyang Food Co. v. United States*, 37 CIT __, __, 918 F. Supp. 2d 1345, 1355 (2013) (holding Commerce must calculate margins "as accurately as possible") (quoting *Shakeproof Assembly Components v. United States*, 268 F.2d 1376, 1382 (Fed. Cir. 2001).

Plaintiffs counter with examples of exporters who did not track scrap production but still got the offset. Yet none of these cases are relevant here. For example, in *Multilayered Wood Flooring from the People's Republic of China*, 76 Fed. Reg. 64,318 (Dep't Commerce Oct. 18, 2011) (final determ.) and accompanying Issues & Decision Mem. at cmt. 23, Commerce allowed an offset when it learned that respondent produced and sold wood scraps on a monthly basis. The agency also confirmed that the wood scrap stemmed from the manufacture of subject merchandise. *Id.* Chengde, by contrast, did not show that it sold its scrap right after production. It also failed to prove that the scraps included in its offset ratio were made when producing subject goods. *See* C&D Resp. at Ex. D-13. Because Chengde did not meet its evidentiary burden, Commerce reasonably denied the offset. *See* 19 C.F.R. § 351.401(b)(1) (stating interested party bears burden to prove amount of adjustment to NV).[8]

The court also disagrees that Commerce needed to identify shortcomings in Chengde's responses before denying the offset. Pls.' Br. 27–28. Under 19 U.S.C. § 1677m(d), if Commerce "determines that a response to a request for information . . . does not comply with the

[8] Plaintiffs' other cases do not show that Commerce's decision to deny the offset was unreasonable. In *Stainless Steel Sinks*, Commerce granted an offset because warehouse out-slips supported respondent's claimed rate of scrap production. *Stainless Steel Sinks* at cmt. 9. And in *Utility Scale Wind Towers from the Socialist Republic of Vietnam*, 77 Fed. Reg. 75,984 (Dep't Commerce Dec. 26, 2012) (final determ.) and accompanying Issues & Decision Mem. at cmt. 5, Commerce granted an offset for steel scrap because respondent sold scrap each month and based its yield loss ratio on production instructions for subject goods. Neither of these proceedings helps Chengde, which claimed only that the amount of scrap it sold equaled the amount it produced.

In fact, Commerce denied an offset for aluminum scrap in *Wind Towers* for much the same reason that it denied an offset to Chengde. In *Wind Towers*, respondent divided the total amount of aluminum scrap sold by the amount of aluminum used during the investigation period—regardless of whether it related to subject or non-subject goods—and Commerce found these data inadequate to estimate the true amount of scrap made in the manufacture of subject merchandise. *See id.*

request," then the agency must "promptly inform the person submitting the response of the nature of the deficiency." This ensures that Commerce's data collection does not morph into an administrative guessing game, where the agency punishes parties for giving incomplete answers to cryptic questions. *See Böwe-Passat v. United States*, 17 CIT 335, 342 (1993) (remanding where deficiency letter failed to state data needed to grant level-of-trade adjustment).

Here, however, Commerce told Chengde exactly what it needed: data regarding the production of steel scrap. In its lead questionnaire, Commerce asked Chengde to identify by month the quantity of scrap "produced, sold, [or] reintroduced into production." Initial Q. at E-9. It also asked for documents, including "production records demonstrating production of each by-product/co-product during one month of the [review period]." *Id.* In response, Chengde stated that it kept no records of scrap production. C&D Resp. at D-14, D-16. So unlike *Böwe-Passat*—where Commerce made hazy requests for data then punished respondents for failing to deliver—Commerce stated exactly what it needed, and Chengde answered that it could not provide the information. In such situations, Commerce need not flag deficiencies in a party's responses, because the party never "responded" to the agency's request to begin with. *See Ta Chen Stainless Steel Pipe, Inc. v. United States*, 298 F.3d 1330, 1337–38 (Fed. Cir. 2002) ("A failure to respond is not the same as a 'response' as required by the statute.").

In a similar vein, Plaintiffs argue Commerce needed to explain why it rejected the data accompanying Chengde's scrap offset formula. Pls.' Br. 26–29. Under § 1677m(e)(3) and (5), the agency must consider a party's submission if it is "not so incomplete that it cannot serve as a reliable basis for reaching the applicable determination" and "can be used without undue difficulties." Statute also requires Commerce, in general, to calculate NV based on records "kept in accordance with the generally accepted accounting principles ["GAAP"] of the exporting country." 19 U.S.C. § 1677b(f)(1)(A). According to Plaintiffs, Commerce should have relied on Chengde's GAAP-consistent records to grant the offset.

Commerce complied fully with both of these laws. In its responses, Chengde provided no evidence to show that the amount of scrap it produced equaled the amount it sold. Hence, although it did not analyze each § 1677m(e) factor in its analysis, Commerce reasonably concluded that Chengde's data were not a "reliable basis" to permit the offset. *See I&D Memo* at cmt. 2; 19 U.S.C. § 1677m(e)(3). Similarly, the agency did not need to grant the offset just because

Chengde's books complied with GAAP. *See* 19 U.S.C. § 1677b(f)(1)(A). As the agency noted, Chengde's records tracked only scrap sales, and this scrap could have been made during prior review periods or in the manufacture of nonsubject goods. *I&D Memo* at cmt. 2. With no data to tie scrap sales to scrap produced, Chengde's records did not reasonably reflect Chengde's scrap production. *See Hynix Semiconductor, Inc. v. United States*, 424 F.3d 1363, 1369–70 (Fed. Cir. 2005) (upholding agency's finding that GAAP-compliant books did not reflect R&D costs).

Commerce's decision to deny the scrap offset was based in substantial evidence and accorded with law.[9]

III. Commerce Properly Used a Surrogate to Value Chengde's Ocean Freight

Plaintiffs also dispute the decision to use a surrogate value to estimate Chengde's ocean freight costs. Chengde bought freight services from Korean shippers through Chinese agents, and Plaintiffs argue Commerce should have used the price Chengde actually paid to value Chengde's freight. *See* Pls.' Br. 32–36. Yet because Plaintiffs could not prove the price exchanged between Chengde's agents and the Korean shippers, Commerce's choice passes muster.

A. Background

As discussed above, the law requires Commerce to calculate the NV of NME goods using surrogate prices from ME countries. *See* 19 U.S.C. § 1677b(c)(4). If an NME exporter purchases inputs directly from ME suppliers, however, then Commerce may value those inputs using the actual price the exporter paid. 19 C.F.R. § 351.408(c)(1) (2012); *Antidumping Methodologies: Market Economy Inputs, Expected Non-Market Economy Wages, Duty Drawback*, 71 Fed. Reg. 61,716, 61,717–18 (Dep't Commerce Oct. 19, 2006) (request for cmts.) (creating presumption to use market prices if 33 percent or more of input purchased from ME suppliers).

To ship its goods abroad, Chengde hired ocean freight services from a few Korean shippers. Chengde did not pay the Koreans directly, however. Instead, it gave money to a freight forwarder, Shanghai Loyal, which in turn liaised with Chinese agents. These agents then paid the shippers to carry Chengde's freight. *See I&D Memo* at cmt. 8.

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[9] Chengde also argues that Commerce incorrectly applied adverse facts available ("AFA") to deny the scrap offset. *See* Pls.' Br. 30–32. Yet the AFA regime, by its own terms, applies only where "necessary information is not available on the record." 19 U.S.C. § 1677e(a)(1). Here, there was no evidentiary gap to fill. Commerce, in its discretion, offered an offset not required by law, and Chengde could not carry its burden to secure it.

Because Korea is an ME country, Plaintiffs urged Commerce to use the amount Chengde paid the Korean shippers as its freight value. *See id.* In support, Chengde provided invoices between itself and its freight forwarder, Shanghai Loyal. Third Supplemental Resp. ("Third Supp. Resp.") at Ex. S3–4, CD IV 60–65 (May 2, 2012), ECF No. 46–3 (May 24, 2013). Chengde also furnished documents displaying the amount Shanghai Loyal paid to the Chinese agents who contracted with the Korean shippers. *Id.* at Ex. S3–5. Chengde was unable to document how much the Chinese agents paid the Korean shippers, however. When Chengde asked the agents to disclose how much they paid the shippers, the agents refused to release the data. In the end, all Chengde could get from the agents was a confirmation that they paid the Korean shippers in U.S. dollars. *See id.* at Ex. S3–6.

In light of this gap in the record, Commerce declined to use Chengde's proposed ocean freight price in the *Final Results*. The agency explained that it could not rely on payments between Chinese entities to establish the amount Chengde paid for ME freight services. *See I&D Memo* at cmt. 8. Commerce therefore used a surrogate to value Chengde's ocean freight.

B. Discussion

On appeal, Plaintiffs argue that Commerce should have valued Chengde's ocean freight using the amount Chengde paid the Koreans through its freight forwarder. They cite *Certain Polyester Staple Fiber from the People's Republic of China*, 72 Fed. Reg. 19,690 (Dep't Commerce Apr. 19, 2007) (final determ.) and accompanying Issues & Decision Mem. ("*Polyester Staple Fiber*") at cmt. 15, to show that Commerce does not always require proof of the price exchanged between agents and ME shippers. And so, Plaintiffs continue, the agency's decision to value ocean freight using a surrogate was unlawful. *See* Pls.' Br. 32–36.

The court disagrees. As discussed above, the law presumes that government action distorts the prices NME exporters pay for their inputs. *See Blue Field*, 37 CIT at __, 949 F. Supp. 2d at 1317. Consequently, before using an NME exporter's actual costs to value freight, Commerce requires proof of the U.S. dollar amount exchanged between NME shipping agents and ME carriers. *See, e.g.*, *Sebacic Acid from the People's Republic of China*, 65 Fed. Reg. 49,537 (Dep't Commerce Aug. 14, 2000) (final admin. review) and accompanying Issues & Decision Mem. at issue 8. This ensures that freight prices used in the NV calculus reflect market reality and not less-than-fair prices traded between NME companies.

Here, Chengde could not prove the price exchanged between its Chinese agents and the Koreans, so Commerce reasonably used a surrogate to value ocean freight. Indeed, the situation mirrors *Yantai Oriental Juice Co. v. United States*, 26 CIT 605, 614–16 (2002), where plaintiff proved the price paid to a Chinese freight forwarder but not the price paid to the ME shipper. *Yantai* affirmed the agency's decision to use a surrogate for ocean freight, because plaintiff had not shown how a transaction between "two nonmarket entities would be determined by market forces." *Id.* at 615–16. Furthermore, this case is unlike *Polyester Staple Fiber*, where an ME shipper hired a Chinese agent to collect fees on its behalf. *Polyester Staple Fiber* at cmt. 15. Presumably, this contractual arrangement guaranteed that the price paid to the agent and the price received by the shipper were the same. *See id.* Here, however, there is no proof that the Korean shippers hired the Chinese agents to collect Chengde's fees. Because the agent and shippers were unaffiliated, there is little reason to believe that the price paid to the agents equaled the price remitted to the shippers.[10]

Plaintiffs also argue that Commerce could not punish Chengde for its failure to squeeze price data from the Chinese agents. Pls.' Br. 35. Yet the case Plaintiffs cite for this proposition, *Shantou Red Garden Foodstuff Co. v. United States*, 36 CIT __, 815 F. Supp. 2d 1311 (2012), does not jibe. In *Shantou*, Commerce applied AFA when an exporter failed to secure factor of production data from a noncomplying supplier. *Id.* at __, 815 F. Supp. 2d at 1316. The court remanded because Commerce had not ordered the plaintiff to solicit the data from the supplier; hence Commerce's finding that plaintiff had not complied was unsubstantiated in evidence. *Id.* at __, 815 F. Supp. 2d at 1317–19. Here, by contrast, Commerce did not deploy AFA to calculate Chengde's margins, but instead used a surrogate where the evidence did not justify using Chengde's actual costs. This approach was permissible and not punitive.

Finally, Plaintiffs argue that Commerce's surrogate was not specific to Chengde's ocean freight. Pls.' Br. 36. Chengde shipped its wares in bulk, but Commerce used the cost to ship a full container as its ocean freight value. The court rejects this argument, however, on procedural grounds. During the review, Plaintiffs never said Commerce's surrogate was insufficiently specific to Chengde's input. And although ATP arguably broached the topic in its case brief, it relegated

[10] Chengde argues that it *did* document the price between the agent and shippers, that is, it proved there was a U.S. dollar settlement between the Chinese agents and the Korean suppliers. Pls.' Br. 34. But the fact that the companies exchanged U.S. currency is unimportant. Chengde failed to prove the *amount* of money paid to the shipper, and this is the information Commerce needed to confirm Chengde's freight costs.

its discussion to a one-sentence footnote. *See* ATP Case Br. 23 n.46. This meager effort was not enough to exhaust the argument for appeal. *See* 28 U.S.C § 2637(d) (requiring exhaustion); *see also Smith-Kline Beecham Corp. v. Apotex Corp.*, 439 F.3d 1312, 1320 (Fed. Cir. 2006) (holding arguments footnoted in opening brief not preserved).[11]

The decision to use a surrogate to value ocean freight was moored in substantial evidence and accorded with law.

IV. Commerce Reasonably Selected a Surrogate for Inland Freight Expenses

Next, Plaintiffs claim that Commerce chose a flawed surrogate for Chengde's inland freight expenses. Pls.' Br. 37–40. This argument fails too, because there was no inland freight surrogate on the record besides the one Commerce used.

A. Background

Once again, Commerce must value inputs into NME goods using "the best available information" on the record. 19 U.S.C. § 1677b(c)(1). One such input was truck freight services, by which Chengde shipped OCTG from its factory to an inland port 7.5 kilometers away, then on to the port of exit 280 kilometers further. C&D Resp. at C-22.

To value inland freight, Commerce used a rate schedule from Indonesian freight forwarder PT Mantap Abiah Abadi ("PT Mantap"). Prelim. Factor Mem. at Attach. 3. Commerce based the rate on shipments between 50 and 200 kilograms from Jakarta to twelve outlying cities. *See id.* This calculus yielded a freight rate of 5.433 Indonesian rupiah per kilogram per kilometer. Final Analysis Mem. at Attach. 1. No other party—Plaintiffs included—proposed an alternative surrogate value for inland freight.

In its case brief, ATP argued that Chengde shipped its goods in volumes comparable to a full container load. ATP Case Br. 18–20. As a consequence, ATP claimed Commerce should have priced inland freight on a per-metric ton basis rather than a per-kilogram basis. *Id.* Commerce rejected this argument in the *Final Results* because there was "no evidence on the record as to whether Chengde shipped full

[11] Even if Chengde exhausted its specificity argument, the court still rejects it. In support of its position, Chengde cites *Home Meridian International, Inc. v. United States*, 36 CIT __, __, 865 F. Supp. 2d 1311, 1316–19 (2012). There, Commerce rejected non-contemporaneous actual prices in favor of a contemporaneous third-country surrogate to value a major input. *Id.* at 1316. The court held it was unreasonable to ignore otherwise valid market prices when contemporaneous surrogates were flawed. *Id.* at 1319. Yet in this case, Commerce considered the proposed ME price for ocean freight and found it unreliable, and for good reason: Chengde offered no evidence to support the price supposedly paid to the market economy shippers.

container loads by truck" during the review period. *I&D Memo* at cmt. 9. The agency also noted that the record lacked per-metric ton inland freight surrogates. *Id.*

B. Discussion

On appeal, Plaintiffs offer two main reasons why Commerce could not rely on the PT Mantap data to value inland freight. First, Chengde sold OCTG in volumes much greater than a ton, meaning kilogram-based freight rates were likely too high, and second, the PT Mantap data were not authenticated. Pls.' Br. 37–40. Neither of these arguments prevails, however, because there were no inland freight surrogates on the record besides the one Commerce used.

The court cannot find any precedent—and the parties cite none—requiring Commerce to hunt for surrogates when relevant data are already on the record. The law surely compels Commerce to use the "best available information" to value inputs, 19 U.S.C. § 1677b(c)(1), but the law also sets the burden of supplying record data on the parties, *QVD Food Co. v. United States*, 658 F.3d 1318, 1324 (Fed. Cir. 2011) (quoting *Tianjin Mach. Imp. & Exp. Corp. v. United States*, 16 CIT 931, 936, 806 F. Supp. 1008, 1015 (1992)) ("[T]he burden of creating an adequate record lies with [interested parties] and not with Commerce."). In this case, the record sported only one option for pricing inland freight: the PT Mantap per kilogram rate. Plaintiffs argue these data were flawed,[12] yet without an alternative value to choose, Commerce reasonably relied on that information to price inland freight. *See Ames True Temper v. United States*, 31 CIT 1303, 1310–13 (2007) (sustaining agency's choice to use only brokerage and handling surrogate in record and not surrogate from prior reviews). If Chengde wanted the agency to use a different surrogate, it should have provided one, as respondents have done in past reviews. *See, e.g.*, *Certain Steel Wheels from the People's Republic of China*, 77 Fed. Reg. 17,021 (Dep't Commerce Mar. 23, 2012) (final determ.) and accompanying Issues & Decision Mem. at cmt. 5 (using per-ton freight rate after respondent added full-container shipping data to record).

[12] Plaintiffs have not proven here that the PT Mantap data were unrepresentative. Although they now claim that the volume of Chengde's smallest U.S. sale during the review was [[ ]] metric tons, *see* Pls.' Br. 38, Plaintiffs did not cite this figure below to challenge Commerce's inland freight surrogate, *see* ATP Case Br. 18–20. This means the argument was not exhausted—yet even if it were, simply because Chengde sold its wares in the United States in tons does not mean it shipped its goods to the port of exit in tons. *See* U.S. Steel Br. 40. Furthermore, Chengde's brief neither disproves the authenticity of the PT Mantap data nor identifies anything unreasonable in Commerce's interpretation thereof. *See* Pls.' Br. 40. As such, the court finds the agency's surrogate choice was reasonable on the record available.

Plaintiffs nevertheless contend that "Commerce routinely supplements the record with surrogate value data it considers reliable." Pls.' Br. 39. Yet this argument ignores a critical point. Although Commerce may supplement the record where it lacks reliable surrogate values, this discretion does not shift from respondents the burden to provide surrogate data. *See QVD Food*, 658 F.3d at 1324. Nor has anyone proven that Commerce supplements the record with its own research as a matter of binding agency practice. *See* Pls.' Br. 39–40 (citing three reviews, not of OCTG, where Commerce voluntarily supplemented record); *Huvis Corp. v. United States*, 31 CIT 1803, 1811, 525 F. Supp. 2d 1370, 1378 (2007) (recognizing agency binding practice where "uniform and established procedure exists that would lead a party, in the absence of notification of a change, reasonably to expect adherence to the [action] or procedure"). Hence Commerce's decision to use the PT Mantap data as a surrogate value for inland freight was neither arbitrary nor unfounded in substantial evidence.

V. Commerce Reasonably Treated Thread Protectors as a Direct Input

Finally, Plaintiffs challenge the decision to include thread protectors as a direct input into Chengde's OCTG. Pls.' Br. 40–43. They claim thread protectors are better described as a packing material. The court rejects this argument, however, because Commerce reasonably interpreted the antidumping duty order and record evidence to classify thread protectors as direct inputs.

A. Background

When calculating the NV of NME goods, Commerce adds an amount for overhead, profit, and other expenses attributable to the manufacture of the merchandise. *See* Pls.' Br. 41; 19 U.S.C. § 1677b(c)(1). Commerce calculates these expenses as a fraction of the cost of inputs directly consumed in the goods. *See* Prelim. Analysis Mem. at Attach. I, CD IV 68 (May 30, 2012), ECF No. 46–3 (May 24, 2013). Hence, if Commerce classifies an input as a material part of the product, that input will inflate the exporter's general expenses. Conversely, if Commerce classifies an input as an indirect material, such as packaging, then the agency excludes that cost when generating the exporter's expenses. *See* Pls.' Br. 41.

In this case, Commerce included thread protectors as a direct input into Chengde's OCTG. *See* Prelim. Factor Mem. at Attach. I.[13] ATP challenged this decision in its case brief, arguing "the Department should only include the surrogate value for threading protectors as a packing expense." ATP Case Br. 21. Nevertheless, in the *Final Results*, Commerce deemed that thread protectors were part of the subject merchandise. In support, the agency cited the OCTG antidumping duty order and American Petroleum Institute ("API") standards treating thread protectors as an integral part of the subject goods. *See I&D Memo* at cmt. 7 (discussing API-5CT tubing).

B. Discussion

On appeal, Plaintiffs challenge Commerce's decision to classify thread protectors as a direct material. Pls.' Br. 40–43. They begin with the language of the antidumping duty order, which encompasses "certain OCTG . . . regardless of end finish (e.g., whether or not plain end, threaded, or threaded and coupled) . . . whether or not thread protectors are attached." *OCTG Order* at 28,553. In Plaintiffs' view, the words "whether or not thread protectors are attached" means the protectors are not part of the subject good. *See* Pls.' Br. 41–42. Plaintiffs also argue that the statute's definition of packing materials embraces thread protectors, and in support, they cite purchase contracts listing end protectors as a packing item. *Id.* at 42.

The court disagrees. To begin, the antidumping order does not clearly include or exclude thread protectors as a part of subject OCTG. Although the clause "whether or not thread protectors are attached" suggests protectors are not a part of the good, other language betokens the opposite. Immediately following Plaintiffs' favored phrase, the order states "[e]xcluded from the scope of the order are . . . unattached thread protectors." *OCTG Order* at 28,553. Because the government excluded unattached thread protectors from the order's scope, Commerce inferred that attached protectors are part of the subject good. *See I&D Memo* at cmt. 7. The court will defer to this reasonable interpretation of the order. *See Global Commodity Grp. LLC v. United States*, 709 F.3d 1134, 1138 (Fed. Cir. 2013) (granting Commerce "significant deference" to interpret scope of antidumping order).

Furthermore, the statute does not compel Commerce to classify thread protectors as a packing material. 19 U.S.C. § 1677b(a)(6)(B)(i) defines packing materials as "containers and coverings . . . incident to

[13] In fact, Commerce double counted thread protectors for certain control numbers in the *Preliminary Results*, deeming them both direct and indirect materials. In the *Final Results*, however, Commerce classified thread protectors only as a direct material. *I&D Memo* at cmt. 7.

placing the foreign like product in condition packed ready for shipment to the place of delivery to the purchaser." Yet as U.S. Steel points out, thread protectors not only preserve OCTG during shipment, but also protect the goods from dust and water damage in storage. U.S. Steel Br. 42; First Supp. Resp. at Ex. S1–9 (ISO 11960 document requiring thread protectors to protect OCTG during transit and "normal storage period" of one year); *see also Fresh Garlic from the People's Republic of China*, 72 Fed. Reg. 34,438 (Dep't Commerce June 22, 2007) (final admin. review) and accompanying Issues & Decision Mem. at cmt. 10 (treating jars as direct material because they extended shelf life of peeled garlic). This suggests thread protectors are more than a mere incident to shipping.

Finally, Chengde's own response defines thread protectors as a direct input. In the second supplemental questionnaire, Commerce asked whether Chengde used anything to pack its OCTG other than iron or steel straps and buckles. In answer, Chengde wrote, "Jiangsu Chengde reported the threading protector as a packing material for convenience. However, API-5CT [the specification for the OCTG in question] treats threading protector as part of subject merchandise." Second Supp. Resp. 11. And immediately thereafter, Chengde confirmed that it used no other packing materials "[e]xcept steel belts and steel buckles." *Id.* These data implied that thread protectors are direct inputs, and although ATP listed protectors as a packing material in its purchase orders, Commerce had discretion, when faced with conflicting record evidence, to choose the result that it found more plausible. *See Home Meridian Int'l, Inc. v. United States*, 37 CIT __, __, 922 F. Supp. 2d 1366, 1376 (2013) ("When presented with conflicting evidence that provides substantial evidence to support opposite conclusions, the court will defer to Commerce's reasoned choice between the two."). Commerce's designation of thread protectors as a direct input was grounded in substantial evidence and accorded with law.

CONCLUSION AND ORDER

In summary, the court sustains Commerce's decision making regarding steel scrap, ocean freight, inland freight, and thread protectors. Commerce's reasoning regarding steel billet, however, was not similarly sound. On remand, Commerce must reconsider its classification of Chengde's billet inputs as alloy steel or carbon steel. And pursuant to its voluntary remand, Commerce must also reconsider whether the Indonesian GTA data are the best available information on the record to value high- and low-carbon steel billet.

Upon consideration of all papers and proceedings herein, it is hereby:

ORDERED that the final determination of the International Trade Administration, United States Department of Commerce, published as *Certain Oil Country Tubular Goods from the People's Republic of China*, 77 Fed. Reg. 74,644 (Dep't Commerce Dec. 17, 2012) (final admin. review), as amended by *Certain Oil Country Tubular Goods from the People's Republic of China*, 78 Fed. Reg. 9033 (Dep't Commerce Feb. 7, 2013), be, and hereby is, REMANDED to Commerce for redetermination; it is further

ORDERED that Plaintiffs' Rule 56.2 Motion for Judgment on the Agency Record be, and hereby is, GRANTED as provided in this Opinion and Order; it is further

ORDERED that Commerce shall issue a redetermination ("Remand Redetermination") in accordance with this Opinion and Order that is in all respects supported by substantial evidence, in accordance with law, and supported by adequate reasoning; it is further

ORDERED that Commerce shall reevaluate the chemical composition of billet used to make the OCTG sold under contracts [[ ]]—explaining whether Chengde's mill certificates (*supra* Table 2 no. 7) establish the chemical properties of OCTG not specifically tested in those certificates—and shall redetermine surrogate values for that billet in accordance with this explanation; it is further

ORDERED that Commerce shall reevaluate the chemical composition of billet used to make the OCTG sold under contract [[ ]]—explaining whether Chengde's entry summary (*supra* Table 2 no. 9) establishes the chemical properties of OCTG described in that summary— and shall redetermine surrogate values for that billet in accordance with this explanation; it is further

ORDERED that Commerce shall reconsider its decision to use Indonesian GTA data under HTS 7207.19 and 7207.20 as surrogate values for high- and low-carbon steel billet, and in doing so, must determine whether such surrogates represent the "best available information" on the record in accordance with 19 U.S.C. § 1677b(c)(1), as compared with alternative surrogates in the record; it is further

ORDERED that Commerce shall recalculate Chengde's weighted-average dumping margin consistent with the reevaluated surrogate values for steel billet; it is further

ORDERED that Commerce shall have ninety (90) days from the date of this Opinion and Order in which to file its Remand Redetermination, which shall comply with all directives in this Opinion and Order; that the Plaintiff and Defendant-Intervenor shall have thirty (30) days from the filing of the Remand Redetermination in which to

file comments thereon; and that the Defendant shall have thirty (30) days from the filing of Plaintiff and Defendant-Intervenor's comments to file comments.

Dated: September 26, 2014
New York, New York

/s/ *Richard W. Goldberg*
RICHARD W. GOLDBERG
SENIOR JUDGE

Slip Op. 11–117

DONGGUAN SUNRISE FURNITURE CO., LTD., TAICANG SUNRISE WOOD INDUSTRY CO., LTD., TAICANG FAIRMONT DESIGNS FURNITURE CO., LTD., and MEIZHOU SUNRISE FURNITURE CO., LTD., Plaintiffs, LONGRANGE FURNITURE CO., LTD., CONSOLIDATED PLAINTIFF, COASTER COMPANY OF AMERICA and LANGFANG TIANCHENG FURNITURE CO., LTD., Plaintiff-Intervenors, v. UNITED STATES, Defendant, AMERICAN FURNITURE MANUFACTURERS COMMITTEE FOR LEGAL TRADE and VAUGHAN-BASSETT FURNITURE COMPANY, INC., Defendant-Intervenors.

Before: Jane A. Restani, Judge
Consol. Court No. 10–00254

[Defendant-Intervenors' motion for reconsideration in antidumping duty matter denied.]

Dated: October 6, 2014

Peter J. Koenig, Squire Patton Boggs (US) LLP, of Washington, DC, for plaintiffs.

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

Kristin H. Mowry, Jeffrey S. Grimson, Jill A. Cramer, Sarah M. Wyss, and *Daniel R. Wilson*, Mowry & Grimson, PLLC, of Washington, DC, for plaintiff-intervenors.

Stephen C. Tosini, Senior Trial Counsel, Commercial Litigation Branch, Civil Division, U.S. Department of Justice, of Washington, DC, for defendant. With him on the brief were *Stuart F. Delery*, Assistant Attorney General, *Jeanne E. Davidson*, Director, and *Patricia M. McCarthy*, Assistant Director. Of counsel on the brief was *Rebecca Cantu*, Senior Attorney, Office of the Chief Counsel for Trade Enforcement and Compliance, U.S. Department of Commerce, of Washington, DC.

J. Michael Taylor, Joseph W. Dorn, and *Daniel L. Schneiderman*, King & Spalding, LLP, of Washington, DC, for defendant-intervenors.

OPINION

Restani, Judge:

Defendant-intervenors the American Furniture Manufacturers Committee for Legal Trade and Vaughan-Bassett Furniture Co., Inc. (collectively "AFMC") move for reconsideration of the court's decision

in *Dongguan Sunrise Furniture Co., Ltd. v. United States*, 997 F. Supp. 2d 1330 (CIT 2014) ("*Dongguan IV*"), pursuant to USCIT Rule 59. AFMC's Mot. for Recons. 1, ECF No. 221 ("Mot. for Recons."). In the alternative, AFMC requests that the court remand the case for the Department of Commerce ("Commerce") to make further factual findings. *Id.* at 9. Plaintiffs Dongguan Sunrise Furniture Co., Ltd., Taicang Sunrise Wood Industry Co., Ltd., Taicang Fairmont Designs Furniture Co., Ltd., and Meizhou Sunrise Furniture Co., Ltd. (collectively "Fairmont") oppose the motion. Reply to Def.-Intvnr. AFMC Mot. for Recons. 1, ECF No. 229.

In *Dongguan IV*, the court reviewed and remanded to Commerce its Final Results of Third Redetermination Pursuant to Court Order, ECF No. 193–1. The court held that the partial adverse-facts-available ("AFA") rates assigned to Fairmont were not supported by substantial evidence because they were not reflective of Fairmont's commercial reality and were far beyond the amount necessary to deter future non-compliance. *Dongguan IV*, 997 F. Supp. 2d at 1335. Assuming arguendo that Commerce could uptick the substitute rate based on a specific need to deter strategic behavior (i.e., failing to report sales with high dumping margins in an attempt to get a lower rate), the court concluded that using extremely high substitute AFA rates for this purpose could not be done without a finding that Fairmont actually engaged in such strategic behavior. *Id.* at 1337.

AFMC contends that "[r]econsideration is warranted because the decision [was] based on erroneous *de novo* factual findings." Mot. for Recons. 1. Specifically, AFMC argues that the record evidence demonstrates that Fairmont strategically concealed its unreported sales, presumably to hide sales with high dumping margins, and suggestions to the contrary in the court's opinion amounted to an impermissible and erroneous finding of fact. *Id.* at 2–9. According to AFMC, the factual predicate for the court's decision thus was mistaken. *Id.* at 2.

The court's understanding of the record in this case, namely that Commerce has not found that Fairmont avoided reporting sales for strategic reasons, long has been apparent. In the original challenge to the partial AFA rates in this case, the court accepted only "Commerce's subjective finding that Fairmont failed to put forth its maximum effort because it performed a perfunctory identification of in-scope sales" as supported by the record in justifying the application of AFA to the small portion of sales that Fairmont did not report as in-scope merchandise. *Dongguan Sunrise Furniture Co., Ltd. v. United States*, 865 F. Supp. 2d 1216, 1229 (CIT 2012). The court noted that Commerce's alternative justification based on certain correspon-

dence with Fairmont purportedly showing a lack of cooperation beyond general sloppiness on Fairmont's part was unpersuasive and the court did not rely on it. *Id.* at 1231 n.17. In considering Fairmont's challenge to Commerce's first remand determination, the court stated that "[a] calculated rate of 34% for Fairmont's reported sales suggests that rates ranging from 134% to over 215% are not reflective of Fairmont's commercial reality, *especially when there is no indication that Fairmont failed to report certain sales for strategic reasons.*" *Dongguan Sunrise Furniture Co., Ltd. v. United States*, 904 F. Supp. 2d 1359, 1364 (CIT 2013).

Despite the presence in earlier opinions of statements very similar to the ones AFMC now challenges, AFMC never previously objected on this basis. It is only after this case has been remanded for the fourth time that AFMC challenges this reading of the record. "The decision to grant a motion for rehearing rests in the sound discretion of the Court." *Xerox Corp. v. United States*, 20 CIT 823, 823 (1996). Because AFMC had ample opportunity to raise its concerns about the general context of Commerce's choice previously but failed to do so, the court will not entertain them now. *Cf. United States v. Matthews*, 32 CIT 1087, 1089, 580 F. Supp. 2d 1347, 1349 (2008) ("[A]rguments raised for the first time on rehearing are not properly before the court for consideration when prior opportunity existed . . . for the moving party to have adequately made its position known." (ellipses in original)).

Obviously, the main holding has been, and continues to be, that the selected rate is not related to Fairmont's actual sales behavior, no matter what led to the lack of full compliance.[1] *See Dongguan IV*, 997 F. Supp. 2d at 1338. Thus, had the challenge been timely it would be inapposite.

For the foregoing reasons, AFMC's motion is DENIED.

Dated: October 6, 2014
New York, New York

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

[1] It should be noted that even *if* there were some gamesmanship, the rate selected must be reasonable. It cannot be imposed as a punishment. *See Gallant Ocean (Thail.) Co. v. United States*, 602 F.3d 1319, 1323 (Fed. Cir. 2010). In this matter that court was not called upon to decide where the line is between deterring strategic behavior and punishment.

Slip Op. 14–118

MID CONTINENT NAIL CORP., Plaintiff, v UNITED STATES, Defendant, and TARGET CORP., Defendant-Intervenor.

Before: Nicholas Tsoucalas,
Senior Judge
Court No.: 10–00247

[Redetermination upon remand by the Department of Commerce was not supported by substantial evidence nor in accord with the law.]

Dated: October 6, 2014

Adam H. Gordon and *Jordan C. Kahn,* Picard Kentz & Rowe LLP, of Washington, DC, for Mid Continent Nail Corporation, plaintiff.

Stuart F. Delery, Assistant Attorney General, *Jeanne E. Davidson,* Director, and *Patricia M. McCarthy,* Assistant Director, Department of Justice, Civil Division, Commercial Litigation Branch, Washington, DC, for defendant. Of counsel on the brief was *Nathaniel J. Halvorson,* Attorney, Office of the Chief Counsel for Trade Enforcement and Compliance, U.S. Department of Commerce, of Washington, DC.

Marguerite E. Trossevin and *James J. Jochum,* Jochum Shore & Trossevin, PC, of Washington, DC, for Target Corporation, defendant-intervenor.

OPINION

Tsoucalas, Senior Judge:

Before the court are the final results of defendant United States Department of Commerce's ("Commerce") redetermination of its scope ruling on nails within toolkits imported by Target Corporation ("Target"). *See Final Results of Redetermination Pursuant to Remand Order*, ECF No. 99 (Apr. 30, 2014) ("*Third Remand Results*"). Commerce found that the nails were outside the scope of the antidumping duty order on nails from the People's Republic of China ("PRC") because they were part of a mixed-media set. *Id.* at 51. Plaintiff Mid Continent Nail Corp. ("MCN") contests the *Third Remand Results* and requests another remand of this case. *See* Pl.'s Cmts. on Remand Results, ECF No. 104 (June 27, 2014). Commerce and defendant-intervenor disagree, insisting that Commerce should affirm the *Third Remand Results*. *See* Def.-Int.'s Cmts. on Def.'s Redetermination Pursuant to Remand Order, ECF No. 103 (June 27, 2014); Def.'s Cmts. on Redetermination Pursuant to Remand Order, ECF No. 113 (July 31, 2014).

BACKGROUND

A. Antidumping Duty Order and Initial Scope Ruling

In August 2008, Commerce issued an antidumping order covering

steel nails from the PRC. *See* Notice of Antidumping Duty Order: Certain Steel Nails from the PRC, 73 Fed. Reg. 44,961 (Aug. 1, 2008) ("*Nails Order*"). The *Nails Order* covers:

> certain steel nails having a shaft length up to 12 inches. Certain steel nails include, but are not limited to, nails made of round wire and nails that are cut. Certain steel nails may be of one piece construction or constructed of two or more pieces. Certain steel nails may be produced from any type of steel, and have a variety of finishes, heads, shanks, point types, shaft lengths and shaft diameters. Finishes include, but are not limited to, coating in vinyl, zinc (galvanized, whether by electroplating or hot-dipping one or more times), phosphate cement, and paint. Head styles include, but are not limited to, flat, projection, cupped, oval, brad, headless, double, countersunk, and sinker. Shank styles include, but are not limited to, smooth, barbed, screw threaded, ring shank and fluted shank styles. Screw-threaded nails subject to this proceeding are driven using direct force and not by turning the fastener using a tool that engages with the head. Point styles include, but are not limited to, diamond, blunt, needle, chisel, and no point. Finished nails may be sold in bulk, or they may be collated into strips or coils using materials such as plastic, paper, or wire.

Id. at 44,961–62. The scope language also identifies several exclusions to the *Nails Order*, including "roofing nails," "corrugated nails," "fasteners suitable for use in power-actuated hand tools," "thumb tacks," nails of certain size specifications that are "collated with adhesive or polyester film tape back with a heat seal adhesive," and fasteners meeting certain specifications. *Id.* at 44,962.

Target imports toolkits from the PRC, which include various household tools. *See Mid Continent Nail Corp. v. United States,* 35 CIT __, __, 770 F. Supp. 2d 1372, 1375 (2011) ("*MCN I*"). Of particular relevance to the instant case, the toolkits "include a plastic container holding approximately fifty one-inch brass coated steel nails." *Id.,* 770 F. Supp. 2d at 1375. Target requested a scope ruling from Commerce that six of its tool kits containing these nails are outside the *Nails Order. Id.* ; 770 F. Supp. 2d at 1375. Although it conceded that the nails in the toolkit would be in-scope merchandise if considered on their own, Target insisted that Commerce should focus on the toolkits as a whole. In support of its argument, Target noted that the *Nails Order* did not mention nails packaged with non-scope merchandise and that Commerce previously considered similar "mixed media" items as a whole. *Id.*

Commerce issued its scope ruling in August 2010. *See Final Scope Ruling – Certain Steel Nails from the PRC, Request by Target* (Aug. 10, 2010) ("*Scope Ruling*"). Commerce first noted that the 19 C.F.R. § 351.225(k)(1) factors ("(k)(1) factors") were not dispositive as to whether the scope covered brass coated steel nails in toolkits. *Id.* at 5. Commerce then applied the 19 C.F.R. § 351.225(k)(2) factors ("(k)(2) factors"), considering the tool kit as a set including the subject merchandise. *Id.* Based on this analysis, Commerce found that the tool kits were outside the scope of the Nails Order. *Id.*

B. Proceedings Before the Court of International Trade and Remand Redeterminations

This Court rejected Commerce's analysis in the Scope Ruling, finding that Commerce failed to articulate adequate reasoning for its decision to focus the scope inquiry on the toolkits rather than the nails. *See MCN I*, 35 CIT at __, 770 F. Supp. 2d at 1379–83. The Court remanded the Scope Ruling so that Commerce could identify a test for making such a determination[1] and provide legal justification for that test. *Id.* at __, 770 F. Supp. 2d at 1382–83.

On remand, Commerce found that it had the authority to consider mixed-media items as a set. *See Final Results of Redetermination Pursuant to Remand Order* at 2–5 (Oct. 17, 2011) ("*First Remand Results*"). It then articulated a four-factor test for answering the *Walgreen* question: (1) the practicability of separating the component merchandise for repackaging or resale; (2) the value of the component merchandise as compared to the value of the product as a whole; (3) the ultimate use or function of the component merchandise relative to the ultimate use or function of the mixed-media set as a whole; and (4) any other relevant factors that may arise on a product-specific basis. *Id.* at 7–11. Using this test, Commerce found that the toolkit as a whole was the proper focus of the scope inquiry. *Id.* at 11–14. It then determined that the toolkit was outside the scope of the *Nails Order*. *Id.* at 14–18.

Upon review of the *First Remand Results,* the Court found that Commerce's analysis was improper because Commerce did not have the authority to conduct a mixed-media analysis. *See Mid Continent Nail Corp. v. United States,* 36 CIT __, __, 825 F. Supp. 2d 1290, 1296 (2012) ("*MCN II*"). The Court remanded for further proceedings consistent with its opinion that "the nails in question here are unam-

[1] Whether Commerce should focus a mixed-media scope inquiry on the set as a whole or on the individual component that appears to be within the scope of the order is referred to as the "*Walgreen* question." This name refers to the decision of the Court of Appeals for the Federal Circuit in *Walgreen Co. of Deerfield, Inc. v. United States*, 620 F.3d 1350 (Fed. Cir. 2010).

biguously subject to the *Nails Order,* and there is no support in the law or the record for concluding otherwise." Id., 825 F. Supp. 2d at 1296.

In its second redetermination, Commerce issued a ruling consistent with the Court's decision in *MCN II. See Final Results of Redetermination Pursuant to Remand Order* at 5 (Mar. 7, 2012) ("*Second Remand Results*"). Specifically, Commerce found that the nails in the toolkits were within the scope of the *Nails Order. Id.* The Court upheld the *Second Remand Results* in their entirety, *see Mid Continent Nail Corp. v. United States,* 36 CIT __, __, Slip Op. 12–97 at 1 (July 25, 2012), and Commerce appealed to the United States Court of Appeals for the Federal Circuit ("CAFC").

C. CAFC Determination

On appeal, the CAFC reversed the CIT's opinion in *MCN II. See Mid Continent Nail Corp. v. United States*, 725 F.3d 1295, 1301 (Fed. Cir. 2013) ("*MCN III*"). Specifically, the CAFC found that the CIT's holding that Commerce lacked authority to conduct a mixed-media inquiry was erroneous. It also found that Commerce had yet to reasonably interpret the *Nails Order* in such a way as to justifiably exclude the nails in Target's toolkits from the scope, noting that the fourth factor of the mixed-media test was overly broad. *Id.* The CAFC provided Commerce with guidance for its remand redetermination, stating that "any implicit mixed-media exception to the literal scope of the order must be based on preexisting public sources," and that "Commerce may attempt to draw an ascertainable standard from these rulings if they were publicly available at the time the [*Nails Order*] was issued . . . ." *Id.* at 1305.

D. Third Remand Redetermination

In its third remand results, Commerce attempted to find a test by which it could determine whether to focus its scope ruling on the mixed-media set as a whole or on the individual component. *Third Remand Results* at 6–17. First, Commerce noted that "mixed-media" scope inquiries "involve merchandise that includes a component that appears to at least have some superficial overlap with the literal language of the order, but also consists of elements that do not appear to be covered by the literal language of the order." *Id.* at 6. Commerce also noted that the outcome of these scope inquiries depends largely on whether Commerce treats the set as a whole or whether it focuses on the individual component that appears to be covered by the order. *Id.*

Next, Commerce surveyed the available scope rulings on "mixed-media" products to determine whether there was a common analytical framework for determining the proper focus a "mixed-media" scope inquiry. *Id.* at 9–16. Commerce altered the four-factor test it previously articulated in the *First Remand Results* taking into account these rulings and the CAFC's ruling in *MCN III,* listing the factors as (1) the "unique language of the order"; (2) the "practicability of separating the component merchandise for repackaging or resale"; (3) the "value of the component merchandise as compared to the value of the product as a whole"; and (4) the "ultimate use or function of the component merchandise relative to the ultimate use or function of the mixed-media set as a whole". *Id.* at 17. Where Commerce finds that it should analyze the product as a whole set it will move straight to the (k)(2) factors, but where it will analyze the individual component Commerce will make its scope determination based on the (k)(1) factors. *Id.* at 20.

Commerce then applied this test to Target's toolkits. *Id.* at 23–26. Commerce found that the language of the *Nails Order* describes the nails in question but does not address merchandise contained in toolkits, the packaging of nails with other products, or the arrangement of the nails upon importation. *Id.* at 23–24. As for the relative value of the nails, Commerce found that it was very small in light of Target's statement that the total value of the nails was a "small percentage" of the value of the toolkit as a whole. *Id.* at 24. Commerce also determined that separating and repackaging the nails was not practicable because the nails were packaged with non-subject fasteners in a smaller case within the toolkit. *Id.* at 24–25. Finally, Commerce found that the use of the nails, fastening two objects together, was complementary to but distinct from the use of the toolkit, which was "provid[ing] a convenient collections of tools and accessories for the intention of home repair and maintenance." *Id.* at 25. It added that there was a variety of tools and accessories, each of which had specialized uses, so the choice of toolkit would not be based exclusively on the type of nail inside tool kit. *Id.* at 25–26. Because each factor of the test indicated that Commerce should evaluate the toolkits as a whole, Commerce determined that it should focus the scope inquiry on the toolkits rather than the steel nails. *Id.* at 26.

Because it was focusing on the toolkits as a whole, Commerce moved directly to an analysis of the (k)(2) factors. *Id.* Commerce analyzed each of the six toolkits at issue, determining that they "include some merchandise that at least superficially meets the physical description of the merchandise subject to the *Nails Order* and some merchandise which clearly does not meet the physical

description of the merchandise subject to the *Nails Order*. *Id.* at 26–29. Commerce also noted that the brass coated nails contained within the toolkits comprise, at most, a tangential feature in the advertising" of Target's toolkits. *Id.* at 29–30. Commerce also noted that the display of the toolkits varied across Target stores: in some cases the toolkits were displayed alongside subject nails, but in other stores the toolkits were not displayed by subject nails. *Id.* at 30. Commerce also found that the channels of trade factor was inconclusive, as the toolkits and nails shared certain channels of trade, but there were also channels of trade that were distinct for the two products. *Id.* at 30–31. Additionally, Commerce found that the expectations of the ultimate purchaser differed as between toolkits and nails, because the purchaser of the former expected to purchase an assortment of tools for an assortment of functions at a price of $25 to $60, while a purchaser of in-scope nails would expect more nails and a lower price. *Id.* at 31. Commerce noted that the majority of the tools in Target's toolkits are not used with nails. *Id.* Commerce made similar findings with regard to the ultimate use of the product, as Target's toolkits serve to "aid in various repair tasks" in the home, while the in-scope nails are used to hang or fasten objects. *Id.* at 32. Noting that three of the five (k)(2) factors support a finding that the toolkits are outside the scope of the *Nails Order*, and that the other two factors were inconclusive, Commerce found that Target's toolkits were outside the scope of the *Nails Order*. *Id.* at 32.

Commerce also addressed comments by the parties on its determination relevant to the instant litigation. First, Commerce rejected MCN's assertion that the determination was unauthorized rule making because it was simply resolving a gap in the statute and regulations by clarifying existing procedures and providing a justification for those procedures. *Id.* at 35. Second, Commerce rejected MCN's argument that the prior scope rulings were not publicly available because they the scope rulings were "available in [Commerce]'s Central Records Unit public reading room and listed in the quarterly published list of scope rulings." *Id.* at 38. Finally, Commerce found that, contrary to MCN's insistence, both the mixed-media analysis and the (k)(2) factors analysis were supported by substantial evidence and consistent with law. *Id.* at 42–51.

JURISDICTION and STANDARD OF REVIEW

The Court has jurisdiction pursuant to 28 U.S.C. § 1581(c) (2006) and section 516A(a)(2)(B)(vi) of the Tariff Act of 1930,[2] as amended, 19 U.S.C. § 1516a(a)(2)(B)(vi) (2006).

The Court must uphold Commerce's scope 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). When reviewing a scope ruling, the Court grants "significant deference to Commerce's interpretation of its own orders." *Allegheny Bradford Corp. v. United States,* 28 CIT 830, 842, 342 F. Supp. 2d 1172, 1183 (2004). "However, Commerce cannot 'interpret' an antidumping order so as to change the scope of that order, nor can Commerce interpret an order in a manner contrary to its terms." *Duferco Steel, Inc. v. United States*, 296 F.3d 1087, 1095 (Fed. Cir. 2002) (citing *Eckstrom Indus., Inc. v. United States,* 254 F.3d 1068, 1072 (Fed. Cir. 2001)).

DISCUSSION

I. Commerce's Methodology

MCN contests the following aspects of Commerce's method for answering the *Walgreen* question in its *Third Remand Results*: (1) Whether Commerce's refusal to conduct notice and comment rulemaking was consistent with the requirements of the APA; (2) whether Commerce complied with the direction of the CAFC in *MCN III* when deriving the mixed media test; and (3) whether Commerce's application of its four factor mixed media test was supported by substantial evidence.

A. Commerce was not required to conduct notice-and-comment rule making.

The first issue before the court is whether Commerce's attempt to answer the *Walgreen*'s question through its adoption of the four-factor mixed media test violated the notice-and-comment rule making procedures required under the Administrative Procedures Act ("APA").

MCN argues that Commerce's adoption of the four-factor mixed media test was improper because Commerce promulgated a new rule without the notice-and-comment rulemaking procedures required under the APA. Pl.'s Cmts. at 6. MCN insists that the APA mandates that a test of this nature must "occur with particularized notice and comment" procedures. *Id.* MCN also insists that the CAFC recognized

[2] All further references to the Tariff Act of 1930 will be to the relevant provisions of Title 19 of the United States Code, 2006 edition, and all applicable supplements thereto.

the benefit of formal rule-making for this issue in *MCN III* and that Commerce could have reasonably foreseen the need for such rule-making given the need to "address mixed media scope inquiries in a comprehensive manner." *Id.* at 10.

The court must reject MCN's arguments. The CAFC specifically spoke to this issue in *MCN III,* stating that "Commerce may attempt to draw an ascertainable standard" from "pre-existing public sources" as long as they were publicly available at the time the *Nails Order* was issued. *MCN III*, 725 F.3d at 1305. Thus, the CAFC explicitly granted Commerce the ability to attempt to support a mixed media standard without conducting notice-andcomment under the APA in their *Third Remand Results*, so long as Commerce's test complied with the CAFC's *MCN III* guidelines. *See id.*

B. Commerce's mixed media test failed to comply with the direction of the CAFC in *MCN III*

The next issue before the court is whether Commerce's mixed media test complied with the CAFC's instructions in *MCN III.* As discussed above, in *MCN III*, the CAFC instructed Commerce that "any implicit mixed-media exception to the literal scope of the order must be based on preexisting public sources," and that "Commerce may attempt to draw an ascertainable standard from these rulings if they were publicly available at the time the [*Nails Order*] was issued . . . ." *MCN III,* 725 F.3d at 1305.

The court must first address whether Commerce relied on publicly available scope determinations issued before the *Nails Order* to support its mixed media test in the *Third Remand Results.* The scope rulings Commerce relied on were published quarterly in the Federal Register, and were available for public viewing in Commerce's Public File Room. *See Third Remand Results* at 18. Because these scope rulings were publically available, this court will allow Commerce to attempt to support its mixed media analysis based on sources that were publically available at the time the *Nails Order* was issued.

Commerce constructed its mixed media test in order to answer the *Walgreen* question, which addresses whether Commerce should focus its scope ruling on the mixed media set as a whole or on the individual components. *Third Remand Results* 6–17. Commerce relied on prior scope rulings in order to construct the mixed media test from a common set of analytical principles. *Id.* at 9–17. The mixed media test consisted of four factors: (1) the "unique language of the order"; (2) the "practicability of separating the component merchandise for repackaging or resale"; (3) the "value of the component merchandise as compared to the value of the product as a whole"; and (4) the "ultimate use or function of the component merchandise relative to the

ultimate use or function of the mixed-media set as a whole." *Id.* at 17. Commerce insists that "these four factors articulate the common principles relied upon in [its] prior scope rulings and throughout [its] past practice." *Id.* at 17.

In the first set of scope rulings relied on by Commerce to support its mixed media test, Commerce focused on the product as a whole and found the requested product to be outside the class or kind of merchandise subject to the order. *See Final Scope Ruling – Antidumping Duty Order on Certain Cased Pencils from the PRC – Request by Creative Designs Naturally Pretty* (February 9, 1998) (concluding that pencils contained within a vanity set were not subject to the order on pencils from the PRC) ("*Vanity Set Scope Ruling*"); *See Final Scope Ruling – Antidumping Duty Order on Certain Cased Pencils from the PRC – Request by Dollar General Corporation* at 3, (April 6, 2001) ("The issue presented by this scope inquiry is whether Dollar's [stationery sets], which include a 3 1/4-inch or 4 1/2-inch pencil, are within the scope of the order on certain cased pencils from the PRC.") ("*Stationery Sets Scope Ruling*"); *See Final Scope Ruling – Antidumping Duty Order on Certain Cased Pencils from the PRC – Request by Target Corporation Regarding "Hello Kitty Fashion Totes"* at 4, (September 29, 2004) ("[Commerce] observe[d] that the Totes include a single pencil which, considered individually, is covered by the scope of the order. The Totes are multimedia sets, however . . . [and] the scope of the order does not contemplate mixed-media sets.") ("*Totes Scope Ruling*"); *See Final Scope Ruling – Antidumping Duty Order on Certain Cased Pencils from the PRC – Request by Target Corporation,* (March 4, 2005) (concluding that art sets containing subject pencils and other non-subject art supplies were outside the scope of the order) ("*Art Sets Scope Ruling*"); *See Final Scope Ruling – Antidumping Duty Order on Certain Cased Pencils from the PRC – Request by Fiskars Brands, Inc.,* (June 3, 2005) (concluding that compasses containing subject pencils were outside the scope of the order) ("*Compass Scope Ruling*") *See Final Scope Ruling Antidumping Duty Order on Certain Lined Paper Products from the People's Republic of China, Request by Avenues in Leather, Inc.,* (May 8, 2007) (concluding that padfolio containing subject lined paper pads were outside the scope of the order) ("*Padfolios Scope Ruling*") *See Certain Lined Paper Products from the People's Republic of China – Davis Group of Companies Corp. Scope Ruling Request,* (February 21, 2008) (concluding that padfolios containing subject lined paper pads were outside the scope of the order) ("*Davis Padfolios Scope Ruling*").

In the second set of scope rulings relied on by Commerce to support its mixed media test, Commerce focused on the component and found the requested product to be within the class or kind of the merchandise subject to the order. *See Recommendation Memo – Final Scope Ruling on the Request by Texsport for Clarification of the Scope of the Antidumping Duty Order on Porcelain-on-Steel Cooking Ware from the PRC,* (August 8, 1990) (concluding that porcelain-on-steel cookware imported as part of a camping set was subject to the order) ("*Cookware Scope Ruling*"); *See Final Determination of Sales at Less Than Fair Value: Fresh Cut Roses from Ecuador,* 60 Fed. Reg. 7019, (February 6, 1995) (roses individually dutiable in mixed flower bouquet) ("*Bouquets Scope Ruling*").

MCN argues that the scope rulings Commerce relied upon to articulate the four-factor test it used in the *Third Remand Results* "cannot and do not create a generally applicable analytical framework" for addressing the *Walgreen* question. *Id.* at 17. MCN insists that the scope rulings are isolated, contradictive, and generally do not provide any guidance to respondents. *Id.*

MCN notes that, in *MCN III,* the CAFC recognized a presumption that components of a mixed media set that meet the physical specifications of an order are presumed to be within the scope of that order. *Id.* at 10. MCN also notes that Commerce recognized that the nails in Target's toolkits, if analyzed alone, would be subject to the *Nails Order*. *Id.* MCN argues that Commerce failed to overcome this presumption, instead providing an "outcome determinative" analysis that relied on scope rulings that were "entirely devoid of reasoning that could provide guidance for future cases." *Id.* at 11. Ultimately, MCN concludes that the "ad-hoc" determinations did not provide a standard or consistent practice upon which to base Commerce's methodology. *Id.* at 12–13. MCN also argues that Commerce should have relied on evidence like the Harmonized Tariff Schedule of the United States ("HTSUS") to consider whether there was sufficient evidence to overcome the presumption that the nails in Target's toolkits were subject to the *Nails Order*.

The court finds that Commerce failed to comply with the direction of the CAFC for the following reasons. First, Commerce failed to demonstrate how the "unique language of the order" is relevant to its mixed media test. Commerce supported the inclusion of this factor by attempting to identify a standard derived from the *Cookware Scope Ruling* and *Bouquets Scope Ruling*. *Third Remand Results* at 7–11.

The prior scope rulings Commerce relies on to support including the unique language of the order as a factor in its mixed media test fail to support an ascertainable mixed media standard. Unlike in the in-

stant case where the scope language is silent, in both the *Cookware Scope Ruling* and the *Bouquets Scope Ruling,* the language of the order clearly addresses all of the relevant merchandise in the mixed media set. For instance, in the *Cookware Scope Ruling,* Commerce determined whether "kitchenware" and "cookware" imported together as part of a mixed media set were subject to the order. Commerce found that only the "cookware" within the set was dutiable because "kitchenware" was "specifically excluded from the order." *Cookware Scope Ruling* at 4. Because the scope language was clear, Commerce declined to conduct a mixed media analysis. *Id.* at 2. Similarly, in the *Bouquets Scope Ruling,* Commerce once again avoided conducting a mixed media analysis when determining whether roses imported within bouquets including non-dutiable flowers would be subject to the order at issue. *Bouquets Scope Ruling,* 60 Fed. Reg. at 7022. The language of the order contemplated bouquets, eliminating any need for Commerce to conduct a mixed media analysis. *Id.*

In the *Third Remand Results*, Commerce insists that the language of the order controls the mixed media analysis and "informs the application" of the remaining factors in its mixed media test. *Third Remand Results* at 21. Commerce argues that "[b]y looking at the language of the order, [Commerce] can determine where such an analysis is warranted, either from the silence of the order or language in the order speaking to these factors." *Id.* Commerce failed to support this contention. Apart from the fact that both of these scope rulings involve a mixed media set, neither scope ruling contemplated a mixed media analysis. Furthermore, it is well established that "the process must begin with the language of the order, which provides the 'predicate for the interpretive process,'" but these scope rulings do not provide guidance with regards to how this factor is relevant to a mixed media analysis. *MCN III* 725 F.3d at 1303 (citing *Duferco Steel, Inc. v. United States,* 296 F.3d 1087, 1097 (Fed. Cir. 2002)). Where the scope language is clear, like in the *Cookware Scope Ruling* and *Bouquets Scope Ruling,* "scope analysis [is] at an end." *See id.*

Secondly, the *Cookware Scope Ruling* and *Bouquets Scope Ruling* cannot be reconciled with the seven other scope rulings Commerce cited in its *Third Remand Results*. None of the remaining scope rulings contain orders which clearly address the subject merchandise or the mixed media set. The remaining scope rulings appear to be isolated examples of how the test is outcome determinative as to whether Commerce finds that the mixed media set is subject to the order. All of the remaining scope rulings contain an ambiguous order, and rely on the (k)(2) factors in order to justify excluding the subject

merchandise from the scope of the order. Additionally, the nine scope rulings rely on a number of different bases for excluding a product from the scope of an order. *Third Remand Results* at 9–16. For instance, in the *Vanity Set Scope Ruling* Commerce found as a "threshold matter" that it would treat the vanity set as a whole set, rather than analyzing the pencils included in the set individually. *See Third Remand Results* at 11; *Vanity Set Scope Ruling* at 4. Commerce determined the answer to the *Walgreen* question on the basis that the pencil included within the vanity set was only a "minor component" of the mixed media set. *Vanity Set Scope Ruling* at 4. This resulted in Commerce limiting its analysis of the (k)(2) factors to only the whole set, and thus, Commerce determined that the vanity set was excluded from the scope of the order on pencils from the PRC. *Id.* at 4–8. Furthermore, in the *Compass Scope Ruling,* Commerce chose to answer the *Walgreen* question primarily by weighing the (k)(2) factors and concluding that the purchaser's ultimate expectation was to obtain a "drawing tool" as opposed to obtaining a pencil to be used for writing. *Compass Scope Ruling* at 8. Contrary to Commerce's assertions, these scope rulings appear to answer the *Walgreen* question based on the facts and circumstance in each particular case, and do not identify a broader ascertainable mixed media standard.

Thirdly, Commerce argues that its mixed media test occurs "within the context" of the (k)(1) factors. *Third Remand Results* at 36. It is unclear to the court how this test occurs within the (k)(1) factors. Commerce relies on scope rulings which answer the *Walgreen* 's question based on the (k)(2) factors. *See Vanity Set Scope Ruling; Stationery Sets Scope Ruling; Totes Scope Ruling; Art Sets Scope Ruling; Compass Scope Ruling; Padfolios Scope Ruling; Davis Padfolios Scope Ruling.* Thus, in the *Third Remand Results,* Commerce attempts to imbed its test within the (k)(1) factors by using "ad-hoc" determinations that do not provide an "ascertainable standard that would allow importers to predict how Commerce would treat their mixed media products." *MCN III*, 725 F.3d at 1305.

Furthermore, MCN correctly notes that in *MCN III* the CAFC did in fact recognize a presumption that components of a mixed media set that meet the physical specifications of an order are presumed to be within the scope of that order. *See MCN III*, 725 F.3d at 1304. In this case, neither party disputes the fact that the nails contained in Target's toolkits "meet the physical characteristics of the nails subject to the scope of the *Nails Order*." *Third Remand Results* at 28–29. The CAFC stated that "[i]n order to overcome this presumption Commerce must identify published guidance issued prior to the date of the original antidumping order . . . that provides a basis for interpreting

the order contrary to its literal language." *See MCN III,* 725 F.3d at 1304. Here, Commerce failed to explicitly address how its mixed media test reflects this presumption at any point in the *Third Remand Results*.

Ultimately, Commerce's mixed media test fails to comply with the instructions the CAFC articulated in *MCN III*, which required Commerce to draw an ascertainable mixed media standard from information that was publically available at the time the *Nails Order* was issued. These nine scope rulings do not identify a coherent and ascertainable standard encompassing all of the factors in Commerce's mixed media test, and thus, they do not provide guidance that would allow importers to predict how Commerce would treat their mixed media products. Because Commerce's test is inconsistent with *MCN III*, this court declines to find whether Commerce's application of its four-factor mixed media test was supported by substantial evidence.

Conclusion

For the reasons discussed above, this case is remanded to Commerce for further proceedings consistent with this opinion, it is hereby

ORDERED that the *Final Results of Redetermination Pursuant to Remand Order* is to be remanded to the United States Department of Commerce for reconsideration of its mixed media standard in accordance with the United States Court of Appeals for the Federal Circuit's decision in *Mid Continent Nail Corp. v. United States,* 725 F.3d 1295 (Fed. Cir. 2013).

Dated: October 6, 2014
New York, New York

/*s*/ *Nicholas Tsoucalas*
NICHOLAS TSOUCALAS
SENIOR JUDGE

Slip Op. 14–119

NAVNEET PUBLICATIONS (INDIA) LTD., MARISA INTERNATIONAL, SUPER IMPEX, PIONEER STATIONARY PVT. LTD., SGM PAPER PRODUCTS, LODHA OFFSET LIMITED, and MAGIC INTERNATIONAL PVT. LTD., Plaintiffs, v. UNITED STATES, Defendant, and ASSOCIATION OF AMERICAN SCHOOL PAPER SUPPLIERS, Defendant-Intervenor.

Before: Richard W. Goldberg, Senior Judge
Court No. 13–00204

[Granting plaintiff's motion for a preliminary injunction.]

Dated: October 6, 2014

Neil R. Ellis, *Richard L.A. Weiner*, and *Rajib Pal*, Sidley Austin LLP, of Washington, DC, for plaintiffs.

Antonia R. Soares, Trial Attorney, Commercial Litigation Branch, Civil Division, U.S. Department of Justice, of Washington, DC, for defendant. With her on the brief were *Stuart F. Delery*, Assistant Attorney General, *Jeanne E. Davidson*, Director, and *Patricia M. McCarthy*, Assistant Director. Of counsel on the brief was *Elika Eftekhari*, Office of the Chief Counsel for Trade Enforcement and Compliance, U.S. Department of Commerce, of Washington, DC.

Timothy C. Brightbill, *Maureen E. Thorson*, and *Tessa V. Capeloto*, Wiley Rein LLP, of Washington, DC, for defendant-intervenor.

OPINION

Goldberg, Senior Judge:

The court considers a motion by plaintiff Navneet Publications (India) Ltd. ("Navneet"), for a preliminary injunction under USCIT Rule 65. During the fifth administrative review of an antidumping order on lined paper products from India, the Department of Commerce assigned Navneet an *ad valorem* antidumping rate of 11.01 percent. *See Certain Lined Paper Products from India*, 78 Fed. Reg. 22,232, 22,234 (Dep't Commerce Apr. 15, 2013) (final admin. review) ("*Final Results*"). Navneet now seeks to prevent entries from a later review period from being liquidated at this 11.01 percent rate. Defendant the United States ("the Government") rejoins that the court lacks jurisdiction to issue an injunction.

The court grants the motion over the Government's objections. The court first holds that it has jurisdiction to enjoin the liquidation of entries at the 11.01 percent rate, even though those entries were made during a subsequent review period. The court also finds that Navneet meets the traditional requirements to secure a preliminary injunction, as discussed below.

BACKGROUND

In 2006, the Department of Commerce ("Commerce") issued an antidumping order on certain lined paper products ("CLPP") from India. *Certain Lined Paper Products from India*, 71 Fed. Reg. 56,949 (Dep't Commerce Sept. 28, 2006) (notice of antidumping duty order). The agency launched the fifth administrative review of this order in October 2011. *See Initiation of Antidumping and Countervailing Duty Administrative Reviews*, 76 Fed. Reg. 67,133, 67,134 (Dep't Commerce Oct. 31, 2011). During the proceeding, Commerce assigned Navneet, a cooperative respondent not selected for individual review, an 11.01 percent antidumping rate, or "all-others" rate. *Final Results* at 22,233-34. This all-others rate would serve as the rate of

liquidation—or the final antidumping duty imposed—for each entry of Navneet's CLPP imported during the fifth review period (September 1, 2010 to August 31, 2011). *Id.* at 22,232. The rate also became the amount importers paid in deposits for Navneet's CLPP that entered, or was withdrawn from warehouse, after the *Final Results* were published. *Id.* at 22,234; *see also* 19 U.S.C. § 1675(a)(2)(C). The *Final Results* were published on April 15, 2013.

Navneet appealed the *Final Results* a month later. *See* Summons, ECF No. 1 (May 15, 2013). The Court of International Trade took jurisdiction under 28 U.S.C. § 1581(c), which gives the court exclusive authority to review final determinations from antidumping investigations and reviews. *See Navneet Publ'ns (India) Ltd. v. United States*, 38 CIT __, __, 999 F. Supp. 2d 1354, 1357 (2014). Thus empowered, the court held that the all-others rate from the fifth review was not based in substantial evidence. *Id.* at __, 999 F. Supp. 2d at 1366. The *Final Results* were remanded so Commerce could revise the rate to comply with the court's opinion and order. *Id.*

As the parties litigated the *Final Results* of the fifth review, Commerce initiated its sixth review of the CLPP order. *See Initiation of Antidumping and Countervailing Duty Administrative Reviews*, 77 Fed. Reg. 65,858, 65,859 (Dep't Commerce Oct. 31, 2012). Commerce completed the sixth review on May 7, 2014, and assigned Navneet a 0.25 percent rate for entries of CLPP from the sixth review period (September 1, 2011, and August 31, 2012). *Certain Lined Paper Products from India*, 79 Fed. Reg. 26,205, 26,206 (Dep't Commerce May 7, 2014) (final admin. review).

Later, but still during the fifth-review litigation, Navneet and the Association of American School Paper Suppliers ("AASPS") requested a seventh review of Navneet's CLPP imports. *See* Appl. for Prelim. Inj. at Ex. 1, ECF No. 57 ("Pl.'s App."). Commerce duly initiated the review, which would have calculated duties for CLPP entered between September 1, 2012, and August 31, 2013. *See Initiation of Antidumping and Countervailing Duty Administrative Reviews*, 78 Fed. Reg. 67,104, 67,105 (Dep't Commerce Nov. 8, 2013).

In December 2013, however, both Navneet and AASPS withdrew their requests for review. Pl.'s App. at Ex. 2. This set off a legal chain reaction that culminated in Navneet's motion for a preliminary injunction. First, because both Navneet and AASPS withdrew their review requests within 90 days of initiation, Commerce had to rescind the review with respect to Navneet. *See* § 19 C.F.R. § 351.213(d)(1). The agency issued its notice of rescission on September 30, 2014. *See* Notice of Recent Development at Ex. A, ECF No. 60 ("Rescission Notice"); 19 C.F.R. § 351.213(d)(4). Second, now that the review is

rescinded, Commerce must instruct Customs and Border Protection ("CBP") to liquidate Navneet's seventh-review-period entries at the cash deposit rate in effect at the time those entries were made. *See* 19 C.F.R. § 351.212(c); *see also* 19 U.S.C. § 1516a(c)(1) (requiring liquidation, absent an injunction, in accordance with agency determination). The cash deposit rate in effect during the latter part of the seventh review period—or April 15 to August 31, 2013—was the invalidated all-others rate issued in the fifth-review *Final Results*.

To avoid having its seventh-review-period entries liquidated at the invalid fifth-review rate, Navneet applied for a preliminary injunction. *See* 19 U.S.C. § 1516a(c)(2) (allowing court to enjoin liquidation of entries covered by agency decision). Plaintiff would limit relief to entries made between April 15 and August 31, 2013 (the "contested entries"), and claims the entries should be liquidated at a revised rate after the fifth-review litigation has ended. Pl.'s App. at Ex. 2 (proposed order); *see also* 19 U.S.C. § 1516a(e) (requiring liquidation in accordance with final court decision of entries enjoined under § 1516a(c)(2)). Absent an injunction, the contested entries will be liquidated at an unlawful rate with no chance for reliquidation to correct the error. Pl.'s App. at 6–7.

DISCUSSION

The court agrees with Navneet. As a threshold matter, the court holds that it has jurisdiction to enjoin liquidation of the contested entries at the invalid fifth-review rate. Navneet also satisfies all the criteria to secure a preliminary injunction. The court thus grants the relief Navneet has requested.

I. The Court Has Jurisdiction to Enjoin Liquidation of the Contested Entries at the Invalid Fifth-Review Rate

The court first holds that it has jurisdiction to enjoin the liquidation of the contested entries at the invalid fifth-review rate, even though those entries occurred during the seventh review period. The court remanded the fifth-review rate under its jurisdictional grant in 28 U.S.C. § 1581(c), and the court retains this jurisdiction to ensure compliance with its rulings. *See Holmes Prods. Corp. v. United States*, 17 CIT 356, 356, 822 F. Supp. 754, 756 (1993).

To illustrate why this is so, the court traces the jurisdictional chain of authority from its first link at 28 U.S.C. § 1581(c). As mentioned before, § 1581(c) gives the Court of International Trade "exclusive jurisdiction of any civil action commenced under section 516A of the Tariff Act of 1930." Section 516A of the Act, codified as amended at 19 U.S.C. § 1516a, permits review of final determinations by Commerce and the International Trade Commission, including decisions under

19 U.S.C. § 1675. *See* 19 U.S.C. § 1516a(a)(2)(B)(iii). And § 1675 governs Commerce's conduct of administrative reviews. Navneet invoked the court's authority under these provisions in its complaint, s*ee* Complaint 1, ECF No. 8, and by this power, the court held the fifth-review all-others rate was unsubstantiated in evidence, *Navneet*, 38 CIT at __, 999 F. Supp. 2d at 1357, 1366.

By the same authority, the court may enjoin liquidation of the contested entries at the invalid fifth-review rate. 19 U.S.C. § 1516a(c)(2) provides:

> In the case of a determination described in paragraph (2) of subsection (a) of this section [which includes the results of administrative reviews] by the Secretary, [Commerce], or the Commission, the United States Court of International Trade may enjoin the liquidation of some or all entries of merchandise covered by a determination of the Secretary, [Commerce], or the Commission, upon a request by an interested party for such relief and a proper showing that the requested relief should be granted under the circumstances.

To paraphrase, if the court has jurisdiction over the final results of a review, then it may enjoin liquidation of entries "covered" by those results, as long as the applicant shows proper grounds for relief. To complete the chain of authority, then, the court must decide whether Navneet's contested entries are covered by a determination from the fifth review, or by some other determination.

The court holds that the contested entries are covered by the all-others rate from the fifth review. At the outset, the court notes the broad sweep of the word "covered" in § 1516a(c)(2). As defined in a common dictionary, the verb "cover" means "to have sufficient scope to include or take into account." Merriam-Webster's Collegiate Dictionary 268 (10th ed. 1993). This implies that an administrative decision "covers" an entry if it brings that entry within its scope or has binding legal effect on the entry. *See Asociacion Colombiana de Exportadores de Flores v. United States*, 916 F.2d 1571, 1577 (1990) (holding deposit rate from investigation "covered" entries from first administrative review).

In this light, the all-others rate from the fifth review certainly "covers" the entries at issue. Although the contested entries were made during the seventh review period, the deposit rate from the fifth review will become the entries' final antidumping rate at liquidation. As explained before, the fifth-review all-others rate served as Navneet's cash deposit rate for entries after April 15, 2013. *See Final Results* at 22,234. Navneet paid deposits at this rate during the latter

part of the seventh review period, or April 15 to August 31, 2013. Then, when Navneet and AASPS requested a seventh review, it appeared Commerce would calculate a new, retrospective rate for Navneet's entries between September 1, 2012, and August 31, 2013. *See* Pl.'s App. at Ex. 1. But now it is clear this will never happen. Because Navneet and AASPS withdrew their requests for review, Commerce rescinded the seventh review with respect to Navneet's entries. *See* Rescission Notice; 19 C.F.R § 351.213(d)(1). And because the seventh review will not yield a new antidumping rate for Navneet's goods, the cash deposit rate from the fifth review will be the contested entries' final rate at liquidation. *See* 19 C.F.R. § 351.212(c). The only final agency determination that could possibly "cover" the contested entries, then, is the fifth-review all-others rate. *See* 19 U.S.C. § 1516a(c)(2). The entries are not covered by a seventh-review determination, because there is no such determination to speak of.

In sum, because a fifth-review determination covers the contested entries, the court may enjoin liquidation of those entries at the invalid fifth-review rate. *See id.* The entries may be liquidated later—most likely at a fifth-review rate revised on remand, or perhaps at the 11.01 percent rate if the Government appeals and the Federal Circuit sustains the *Final Results*. *See id.* § 1516a(e) (requiring liquidation "in accordance with the final court decision").

The Government counters that the court may never enjoin, in an action regarding the fifth review, the liquidation of goods entered during the seventh review period. *See* Def.'s Resp. in Opp'n to Pl.'s Mot. for Prelim. Inj. 9–10, ECF No. 59 ("Gov't Resp."). If it wished to avert liquidation of the contested entries at the invalid fifth-review rate, then Navneet should have taken part in the seventh review and secured a new rate for its seventh-review-period entries. *See id.* at 8–9. And AASPS adds, as a corollary, that Navneet "accepted the correctness of the 11.01 percent rate as a *liquidation* rate for seventh review entries" by withdrawing from the review. AASPS Opp. to Pl.'s Mot. for Prelim. Inj. 5, ECF No. 58 ("AASPS Resp.").

These arguments misconstrue the law. As discussed above, the court can enjoin the liquidation of entries covered by a prior review's deposit rate, even if those entries occurred during a period subject to a rescinded review. *Asociacion Colombiana de Exportadores de Flores*, 916 F.2d 1571, illustrates the point in the context of an investigation and an ensuing review. In *Asociacion*, plaintiff successfully challenged a 4.4 percent antidumping rate from an investigation; after remand, the court sustained a revised 3.1 percent rate in a final judgment. *Id.* at 1574. As litigation progressed, however, Commerce began its first review of the underlying antidumping order, and plain-

tiff did not take part in the review. *Id.* Fearing liquidation of its entries from the first review period at the invalid 4.4 percent rate, plaintiff secured a permanent injunction from the Court of International Trade. *Id.* The Federal Circuit affirmed, reasoning that § 1516a(c)(2) allowed the court to enjoin liquidation of first-review-period entries at the unsound rate from the investigation. *Id.* at 1577; *see also Jilin Henghe Pharm. Co. v. United States*, 28 CIT 969, 980, 342 F. Supp. 2d 1301, 1312 (2004) (granting declaratory relief against liquidation at deposit rate held invalid in final judgment); *Laclede Steel Co. v. United States*, 20 CIT 712, 718, 928 F. Supp. 1182, 1188 (1996) (granting permanent injunction against liquidation at deposit rate held invalid in final judgment).

The lesson of *Asociacion* applies here with equal force. Like the plaintiff in *Asociacion*, Navneet forsook review of certain contested entries, yet invalidated, in court, the deposit rate that covered those entries. On these facts, the Federal Circuit affirmed a permanent injunction under § 1516a(c)(2) to prevent the liquidation of entries at an unlawful rate. S*ee* 916 F.2d at 1577–78. By the same authority, this court may issue preliminary relief to ensure Navneet's entries are liquidated in accordance with a final judgment after remand. Furthermore, though the Government would limit *Asociacion* to situations where plaintiff invalidates a deposit rate from an investigation, the case should not be read so narrowly. *See* Gov't Resp. 13. *Asociacion* affirmed relief under § 1516a(c)(2), which permits injunctions not only for entries covered by decisions from investigations, but also for entries covered by decisions from reviews. *See* 19 U.S.C. § 1516a(c)(2) (stating court may enjoin liquidation of entries covered by determinations under § 1516a(a)(2), which includes reviews). Thus, although *Asociacion* considered granting injunctive relief only where "the original antidumping order [was] challenged in the court suit," 916 F.2d at 1577, the law also permits injunctions where plaintiff challenges and invalidates a deposit rate from a review. Navneet did just that here.

The Government also cites *Corus Staal BV v. United States*, 31 CIT 826, 493 F. Supp. 2d 1276 (2007), to prove that the court may not enjoin liquidation of entries from a given review period, unless plaintiff took part in the review covering that period. But this is not *Corus*'s holding. *Corus* concerned a plaintiff that sought to enjoin the liquidation of fifth-review-period entries at a deposit rate from the second review. *See id.* at 828–30, 839, 493 F. Supp. 2d at 1279–81, 1287–88. Apparently, the second-review deposit rate was never held

unlawful in court, and plaintiff took no part in the fifth review. *See id.* Nonetheless, sometime during the fifth review, the antidumping order covering plaintiff's goods was revoked in a proceeding before Commerce. *Id.* at 829–30, 493 F. Supp. 2d at 1280–81. Plaintiff then tried to enjoin liquidation of its fifth-review-period entries at the second-review rate, invoking the court's residual jurisdiction under 28 U.S.C. § 1581(i). *Id.* at 835–36, 493 F. Supp. 2d at 1284–86. The court denied relief, finding it lacked jurisdiction under § 1581(i) when another provision, § 1581(c), was not "manifestly inadequate" to address plaintiff's claim. Had plaintiff wished to enjoin liquidation, it should have "requested an administrative review" and contested the results under § 1581(c). *Id.* at 836, 493 F. Supp. 2d at 1285. *Corus*'s holding, in sum, is this: The court cannot grant injunctive relief under § 1581(i) when jurisdiction is available under § 1581(c).

Under this proper reading of *Corus*, Navneet prevails. Unlike the plaintiff in *Corus*, Navneet invoked the court's jurisdiction under § 1581(c) when it challenged the antidumping rate from the fifth review. The court retains its jurisdiction to ensure that entries from the latter part of the seventh review period are liquidated at a rate based in substantial evidence. *See Holmes*, 17 CIT at 356, 822 F. Supp. at 756.

II. Navneet Meets the Requirements to Secure a Preliminary Injunction

Now that the question of jurisdiction is settled, the court decides whether injunctive "relief should be granted under the circumstances." 19 U.S.C. § 1516a(c)(2). To secure an injunction, Navneet "must show (1) that it will be immediately and irreparably injured [absent an injunction]; (2) that there is a likelihood of success on the merits; (3) that the public interest would be better served by the relief requested; and (4) that the balance of hardship on all the parties favors the petitioner." *Zenith Radio Corp. v. United States*, 710 F.2d 806, 809 (Fed. Cir. 1983). Navneet satisfies each of these criteria.

First, Navneet has shown that it will suffer irreparable harm if the court withholds an injunction. As explained above, if the court does not grant relief, Commerce will instruct CBP to liquidate the contested entries at the unlawful fifth-review rate. *See* 19 C.F.R. § 351.212(c). And once the entries are liquidated, the action cannot be undone, even by court order. 19 U.S.C. § 1516a(c)(1) generally requires entries to be liquidated in accordance with Commerce's instructions, but provides no framework for reliquidation of entries assessed "not in harmony" with a court decision. *See Agro Dutch Indus. Ltd. v. United States*, 589 F.3d 1187, 1190 (Fed. Cir. 2009) ("[As] a general rule . . . , liquidation moots a party's claims pertaining

to the liquidated entries.").[1] Thus, were relief denied, the contested entries would fall subject to an unlawful rate that the court would be powerless to correct. Navneet would lose the full benefit of judicial review and suffer irreparable harm. *See Zenith*, 710 F.2d at 810 ("[A]brogation of effective judicial review [is] sufficient irreparable injury . . . .").

The Government and AASPS retort that Navneet will suffer no injury that was not "self-inflicted." AASPS Resp. at 5. Had Navneet remained in the seventh review, Commerce would have made a new rate to correct the unlawful one from the fifth review, and Navneet would sustain no harm. *See id.*; Gov't Resp. 11. But forcing Navneet to participate in a review—simply to avoid having its goods liquidated at an invalid rate—would be harmful too. Reviews cost parties time and treasure, and in recognition of this fact, the statute permits Commerce to conduct reviews by request only. *See* 19 U.S.C. § 1675(a)(1); *Asociacion*, 916 F.2d at 1576. By withdrawing from the seventh review, Navneet avoided adding the expense of another proceeding to the sunk cost of its fifth-review litigation. Navneet also signaled, through its withdrawal, that it would accept liquidation of the contested entries at a court-approved rate. This was an efficient course of action, and Navneet's harm is no less grievous for the fact that it withdrew from the review to prevent waste.

Second, Navneet faces a high likelihood of success on the merits. In a way, it has succeeded already. In this case, the court held the fifth-review all-others rate was not based in substantial evidence. *Navneet*, 38 CIT at __, 999 F. Supp. 2d at 1366. The agency is now calculating a revised fifth-review rate, and if this rate is sustained at the end of the remand process, any entries covered by the rate will be liquidated "in accordance with the final court decision in the action." 19 U.S.C. § 1516a(e). Of course, there is a chance the Federal Circuit will sustain the 11.01 percent rate if the Government appeals this court's final judgment. But this possibility does not preclude relief. The court has already held the fifth-review all-others rate to be unfounded in evidence, and this is enough to prove a likelihood of success for the purpose of securing a preliminary injunction.

Third, to grant the injunction would be in the public interest. No doubt it is contrary to the public interest to allow the liquidation of entries at a rate held invalid by this court. *See Laclede*, 20 CIT at 718, 928 F. Supp. at 1188 ("[T]here is a compelling public interest in

[1] The general rule against reliquidation sports some exceptions, but none apply here. *See Agro Dutch*, 589 F.3d at 1191–92 (permitting reliquidation if entries liquidated after injunction is issued, or if typographical error in injunction order allowed liquidation by accident).

having Commerce promptly comply with the judgments of the Court of International Trade . . . ."). And fourth, the injunction would cause little hardship to the defendant. Suspending liquidation may "inconvenience" the Government by delaying the final collection of revenue, but balanced against Navneet's hardship—the "loss of its right to judicial review"—the Government's burden fails to compare. *See Timken Co. v. United States*, 6 CIT 76, 81–82, 569 F. Supp. 65, 71 (1983).

Accordingly, a preliminary injunction is appropriate in this case.

CONCLUSION

Because the court has jurisdiction to grant injunctive relief, and because Navneet has made a showing that relief should be granted, the court issues a preliminary injunction enjoining the liquidation of Navneet's CLPP entries between April 15 and August 31, 2013, at the 11.01 percent all-others rate established in the *Final Results* of the fifth administrative review. A separate order will issue in accordance with these conclusions.

Dated: October 6, 2014
New York, New York

/*s*/ *Richard W. Goldberg*
RICHARD W. GOLDBERG
SENIOR JUDGE