U.S. Court of International Trade

Slip Op. 16–45

JIAXING BROTHER FASTENER CO., LTD., A/K/A JIAXING BROTHER STANDARD PART CO., LTD., IFI & MORGAN LTD., AND RMB FASTENERS LTD., Plaintiffs v. UNITED STATES, Defendant AND VULCAN THREADED PRODUCTS, INC., Defendant-Intervenor.

Court No. 15–00313

[Granting Plaintiffs' Motion to Stay Proceedings]

Dated: May 6, 2016

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Elizabeth Anne Speck, Commercial Litigation Branch, Civil Division, U.S. Department of Justice, of Washington, D.C., for Defendant. With her on the brief were *Benjamin C. Mizer*, Principal Deputy Assistant Attorney General, Civil Division, *Jeanne E. Davidson*, Director, and *Patricia M. McCarthy*, Assistant Director, Commercial Litigation Branch. Of counsel on the brief was *Khalil Gharbieh*, Office of the Chief Counsel for Trade Enforcement and Compliance, U.S. Department of Commerce, of Washington, D.C.

OPINION

RIDGWAY, Judge:

In this action, Plaintiffs Jiaxing Brother Fastener Co., Ltd., *et al*. (collectively "Brother") challenge various aspects of the Final Results of the U.S. Department of Commerce ("Commerce") in the fifth administrative review of the antidumping duty order covering certain steel threaded rod from the People's Republic of China. *See* Complaint[1]; Certain Steel Threaded Rod From the People's Republic of China: Final Results of Antidumping Duty Administrative Review: 2013–2014, 80 Fed. Reg. 69,938 (Nov. 12, 2015) ("Final Results").

Now before the court is Plaintiffs' Motion to Stay Proceedings, which seeks to hold this matter in abeyance pending a determination in another action involving all of the same parties. *See* Plaintiffs'

[1] Except as otherwise indicated, all documents cited herein were filed on the docket of the instant action (*i.e.*, Court No. 15–00313).

Motion to Stay Proceedings at 1, 3 ("Pls.' Brief")[2]; *see also* Joint Status Report and Scheduling Order at 2, 3. In that other action, which challenges the preceding (fourth) administrative review of the same antidumping duty order at issue in this action, Brother contests essentially the same aspects of Commerce's determination that Brother raises here. *Compare* Complaint (filed in this action), *and* First Amended Complaint, *filed in Jiaxing Brother Fastener Co., Ltd., et al. v. United States, et al.*, Court No. 14–00316; Pls.' Brief at 1, 2, 3–4, 5; Joint Status Report and Scheduling Order at 3; *see also American Life Ins. Co. v. Stewart*, 300 U.S. 203, 215 (1937) (case for stay *pendente lite* is clearest "where the parties and the issues are the same" in the two cases).[3]

Brother argues that – in light of the overlapping issues and parties in the two actions – a stay of this action pending a ruling by this court on Brother's Motion for Judgment on the Agency Record in Brother's action challenging the preceding administrative review (Court No. 14–00316) will conserve judicial resources and help minimize the parties' litigation costs. *See*Pls.' Brief at 3, 4, 5; Joint Status Report and Scheduling Order at 3.[4] Brother further contends that such a

[2] The three plaintiffs in this action (and in the other case, *i.e.*, Court No. 14–00316) are Jiaxing Brother Fastener Co., Ltd., a/k/a Jiaxing Brother Standard Part Co., Ltd., IFI & Morgan Ltd., and RMB Fasteners Ltd. Jiaxing Brother Fastener Company is a Chinese manufacturer of the subject merchandise. The other two plaintiffs are related exporter trading companies.

In both actions, the United States is the defendant, and Vulcan Threaded Products, Inc. – a domestic producer of the subject merchandise – is a defendant-intervenor.

[3] The language of the first four counts of the complaints in the two cases is exactly the same, *verbatim*. *Compare* Complaint, Counts I-IV (filed in this action), *and* First Amended Complaint, Counts I-IV, *filed in Jiaxing Brother Fastener Co., Ltd., et al.*, Court No. 14–00316; *see also* Pls.' Brief at 3–4. Count V of the First Amended Complaint in the other action (*i.e.*, Court No. 14–00316) challenges Commerce's "surrogate valuation of brokerage and handling," an issue that Brother does not raise in this case. *See* First Amended Complaint, Count V, *filed in Jiaxing Brother Fastener Co., Ltd., et al.*, Court No. 14–00316; *see also* Joint Status Report and Scheduling Order at 3. Count V of the Complaint in this action asserts that Commerce improperly "fail[ed] to adjust financial ratios to account for SG&A [*i.e.*, selling, general, and administrative] labor expenses included in its direct labor calculation." *See* Complaint, Count V (filed in this action).

[4] Brother is inconsistent in its statements concerning the duration of the requested stay. On the first page of its Motion to Stay, Brother asserts that it seeks "to stay proceedings in this action pending a *final resolution* of all proceedings, *including any and all appeals*, in *Jiaxing Brother Fastener Co., Ltd., et al. v. United States*, Court No. 14–00316." *See* Pls.' Brief at 1 (emphases added).

Elsewhere in its Motion to Stay, however, Brother states that it seeks a stay only "until there is *some guidance* provided" by the court in Court No. 14–00316, with no reference to appeals or finality. *See*Pls.' Brief at 3 (emphasis added); *see also id*. at 4 (seeking to "defer[ ] further proceedings . . . until there is guidance from Court No. 14–00316"); *id*. (asserting that Defendant-Intervenor Vulcan Threaded Products, Inc. "would conserve resources by not being required to file [a brief on the merits in this action] . . . until and unless there is

stay will not prejudice the parties in any way. *See* Pls.' Brief at 4.

The Government opposes Brother's request, arguing that a stay will not achieve any economies, and that, in fact, a stay will harm other parties. *See generally* Defendant's Opposition to Plaintiffs' Motion to Stay Proceedings ("Def.'s Opp. Brief"). Defendant-Intervenor Vulcan Threaded Products, Inc. elected not to brief the issue.[5]

As explained in greater detail below, a stay *pendente lite* of limited duration can be expected to sharpen the issues here and to streamline these proceedings (and thus will help conserve the resources of all concerned) – and, indeed, conceivably may result in the dismissal of one or more of Brother's claims in this action.[6] Even more to the point, the record is devoid of evidence that such a stay will work any real hardship on the Government (or, for that matter, Defendant-Intervenor Vulcan). Brother's motion is therefore granted, and further proceedings in this action are stayed until 30 days following a

guidance" from Court No. 1400316); *id*. (arguing that the Government "would also benefit from definitive guidance arising out of" Court No. 14–00316). And, in the Joint Status Report, Brother asserts that "it would needlessly waste judicial and party resources to argue . . . issues twice before [the parties] can benefit from the [*Court of International Trade's*] *guidance*" in Court No. 14–00316. *See* Joint Status Report and Proposed Scheduling Order at 3 (emphasis added).

Any confusion about the relief that Brother seeks is resolved by the terms of the proposed Order of Stay filed with Brother's Motion to Stay, which are highly specific and envision a fairly limited stay. The proposed Order of Stay contemplates, *inter alia*, that – within 30 days after issuance of an opinion on Brother's Motion for Judgment on the Agency Record pending in Court No. 14–00316 – the parties would file a status report in this action indicating "what, if any, issues/claims [in this action] may be appropriate for voluntary remand by the Department of Commerce or for withdrawal by [Brother]" in light of the opinion in Court No. 14–00316, and indicating the parties' views as to "whether it is appropriate to *continue the stay*" in this matter. *See* Brother's Proposed Order of Stay at 1–2 (emphasis added).

[5] A separate action has been filed by a different plaintiff which, like the instant action, challenges Commerce's Final Results in the fifth administrative review of the antidumping duty order covering certain steel threaded rod from the People's Republic of China. However, the claims asserted in that action differ from the claims that Brother asserts in this action. *See* Complaint, *filed in Hubbell Power Systems, Inc. v. United States, et al.*, Court No. 15–00312; *see also* Joint Status Report and Scheduling Order at 2 (distinguishing claims at issue in this action from claims at issue in Court No. 15–00312). Hubbell Power, the plaintiff in that action, takes no position on the Motion to Stay at issue here. *See* Joint Status Report and Scheduling Order at 2, 4; *see also* Joint Status Report and Scheduling Order at 2, *filed in Hubbell Power Systems, Inc.*, Court No. 15–00312.

It is reported that Vulcan, the defendant-intervenor in this action, opposes Brother's Motion to Stay. *See* Pls.' Brief at 5; Joint Status Report and Scheduling Order at 4; *see also* Joint Status Report and Scheduling Order at 2, *filed in Hubbell Power Systems, Inc.*, Court No. 15–00312. However, because Vulcan did not brief the issue, the record is silent as to any factual or legal bases for the company's position.

[6] Again, at this point Brother seeks a stay of this litigation only through issuance of an opinion on its Motion for Judgment on the Agency Record pending in Court No. 14–00316. *See* n.4, *supra*. And, as Brother notes, that motion has been fully briefed and argued. *See* Pls.' Brief at 5; Joint Status Report and Scheduling Order at 3.

determination in *Jiaxing Brother Fastener Co., Ltd., et al.*, Court No. 1400316.

I. *Analysis*

The Government contends that, to justify the entry of a stay, a movant must "make a strong showing that a stay is necessary" – a showing that the Government maintains Brother has not made. *See* Defendant's Opp. Brief at 3 (quoting *Georgetown Steel Co. v. United States*, 27 CIT 550, 553, 259 F. Supp. 2d 1344, 1347 (2003)); *see also* Defendant's Opp. Brief at 2, 3–5. But, in fact, *Landis*– the seminal case on stays *pendente lite*, relied on in *Georgetown Steel* and invoked by both Brother and the Government here – makes it clear that "the suppliant for a stay must make out a clear case of hardship or inequity in being required to go forward" with litigation (*i.e.*, a "strong showing" of need for a stay) *only* where "there is . . . a fair possibility that the stay . . . will work damage to some one else." *Landis v. North American Co.*, 299 U.S. 248, 255 (1936) (Cardozo, J.) (quoted in *Georgetown Steel*, 27 CIT at 553, 259 F. Supp. 2d at 1346–47); *see also* Def.'s Opp. Brief at 2, 5 (citing *Landis*); Pls.' Brief at 2, 3 (same). This is not such a case.

A. *Whether Entry of a Stay Will Result in Injury to Any Party*

In the instant action, the Government has failed to adduce any evidence that there is even "a fair possibility" that it (or any other party with a cognizable interest) will suffer harm as a result of the requested stay. *See* Pls.' Brief at 4, 5. The Government's sole allegation of potential prejudice posits that "[a] stay in this case could last months or years," and that, during that time, "[a] stagnant case will remain dormant on the Court's docket," while "the memories of agency personnel and other interested parties will fade" and "[n]ew personnel may replace the agency employees with knowledge of this case." *See* Def.'s Opp. Brief at 5.[7] To be sure, the risks that memories may fade and that evidence may be lost or destroyed might be com-

[7] The Government recognizes that "the Court possesses discretion in determining whether to stay a particular case." Def.'s Opp. Brief at 3; *see*, *e.g.*, *Cherokee Nation of Oklahoma v. United States*, 124 F.3d 1413, 1416 (Fed. Cir. 1997) (ruling that the decision as to whether, "[w]hen and how to stay proceedings is within the sound discretion of the trial court"). Nevertheless, citing *Ad Hoc Shrimp Trade Action Committee* and noting "the annual nature of Commerce's administrative reviews," the Government underscores that, in the world of international trade law, parallel litigation of sequential administrative reviews is thoroughly "routine[]." *See* Def.'s Opp. Brief at 4–5 & n.1; *Ad Hoc Shrimp Trade Action Committee v. United States*, 802 F.3d 1339, 1341–48 (Fed. Cir. 2015) (summarizing concurrent/overlapping litigation and administrative proceedings involving common issues, spanning three administrative reviews).

pelling considerations in another case. However, international trade cases like this one are litigated on the administrative record. As such, all of the evidence that can be considered in this action already has been submitted and preserved. Any concerns about the potential for loss of evidence and dimming witness memories that might counsel against a stay in a *de novo* case simply are not present in this situation.

To the extent that the Government seeks to protect (for lack of a better term) the inchoate "institutional memory" of "agency personnel," the Government has cited no authority for the proposition that such a nuanced and attenuated interest constitutes the type of harm that must be weighed in evaluating the appropriateness of a stay in circumstances like these. Moreover, quite apart from its lack of support in the law, the Government's argument is further undermined – as a practical and factual matter – by the not-infrequent turnover in agency staff during the pendency of international trade litigation in general. Certainly the Government does not represent that, absent a stay, there will be no changes in relevant agency personnel for the lifetime of this action.[8] Contrary to the Government's claims, the

True enough. However, that fact alone says nothing about the appropriate outcome here. Applications for stays are a relatively infrequent occurrence. Plaintiff respondents in particular (like Brother here) are generally eager to conclude litigation expeditiously, in the hopes of lowering their assigned dumping margins. But even plaintiff respondents have other interests to weigh. In considering whether or not to seek a stay in circumstances such as these, each party is entitled to do its own individual calculus, balancing the advantages of proceeding with the case against the advantages of deferring it (such as potential savings in the costs of litigation). Brother conducted just such an analysis here. As detailed herein, the case for a stay in this instance is particularly strong. The Government has failed to demonstrate that the requested stay will prejudice any party. *See* section I.A, *infra*. And not only are the parties in this action and in Court No. 14–00316 the same, and the claims in the two actions virtually identical, but, significantly, there is also a threshold, overarching issue with potentially far-reaching implications – *i.e.*, Commerce's selection of Thailand as the surrogate country. *See* section I.B.1, *infra*.

[8] In addition to its argument that it will be prejudiced by a stay because "the memories of agency personnel and other interested parties will fade" and "[n]ew personnel may replace the agency employees with knowledge of this case" (Def.'s Opp. Brief at 5), which is disposed of above, the Government also asserts broadly that "Commerce, defendant-intervenors, and the public have an interest in a speedy disposition of litigation" (*id*. at 6).

As noted above, however, the defendant-intervenor – Vulcan – made a considered determination not to file a brief opposing Brother's request for a stay. *See* n.5, *supra*. The Government thus is in no position to argue the interests of the defendant-intervenor in this case.

Further, as to the existence and extent of any inherent harm that the Government claims is associated with a stay *pendente lite*, it is worth noting that, with some regularity, the Government consents to – and sometimes even itself seeks – such stays. *See*, *e.g.*, Order of December 29, 2006, *entered in Gerber Food (Yunnan) Co., Ltd., et al. v. United States, et al.*, Court No. 04–00454 (in situation strikingly parallel to situation presented here, granting Government's motion for stay of action challenging agency's determination in fourth

proposed stay will not "prejudice the Government's ability to defend this case." *See* Def.'s Opp. Brief at 3.[9]

In sum, the Government has failed to identify any concrete cognizable harm associated with the requested stay.

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administrative review, pending "the issuance of *a final judgment*" in action challenging agency's determination in prior (third) administrative review) (emphasis added); Order of March 4, 2003, *entered in Wilton Indus. v. United States*, Court No. 00–00528 (granting Government's motion for stay of action pending decision by Court of Appeals for Federal Circuit in unrelated case); *Georgetown Steel*, 27 CIT 550, 259 F. Supp. 2d 1344 (denying Government's motion for stay of action challenging antidumping determination pending decision by Court of Appeals for Federal Circuit in related case); *see also*, *e.g.*, *Union Steel Mfg. Co. v. United States*, 37 CIT ____, ____, 896 F. Supp. 2d 1330, 1334 (2013) (citing three cases where no party, including the Government, objected to stay *pendent lite*).

Lastly, and perhaps most fundamentally, the general interest in the "speedy disposition of litigation" is present in all cases, and thus cannot itself alone *per se* preclude the entry of a stay in any case, and certainly not in this one. As the Government acknowledges, the bottom line is that, in evaluating any application for a stay, factors that may weigh against a proposed stay (such as the general interest in the "speedy disposition of litigation") must be balanced against other factors, such as the interest in efficiency, the interest in judicial economy, and the interest in conserving parties' resources, as well as other considerations such as the interest in consistency in judicial decisionmaking, and "public welfare" and "convenience." *See Landis*, 299 U.S. at 254, 256; Def.'s Opp. Brief at 2; *see also* n.11, *infra* (noting that "balancing test" may not apply in certain cases).

[9] None of the cases cited by the parties here expressly holds that the party status of the movant (*i.e.*, plaintiff or defendant) may be a relevant factor in evaluating a request for a stay *pendente lite*. However, underpinning much of the case law – implicitly, if not explicitly – is a concern for the rights of assertedly aggrieved plaintiffs to seek redress in the courts. *See generally An Giang Agriculture and Food Import Export Co. v. United States*, 28 CIT 1671, 1673 n.3, 350 F. Supp. 2d 1162, 1164 n.3 (2004) (collecting cases and analyzing, *inter alia*, *Landis*, *Commodity Futures Trading Comm'n v. Chilcott Portfolio Mgmt., Inc.*, 713 F.2d 1477 (10th Cir. 1983), and *Cherokee Nation*, 124 F.3d 1413).

Research has disclosed no cases where the court's analysis evinces comparable concern for the rights of defendants. This is not to suggest that defendants have no cognizable interest in the speedy disposition of litigation (whether that litigation is likely to result in their vindication, or not) – although it is worth noting that it is typically *defendants* who seek to use delay to their tactical advantage. Nonetheless, the common law historically has recognized the unique status of the plaintiff in litigation. Thus, as the Supreme Court has observed, a plaintiff is the "master of [its] complaint." *See*, *e.g.*, *City of Chicago v. Int'l College of Surgeons*, 522 U.S. 156, 164 (1997); *see also*, *e.g.*, *The Fair v. Kohler Die & Specialty Co.*, 228 U.S. 22, 25 (1913) (Holmes, J.) (explaining that "the party who brings a suit is master to decide what law he will rely upon"); *McDonald v. Piedmont Aviation, Inc.*, 625 F. Supp. 762, 767 (S.D.N.Y. 1986) (in denying defendant's motion to stay action pending outcome of another case, court "upholds *plaintiff's right to chart the course of his own litigation* and to prosecute his claims in the manner of his choice") (emphasis added).

It is therefore somewhat anomalous that, in this case, it is the defendant – the Government – that has asserted that it is inherently harmed by any delay "in a speedy disposition of litigation." *See* Def.'s Opp. Brief at 6. In any event, it does not suffice for any party – plaintiff, defendant, or otherwise – to assert such an inherent right and rest its case on that bald, abstract proposition, without articulating in concrete terms the practical, real-life effects of the potential deprivation of that right under the circumstances of the particular case at bar.

B. Whether Entry of a Stay Will Promote Judicial Economy *and Conserve Party Resources*

The remainder of the Government's arguments focus solely on disputing the advantages that Brother claims will flow from granting the requested stay and on contesting Brother's assertions that requiring it to proceed with this case at this time would constitute a hardship. *See generally* Def.'s Opp. Brief at 2, 3–5. However, absent a showing by the Government that the proposed stay "would severely affect the rights of others," Brother is not required to "make a strong showing of necessity" for the stay. *See Commodity Futures Trading Comm'n v. Chilcott Portfolio Mgmt., Inc.*, 713 F.2d 1477, 1484 (10th Cir. 1983) (cited in Def.'s Opp. Brief at 3).[10] Similarly, absent a showing by the Government that there is at least "a fair possibility that the stay . . . will work damage to some one else," Brother need not establish that going forward with this action would constitute a "clear case of hardship or inequity" for Brother. *See Landis*, 299 U.S. at 255 (cited in Def.'s Opp. Brief at 5).

In any event, Brother has made out a clear case that, at least to some extent, a stay will conserve the resources of all concerned (including the court), and that it is at least possible that the stay will result in very significant savings.[11]

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[10] *CFTC* highlights a number of potentially significant factors that are glossed over or ignored in much of the case law on stays *pendente lite*. For example, *CFTC* notes the significance of the action that the movant seeks to stay, distinguishing between those cases where the relief sought is the stay of another proceeding versus those cases where – as here – "the relief sought is only a stay of the case in which the motion is made." *CFTC*, 713 F.2d at 1484. Similarly, *CFTC* emphasizes the relevance of the identity of the courts potentially affected by the requested stay. Specifically, *CFTC* recognizes that special considerations (such as comity) are implicated where the action sought to be stayed is pending in a different court – and, in particular, that the power of a federal court to stay actions in the state courts is specifically constrained by federal statute. *Id*. at 1484 & n.5.

[11] Quoting *Georgetown Steel* and citing *Cherokee Nation*, the Government asserts that, in evaluating an application for a stay, "a court must weigh [the] competing interests and maintain an even balance," taking into account the interests of all parties, the public, and even the court itself. *See* Def.'s Opp. Brief at 2 (quoting *Georgetown Steel*, 27 CIT at 553, 259 F. Supp. 2d at 1346; *Cherokee Nation*, 124 F.3d at 1416).

It is less than clear, however, that Brother's request for a stay of relatively limited duration is governed by the "balancing test" to which the Government points. *See generally Cherokee Nation*, 124 F.3d at 1416 (discussing *Landis*, and suggesting that "balancing test" governs cases where stay sought is "of indefinite duration"). Even assuming that the "balancing test" is applicable here, it does not tip in favor of the Government. As detailed above, the Government has not demonstrated that it will suffer any real harm as a result of the requested stay. There is thus essentially nothing to "balance" against the considerations weighing in favor of the stay that Brother seeks.

1. Brother's Arguments That This Action and Court No. 14–00316 *Are "Essentially Identical"*

Brother emphasizes that the first two counts of its complaints in both cases raise a threshold, overarching issue – Commerce's selection of Thailand as the surrogate country for use in the agency's non-market economy analysis. *See* Pls.' Brief at 2, 3; Joint Status Report and Proposed Scheduling Order at 3; Complaint, Counts I-II (filed in this action); First Amended Complaint, Counts I-II, *filed in Jiaxing Brother Fastener Co., Ltd., et al.*, Court No. 14–00316. There are at least two critical dimensions to Brother's observation.

First, *whether the decision favors Brother or not*, a decision on Brother's challenge to Commerce's selection of Thailand as the surrogate country in Court No. 14–00316 will almost certainly have implications – indeed, likely major implications – for the parallel claims in this action. As noted above, the language of the first two counts of Brother's First Amended Complaint in its first action is identical to that of the first two counts of its Complaint in this action. *See* n.3, *supra*. Further, Brother litigated those issues in the same fashion at the administrative level in both the fourth and fifth administrative reviews, pressing essentially the same arguments. *Compare*, *e.g.*, Case Brief of Jiaxing Brother Standard Part Co., Ltd. and Affiliates at 1–2, 3–29 (public version) (Aug. 4, 2014) (submitted to Commerce in fourth administrative review) *and* Case Brief of Jiaxing Brother Standard Part Co., Ltd. and Affiliates at 2, 28–51 (public version) (June 22, 2015) (submitted to Commerce in fifth administrative review); *see also* Plaintiffs' Rule 56.2 Memorandum In Support of Judgment Upon the Agency Record at 1, 2–3, 7–31, *filed in* Court No. 14–00316; Plaintiffs' Reply Brief at 1, 2–8, *filed in* Court No. 14–00316.

Second, *if the decision on Brother's challenge to Commerce's selection of Thailand as the surrogate country in Court No. 14–00316 favors Brother*, that decision might well have implications – potentially even decisive implications – for Brother's remaining claims in both Court No. 1400316 and in this action. This is because all of the remaining counts of the First Amended Complaint in Court No. 14–00316 and all of the remaining counts of the Complaint in this action are challenges to surrogate values and financial ratios that Commerce based on Thai data. *See* Pls.' Brief at 3–4; Joint Status Report and Proposed Scheduling Order at 3.[12] As a practical matter,

[12] *See also* Complaint, Counts III-V (filed in this action) (assuming that Commerce's selection of Thailand as surrogate country is sustained, and, respectively, challenging specific Thai import data used by the agency to value steel wire rod, alleging that surrogate financial ratios were not "based on the 'best available information'" and were "unsupported

particularly in light of Commerce's preference for the use of a single surrogate country, all of Brother's remaining claims are (in effect) contingent on the correctness of Commerce's selection of Thailand as the surrogate country (which is the subject of Brother's first two claims). *See*, *e.g.*, *Jiaxing Brother Fastener Co. v. United States*, ____ F.3d ____, ____, ____, ____, 2016 WL 1599802 * 2, 4, 9 (Fed. Cir. 2016) (on appeal in action challenging Commerce's determination in second administrative review of same antidumping duty order at issue here, citing 19 C.F.R. § 351.408(c)(2) and acknowledging agency preference for use of single surrogate country).

Thus, if – as a result of a decision in favor of Brother on either or both of the first two counts – Commerce were to select a new surrogate country in Court No. 14–00316, it presumably would be necessary to reevaluate the surrogate values and financial ratios in that case, because they are based on Thai data. And, to the extent that Commerce's selection of a new surrogate country in Court No. 14–00316 were to lead to the selection of a new surrogate country in this action, it presumably would be necessary to reevaluate the surrogate values and financial ratios in this case as well.[13]

by substantial evidence," and contesting agency's alleged "failure to adjust [the surrogate] financial ratios [calculated from Thai financial statements] to account for SG&A labor expenses included in its direct labor calculation"); First Amended Complaint, Counts III-V, *filed in Jiaxing Brother Fastener Co., Ltd., et al.*, Court No. 14–00316 (assuming that Commerce's selection of Thailand as surrogate country is sustained, and, respectively, contesting the specific Thai import data used by the agency to value steel wire rod, challenging agency's alleged failure to adjust the surrogate financial ratios calculated from Thai financial statements to account for SG&A labor expenses included in its direct labor calculation, and disputing the specific Thai data used by the agency to value brokerage and handling costs).

[13] Of course, as the proverb counsels, "what's good for the goose is good for the gander." Just as a decision *in Brother's favor* on its challenge to Commerce's selection of Thailand as the surrogate country in Court No. 14–00316 will almost certainly have significant implications for the parallel claims in this action, it is also true that a decision *in favor of the Government* on that issue may leave Brother with very little room to maneuver here (and might even cause Brother to consider whether those claims should be abandoned in this action).

In addition, Brother (and the other parties), like the court, also must give appropriate consideration to the implications – if any – for this action (and for Court No. 14–00316) of the judicial determinations in *Jiaxing Brother Fastener Co., Ltd., et al. v. United States, et al.*, Court No. 12–00384. In that action, which involved the second administrative review of the same antidumping duty order at issue in this action, Brother similarly challenged Commerce's selection of Thailand as the surrogate country. The Court of Appeals recently issued an opinion affirming the Court of International Trade's decision, which sustained the selection of Thailand. *See generally Jiaxing Brother Fastener Co.*, ____ F.3d ____, 2016 WL 1599802 (Fed. Cir. 2016), *aff'ing Jiaxing Brother Fastener Co. v. United States*, 38 CIT ____, 11 F. Supp. 3d 1326 (2014) *and Jiaxing Brother Fastener Co. v. United States*, 38 CIT ____, 961 F. Supp. 2d 1323 (2014).

Brother similarly emphasizes that the third counts of its complaints in both cases challenge Commerce's use of certain Thai import data as the surrogate value for Brother's steel wire rod input, which Brother characterizes as "the all-important steel value[]." *See* Pls.' Brief at 3; Joint Status Report and Scheduling Order at 3; Complaint, Count III (filed in this action); First Amended Complaint, Count III, *filed in Jiaxing Brother Fastener Co., Ltd., et al.*, Court No. 14–00316.[14] The gravamen of Count III is that – even if the agency's selection of Thailand as the surrogate country is sustained – the specific Thai data that Commerce used as the surrogate value for steel wire rod must be adjusted. *See* Plaintiffs' Rule 56.2 Memorandum In Support of Judgment Upon the Agency Record at 1, 31–33, *filed in* Court No. 14–00316.[15]

Brother states that "[r]eversal and redetermination on this issue" (*i.e.*, the asserted need for adjustments to the specific Thai data used to value steel wire rod) in Court No. 14–00316 "would have a major impact on the antidumping duty margin and would affect which, if any, other individual surrogate value issues [Brother would] continue to appeal." Pls.' Brief at 3.[16] As noted above, the language of the third count of Brother's First Amended Complaint in Court No. 14–00316 is identical to the language of the third count of its Complaint in this action. *See* n.3, *supra*. Further, Brother litigated the issue in the same fashion at the administrative level in both the fourth and fifth administrative reviews, making virtually the same arguments. *Compare*, *e.g.*, Case Brief of Jiaxing Brother Standard Part Co., Ltd. and Affiliates at 2, 29–34 (public version) (Aug. 4, 2014) (submitted to

[14] *See also Jiaxing Brother Fastener Co.*, ____ F.3d at ____, ____, ____, 2016 WL 1599802 * 4, 5, 9 (on appeal in action challenging Commerce's determination in second administrative review, acknowledging that, in production of steel threaded rod, the input with greatest impact on dumping margin is steel wire rod).

[15] *But see*, *e.g.*, Audio Recording of Oral Argument (March 15, 2016) in Court No. 14–00316 at 2:05:00–2:07:58 (counsel for Brother waives part of its argument that adjustments to the specific Thai data used as the surrogate value for steel wire rod are necessary, at least as to Court No. 1400316). In light of its position as revised at oral argument in Court No. 14–00316, it is unclear whether Brother continues to assert that a decision in Court No. 14–00316 on Brother's challenge to the specific Thai data used as the surrogate value for steel wire rod "would have a major impact on the antidumping duty margin and would affect which, if any, other individual surrogate value issues [Brother would] continue to appeal" (quoting Pls.' Brief at 3) in that case and in this one. Brother has not supplemented its Motion to Stay to clarify this point.

[16] Brother notes, for example, that its challenge to Commerce's surrogate valuation of brokerage and handling charges (the subject of Count V of Brother's First Amended Complaint in Court No. 14–00316) is "of minor comparative importance" relative to its challenge to Commerce's surrogate valuation of steel wire rod, the subject of Count III in both Court No. 14–00316 and in this case (as well as its challenge to Commerce's surrogate financial ratios, the subject of Count IV in Court No. 14–00316 and Counts IV and V in this case). *See* Joint Status Report and Scheduling Order at 3.

Commerce in fourth administrative review) *and* Case Brief of Jiaxing Brother Standard Part Co., Ltd. and Affiliates at 2, 51–55 (public version) (June 22, 2015) (submitted to Commerce in fifth administrative review); *see also* Plaintiffs' Rule 56.2 Memorandum In Support of Judgment Upon the Agency Record at 1, 31–33, *filed in* Court No. 14–00316; Plaintiffs' Reply Brief at 1, 8–14, *filed in* Court No. 14–00316.

In other words, Brother seems to contemplate that – even if it does not prevail on its challenge to Commerce's selection of Thailand as the surrogate country (*i.e.*, Counts I and II) in Court No. 14–00316 – a victory for Brother on its challenge to the specific Thai import data that were used to value steel wire rod for purposes of the Final Results (*i.e.*, a victory on Count III) would cause Brother to reconsider "which, if any, other individual surrogate value issues . . . [it would] continue to appeal" in both Court No. 14–00316 and in this action. In short, Brother represents that a "win" on its challenge to the specific Thai import data used to value steel wire rod in Court No. 14–00316 might well result in its voluntary dismissal of some or all of its remaining claims in that case, and in this case as well.[17]

2. The Government's Arguments Highlighting Differences *Between This Action and Court No. 14–00316*

The Government does not dispute the compelling parallels between the facts and the claims in this action and the facts and the claims in Court No. 14–00316. The Government acknowledges that "Commerce ultimately selected Thailand as the surrogate country to value [Brother's] factors of production in [both] the fourth and fifth administrative reviews, and made similar choices with respect to determining surrogate values for steel wire rod, financial expenses, and labor." Def.'s Opp. Brief at 2.

The Government nevertheless argues that "Commerce's determinations in the fifth administrative review [which are at issue in this action] are independent of those in the fourth administrative review

[17] Significantly, Brother stops short of arguing that the ruling on its Motion for Judgment on the Agency Record in Court No. 14–00316 will likely inform both the parties' briefing and judicial consideration of its claims in Counts III through V of its Complaint in this action, to the extent that Brother does not voluntarily dismiss those claims. However, given the strong similarities between this case and Court No. 14–00316, the ruling in Court No. 14–00316 will almost certainly have implications – potentially major implications – for the parallel claims in this action, whether Brother or the Government prevails. Moreover, Court No. 14–00316 is not the only related litigation that must be borne in mind. *See generally Jiaxing Brother Fastener Co.*, ____ F.3d ____, 2016 WL 1599802, *aff'ing Jiaxing Brother Fastener Co.*, 38 CIT ____, 11 F. Supp. 3d 1326 (2014) *and Jiaxing Brother Fastener Co.*, 38 CIT ____, 961 F. Supp. 2d 1323 (2014).

[which are at issue in Court No. 14–00316], and Commerce relied on . . . different administrative record[s]" in the two cases. Def.'s Opp. Brief at 2; *see also id*. at 3–4 (same); Joint Status Report and Scheduling Order at 4 (same). The Government therefore concludes that a stay will not result in any economies because "[t]he Court can only evaluate [Brother's] claims that Commerce's surrogate country and surrogate value determinations were not supported by substantial evidence by evaluating the record and decision memoranda [that are] specific to each review." Def.'s Opp. Brief at 4; *see also id*. at 3 (same); Joint Status Report and Scheduling Order at 4 (same).

But these general points that the Government makes – while fundamentally true – cannot suffice to carry the day, particularly in this case. The Government fails to address in any concrete way the specific potential practical implications for this action of a decision on Brother's Motion for Judgment on the Agency Record pending in Court No. 14–00316. In light of the strong parallels between the facts and the claims in the two cases, the Government cannot honestly rule out the very real possibility that the forthcoming ruling in Court No. 14–00316 could have a significant (potentially even determinative) impact on the evaluation of the claims in this action by the parties and by the court.

Moreover, it is of no moment that a decision on Brother's Motion for Judgment on the Agency Record in Court No. 14–00316 might not dispose of any or all of the claims in this action. A case may properly be stayed pending the outcome of another case (the "lead" case) even where there is no possibility that the "lead" case will be determinative of the case sought to be stayed – *i.e.*, even where the "lead" case, at most, may streamline the issues in the case sought to be stayed. *See*, *e.g.*, *Landis*, 299 U.S. at 254, 256 (summarily rejecting argument that "before proceedings in one suit may be stayed to abide the proceedings in another, the parties to the two causes must be shown to be the same and the issues identical," and noting that, even though "every question of fact and law" in the case sought to be stayed might not be decided in the "lead" case, "in all likelihood [the 'lead' case] will settle many and simplify them all"); *Levya v. Certified Grocers of California, Ltd.*, 593 F.2d 857, 863–64 (9th Cir. 1979) (ruling that stay pending outcome of another case is appropriate even where the other proceedings are not "necessarily controlling of the action" that is stayed); *CMAX, Inc. v. Hall*, 300 F.2d 265, 268 (9th Cir. 1962) (in evaluating application for stay, court is to weigh the potential effect on "the orderly course of justice measured in terms of the simplifying or complicating of issues, proof, and questions of law").

In the case at bar, it is beyond cavil that a judicial determination in Court No. 14–00316 will help clarify, refine, and sharpen the issues in this action, and will inform the parties' briefing, even if such a determination does not directly dispose of any of the claims here.

II. *Conclusion*

"[T]he power to stay proceedings is incidental to the power inherent in every court to control the disposition of the causes on its docket with economy of time and effort for itself, for counsel, and for litigants." *Landis*, 299 U.S. at 254. For the reasons set forth above, a relatively brief stay of this action – pending a determination in *Jiaxing Brother Fastener Co., et al.*, Court No. 14–00316 – will promote judicial economy, conserve the resources of all parties, and ultimately advance the interests of justice.

Brother's Motion to Stay is therefore granted, and further proceedings in this action are stayed until 30 days following the issuance of an opinion on Brother's Motion for Judgment on the Agency Record pending in Court No. 14–00316.

A separate order will enter accordingly.

Dated: May 6, 2016
New York, New York

/*s*/ *Delissa A. Ridgway*
JUDGE

Slip Op. 16–46

MAVERICK TUBE CORPORATION, PLAINTIFF, TOSÇELIK PROFIL VE SAC ENDÜSTRISI A.Ş., AND ÇAYIROVA BORU SANAYI VE TICARET A.Ş., Consolidated Plaintiffs, BOOMERANG TUBE LLC, ENERGEX TUBE (A DIVISION OF JMC STEEL GROUP), TEJAS TUBULAR PRODUCTS, TMK IPSCO, VALLOUREC STAR, L.P., WELDED TUBE USA INC., AND UNITED STATES STEEL CORPORATION, Plaintiff-Intervenors, v. UNITED STATES, Defendant, BORUSAN ISTIKBAL TICARET A.Ş., BORUSAN MANNESMANN BORU SANAYI VE TICARET A.Ş., TOSÇELIK PROFIL VE SAC ENDÜSTRISI A.Ş., AND ÇAYIROVA BORU SANAYI VE TICARET A.Ş., Defendant-Intervenors.

Before: Jane A. Restani, Judge
Consol. Court No. 14–00244

[Commerce's Final Results of Redetermination in antidumping duty investigation sustained.]

Dated: May 10, 2016

Robert E. DeFrancesco, III, *Alan H. Price*, *Adam M. Teslik*, and *Laura El-Sabaawi*, Wiley Rein, LLP, of Washington, DC, for plaintiff.

David L. Simon, Law Office of David L. Simon, of Washington, DC, for consolidated plaintiffs and defendant-intervenors Tosçelik Profil ve Sac Endüstrisi A.Ş. and Çayirova Boru Sanayi Ve Ticaret A.Ş.

Roger B. Schagrin, *John W. Bohn*, and *Paul W. Jameson*, Schagrin Associates, of Washington, DC, for plaintiff-intervenors Boomerang Tube LLC, Energex Tube (a Division of JMC Steel Group), Tejas Tubular Products, TMK IPSCO, Vallourec Star, L.P., and Welded Tube USA Inc.

Jon D. Corey, *Jonathan G. Cooper*, and *Susan R. Estrich*, Quinn Emanuel Urquhart & Sullivan, LLP, of Washington, DC, for plaintiff-intervenor United States Steel Corporation.

Hardeep K. Josan, Trial Attorney, Commercial Litigation Branch, Civil Division, U.S. Department of Justice, of New York, NY, for defendant. With her on the brief were *Benjamin C. Mizer*, Principal Deputy Assistant Attorney General, *Jeanne E. Davidson*, Director, and *Claudia Burke*, Assistant Director. Of counsel on the brief was *Jessica M. Link*, Attorney, Office of the Chief Counsel for Trade Enforcement & Compliance, U.S. Department of Commerce, of Washington, DC.

Donald B. Cameron, *Brady W. Mills*, *Julie C. Mendoza*, *Mary S. Hodgins*, *R. Will Planert*, and *Sarah S. Sprinkle*, Morris, Manning & Martin, LLP, of Washington, DC, for defendant-intervenors Borusan Istikbal Ticaret A.Ş. and Borusan Mannesmann Boru Sanayi ve Ticaret A.Ş.

OPINION

Restani, Judge:

Currently before the court are the U.S. Department of Commerce's ("Commerce") Final Results of Redetermination Pursuant to Ct. Remand, ECF No. 111–1 ("*Remand Results*"). The *Remand Results* concern the final determination in the antidumping ("AD") investigation of oil country tubular goods ("OCTG") from the Republic of Turkey ("Turkey"), covering the period of investigation between July 1, 2012, and June 30, 2013. *Certain Oil Country Tubular Goods from the Republic of Turkey: Final Determination of Sales at Less Than Fair Value and Affirmative Final Determination of Critical Circumstances, in Part*, 79 Fed. Reg. 41,971, 41,971 (Dep't Commerce July 18, 2014) ("*Final Determination*"). The court remanded Commerce's calculation of the constructed value ("CV") profit margin ("CV Profit") and duty drawback adjustment used in determining the AD duty margin for mandatory Consol. Court No. 14–00244 Page 3 respondent and consolidated plaintiff Çayirova Boru Sanayi ve Ticaret A.Ş. ("Çayirova") and its affiliated exporter Yücel Bora Ithalat-Pazarlama A.Ş. (collectively, "Yücel"). *Maverick Tube Corp. v. United States*, 107 F. Supp. 3d 1318, 1323, 1335, 1338–42 (CIT 2015) ("*Maverick*"). Commerce's revised calculations are supported by substantial evidence and accordingly the *Remand Results* are sustained.

BACKGROUND

The court presumes familiarity with the facts of the case as discussed in *Maverick*, 107 F. Supp. 3d at 1323–26, but the facts relevant to the *Remand Results* are summarized briefly for convenience.

A dumping margin is "the amount by which the normal value[1] exceeds the export price.[2]" 19 U.S.C. § 1677(35)(A) (2012). Relevant to the calculation on remand, when a respondent, such as Yücel, does not have any home market or third country sales, Commerce calculates normal value using CV. 19 U.S.C. § 1677b(a)(4); *see Maverick*, 107 F. Supp. 3d at 1336. CV is calculated by applying a statutory formula, which includes the sum of the costs of production ("Selling Expenses") plus an amount for profit (CV Profit), and other incidental expenses. *See* 19 U.S.C. § 1677b(e); 19 C.F.R. § 351.405(b) (2013). In calculating normal value using CV, Commerce's preferred method is to include "the actual amounts incurred and realized by the specific exporter or producer being examined . . . for selling, general, and administrative expenses, and for profits, in connection with the production and sale of a foreign like product, in the ordinary course of trade, for consumption in the foreign country." 19 U.S.C. § 1677b(e)(2)(A). If such data are unavailable, Commerce resorts to one of three statutory alternatives for calculating Selling Expenses and CV Profit.[3] 19 U.S.C. § 1677b(e)(2)(B). The court will refer to these

[1] The normal value of the subject merchandise is defined as "the price at which the foreign like product is first sold . . . for consumption in the exporting country, in the usual commercial quantities and in the ordinary course of trade and, to the extent practicable, at the same level of trade as the export price or constructed export price." 19 U.S.C. § 1677b(a)(1)(B)(i) (2012). Here, normal value is the price at which OCTG products are sold in Turkey.

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

[3] The three statutory alternatives are:

> (i) the actual amounts incurred and realized by the specific exporter or producer being examined in the investigation or review for selling, general, and administrative expenses, and for profits, in connection with the production and sale, for consumption in the foreign country, of merchandise that is in the same general category of products as the subject merchandise,
>
> (ii) the weighted average of the actual amounts incurred and realized by exporters or producers that are subject to the investigation or review (other than the exporter or producer described in clause (i)) for selling, general, and administrative expenses, and for profits, in connection with the production and sale of a foreign like product, in the ordinary course of trade, for consumption in the foreign country, or
>
> (iii) the amounts incurred and realized for selling, general, and administrative expenses, and for profits, based on any other reasonable method, except that the amount allowed for profit may not exceed the amount normally realized by exporters or producers (other than the exporter or producer described in clause (i)) in connection with the sale, for consumption in the foreign country, of merchandise that is in the same general category of products as the subject merchandise [i.e., what is commonly referred to as the "profit cap."]

alternatives as "alternative (i)," "alternative (ii)," and "alternative (iii)," respectively. Also relevant to the calculation on remand, in calculating export price, Commerce increases export price by "the amount of any import duties imposed by the country of exportation which have been rebated, or which have not been collected, by reason of the exportation of the subject merchandise to the United States[;]" this is commonly referred to as the duty drawback adjustment. 19 U.S.C. § 1677a(c)(1)(B).

On February 25, 2014, Commerce assigned Yücel a preliminary dumping margin of 4.87 percent.[4] *Certain Oil Country Tubular Goods From the Republic of Turkey: Preliminary Affirmative Determination of Sales at Less Than Fair Value, Negative Preliminary Determination of Critical Circumstances, and Postponement of Final Determination*, 79 Fed. Reg. 10,484, 10,486 (Dep't Commerce Feb. 25, 2014) ("*Preliminary Determination*"). In the *Preliminary Determination*, Commerce determined, with respect to Yücel, the data to calculate CV Profit under § 1677b(e)(2)(A) were unavailable, and therefore, that it was necessary to rely on one of the alternatives listed in § 1677b(e)(2)(B). Decision Memorandum for the Preliminary Affirmative Determination in the Antidumping Duty Investigation of Certain Oil Country Tubular Good from the Republic of the Turkey at 25, A-489–816, (Feb. 14, 2014), *available at* http://enforcement.trade.gov/frn/summary/turkey/2014–04108–1.pdf (last visited Apr. 27, 2016) ("*Preliminary I&D Memo*"). Commerce preliminarily calculated Yücel's CV Profit based on its home market sales of non-OCTG pipe products pursuant to alternative (i). *See id.*; *see also* 19 U.S.C. § 1677b(e)(2)(B)(i). Commerce also preliminarily granted Yücel a duty drawback adjustment, but stated it would further consider the adjustment. *Preliminary I&D Memo* at 20.

In Commerce's *Final Determination*, issued on July 18, 2014, Yücel's margin increased dramatically to 35.86 percent. 79 Fed. Reg. at 41,973. Yücel's margin increased for two reasons. First, Commerce calculated CV Profit using alternative (iii) based on data from the 2012 financial statements of Tenaris S.A. ("Tenaris"), a multinational

19 U.S.C. § 1677b(e)(2)(B). The statute "does not establish a hierarchy or preference among these alternative methods." Uruguay Round Agreements Act, Statement of Administrative Action, H.R. Doc. No. 103–316, vol. 1, at 840 (1994), *reprinted in* 1994 U.S.C.C.A.N. 4040, 4176.

[4] Commerce calculated a preliminary margin of zero percent for the other mandatory respondent, Borusan Manesmann Boru Sanayi ve Ticaret A.Ş. and Borusan Istikbal Ticaret A.Ş. (collectively, "Borusan"). *See Certain Oil Country Tubular Goods From the Republic of Turkey: Preliminary Affirmative Determination of Sales at Less Than Fair Value, Negative Preliminary Determination of Critical Circumstances, and Postponement of Final Determination*, 79 Fed. Reg. 10,484, 10,486 (Dep't Commerce Feb. 25, 2014) ("*Preliminary Determination*").

OCTG company whose data Commerce *sua sponte* placed on the record on May 12, 2014.[5] *See* Issues and Decision Memorandum for the Final Affirmative Determination in the Less than Fair Value Investigation of Certain Oil Country Tubular Goods from the Republic of Turkey at 2, 20–27, A-489–816, (July 10, 2014), *available at* http://enforcement.trade.gov/frn/summary/turkey/2014–16873–1.pdf (last visited Apr. 27, 2016) ("*I&D Memo*"). Commerce also did not apply a profit cap as required by alternative (iii) because it did not have "home market data for other exporters and producers in Turkey of the same general category of products." *Id.* at 26. Second, Commerce denied approximately two-thirds of Yücel's duty drawback adjustment because the Harmonized Tariff Schedule ("HTS") headings under which the subject merchandise were reported to Turkish customs appeared to be non-OCTG headings in the United States. *Id.* at 15–16.

Çayirova challenged the *Final Determination*, arguing that Commerce improperly calculated CV Profit using the Tenaris data and should have awarded the full amount of the requested duty drawback adjustment.[6] *See Maverick*, 107 F. Supp. 3d at 1325. The government defended Commerce's CV Profit calculation, but requested a remand to allow it an opportunity to "'reconsider its [duty drawback] determination' because it 'changed certain aspects of its duty drawback decision between the preliminary and final determinations and did not have the opportunity to consider the impact of those changes or certain arguments [that were] raised before the Court.'" *Id.* at 1333 (quoting Def.'s Resp. in Opp'n to Mots. for J. upon the Administrative R. 54, ECF No. 60).

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[5] Commerce rejected applying alternative (i) because Commerce determined that Yücel's non-OCTG pipe products did not fall within the "same general category of products" as the subject merchandise. Issues and Decision Memorandum for the Final Affirmative Determination in the Less than Fair Value Investigation of Certain Oil Country Tubular Goods from the Republic of Turkey at 22–24, A-489–816, (July 10, 2014), *available at* http://enforcement.trade.gov/frn/summary/turkey/2014–16873–1.pdf (last visited Apr. 26, 2016) ("*I&D Memo*"). Commerce rejected alternative (ii) based on concerns with using the business proprietary information ("BPI") of the only other mandatory respondent, Borusan. *Id.* at 21–22.

[6] Maverick Tube Corporation ("Maverick") and United States Steel Corporation ("U.S. Steel") (collectively "petitioners") challenged the *Final Determination* on five grounds, arguing that Commerce: (1) did not support its normal value calculation for Borusan with substantial evidence based on fictitious market allegations; (2) improperly granted Borusan and Yücel duty drawback adjustments; (3) conflated standard J55 OCTG with upgradeable J55 OCTG for dumping margin calculation purposes; (4) failed to acknowledge Borusan's potential undisclosed affiliation; and (5) improperly included Borusan export price sales in its U.S. sales database. *Maverick*, 107 F. Supp. 3d at 1324 & n.5 (citing Pl. Maverick Tube Corp.'s Mem. in Supp. of its Rule 56.2 Mot. for J. on the Agency R. 10–46, ECF No. 49; Mot. of Pl. United States Steel Corp. for J. on the Agency R. Under Rule 56.2, ECF No. 46 (adopting Maverick's arguments)).

In *Maverick*, the court remanded two issues to Commerce: (1) the calculation of CV Profit used in Yücel's dumping margin analysis; and (2) Yücel's duty drawback adjustment.[7] *See id.* at 1342. The court held that Commerce's use of Tenaris's financial statements for the calculation of Yücel's CV Profit was unsupported by substantial evidence because it did not accurately reflect the home market experience. *Id.* at 1338–39. The court further held that Commerce did not adequately explain why it dispensed with alternative (iii)'s profit cap requirement. *Id.* at 1339. For these reasons, the court directed Commerce to explain why a CV Profit based on a range derived from the confidential profit margin of the other mandatory respondent, Borusan Istikbal Ticaret A.Ş. and Borusan Mannesmann Boru Sanayi ve Ticaret A.Ş. (collectively "Borusan"), could not be used in accordance with alternative (ii), beyond the vaguely referenced concerns surrounding the use of business proprietary information ("BPI"). *Id.* at 1340. The court also instructed Commerce to explain its determination that alternative (i) could not be applied because Çayirova's non-OCTG products are not in the "same general category of products" as OCTG. *Id.* With respect to Yücel's duty drawback adjustment, the court held that changes made between the preliminary and final determinations warranted a remand. *Id.* at 1333.

On October 6, 2015, the government moved for clarification as to the scope of the remand order, asking whether the court granted Commerce's request for a remand "to reconsider the remaining duty drawback issues with respect to Yücel[.]" Def.'s Resp. to the Court's Sept. 24, 2015 Op. and Order and Mot. for Clarification 4, ECF No. 94. In response, the court made clear in an order on October 8, 2015, that it would "allow Commerce the opportunity to decide the drawback issue as to Yücel according to its normal established methodologies based on the particular facts that apply to Yücel." Order 2, ECF No. 96 ("Clarification Order").

On remand, Commerce revised Yücel's CV Profit calculation using alternative (ii) based on Borusan's home market sales data. *Remand Results* at 8; *see* 19 U.S.C. § 1677b(e)(2)(B)(ii). Commerce determined that by combining Borusan's Selling Expenses and CV Profit rates into a single aggregate rate, it could use Borusan's data without risking the disclosure of BPI. *Remand Results* at 7. Commerce determined that by combining Selling Expenses and CV Profit, it is protecting Borusan's BPI by making it impossible for Yücel to discern which portion of the Consol. Court No. 14–00244 Page 9 aggregate

[7] The court sustained Commerce's determinations on petitioner's other challenges. *See supra* note 5; *Maverick*, 107 F. Supp. 3d at 1327–28, 1330, 1332, 1333.

figure is attributable to either Selling Expenses or CV Profit.[8] *Id.* at 8. Using this method, Yücel's revised combined CV Profit and Selling Expenses rate is 7.38 percent. Analysis Memorandum for Final Results of Redetermination for Yücel at 2, bar code 343789601 (Feb. 1, 2016) ("Yücel Final Analysis Memo").

With regard to Yücel's duty drawback adjustment, Commerce reconsidered the record evidence and determined that Yücel was not entitled to an adjustment. *Remand Results* at 26. It determined that an adjustment is only available in situations where, "a foreign country would normally impose an import duty on an *input used to manufacture* the subject merchandise, but offers a rebate from the duty if the input is exported to the United States[.]" *Id.* at 25 (quoting *Saha Thai Steel Pipe (Public) Co. v. United States*, 635 F.3d 1335, 1338 (Fed. Cir. 2011)). Commerce determined that Yücel was not entitled to an adjustment because the inputs on which Yücel received a duty exemption were not suitable for, "and therefore could not have been used in its production of, subject merchandise which was exported to the United States."[9] *Id.* These partially offsetting changes ultimately reduced Yücel's dumping margin to 13.59 percent. *Id.* at 40.

Both Maverick Tube Corporation ("Maverick") and United States Steel Corporation ("U.S. Steel") (collectively "petitioners") contest the use of Borusan's BPI in calculating Yücel's combined Selling Expenses and CV Profit rate.[10] They argue that relying on an aggregate figure of Borusan's proprietary information has the potential of disclosing Borusan's BPI, as Yücel can access its own BPI information and simply "back its information out from Borusan's[.]" Maverick Tube Corp.'s Cmts. on the U.S. Dep't of Commerce's Feb. 2, 2016 Final Results of Redetermination Pursuant to Ct. Remand 4, ECF No. 117 ("Maverick Cmts."); U.S. Steel Corp.'s Cmts. on the U.S. Dep't of Commerce's Final Results of Redetermination Pursuant to Ct. Remand 8, ECF No. 115 ("U.S. Steel Cmts."). They assert that Com-

[8] Although the issue likely was mooted by its decision to calculate CV Profit using alternative (ii), Commerce complied with the court's instructions and further explained its rejection of alternative (i). Commerce clarified that differences in market conditions between the oil and gas and construction industries were not in and of themselves reasons that products would not be in the same general category, but were relevant to the analysis of whether the products were sold and used in the same industry. *Remand Results* at 10. Commerce also explained that testing requirements and quality standards for OCTG indicated that they were used in "down-hole" applications, which was relevant for analyzing the products' uses and characteristics. *Id.* at 10– 11. Commerce declined to reexamine its reasoning for dispensing with the profit cap requirement under alternative (iii) because that issue was mooted by its decision to calculate CV Profit pursuant to alternative (ii). *Id.* at 13.

[9] "According to Yücel, the only hot-rolled steel coils that were suitable for consumption in the production of its OCTG exported to the United States were purchased from domestic sources." Id. at 25.

[10] Borusan has not objected to the manner in which Commerce used its BPI.

merce must revert to using Tenaris's financial statements under alternative (iii), because using an aggregate figure erodes the prior practice of Commerce and the court in assuring adequate protection of BPI.[11] Maverick Cmts. at 4–5, 13–15 ("It also amounts to a substantial change in practice without notice and comment period."); U.S. Steel Cmts. at 3, 10 ("[W]hen data is available from only one other respondent, Commerce's longstanding and oft-followed practice is to reject [alternative (ii)] to avoid the risk of disclosing that respondent's proprietary information.").[12]

Çayirova argues Commerce properly calculated CV Profit, but challenges Commerce's duty drawback determination. *See* Objs. of Pl. Çayirova Boru Sanayi ve Ticaret A.Ş. to Dep't of Commerce Redetermination on Remand 1, ECF. No. 113 ("Çayirova's Cmts."). Çayirova argues that Commerce adopted an unprecedented threshold inquiry in its duty drawback analysis requiring that inputs for which a company claims duty drawback must be suitable for or used in the production of the subject merchandise. Çayirova Cmts. at 5–11. Çayirova further argues that this "suitability-for-use" test is a new legal standard that was improper so late in the litigation and was not applied equally to both respondents in this case, as Yücel was the only party subject to remand on the duty drawback issue. *See id.* at 11–15.

JURISDICTION AND STANDARD OF REVIEW

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

DISCUSSION

I. Constructed Value Profit Margin

Commerce has an obligation to protect BPI that is disclosed in the course of AD investigations. *See* 19 U.S.C. § 1677f(b)(1)(A). Although Commerce has previously avoided the application of alternative (ii) to calculate a respondent's CV Profit in cases where there is only one

[11] Maverick and U.S. Steel further argue that the use of Borusan's home market sales in the calculation of Selling Expenses and CV Profit is improper because Borusan's home market sales are mainly "overruns," are not used in oil or gas exploration, and were made under unusually customer-friendly terms. Maverick Cmts. at 7–13; U.S. Steel Cmts. at 10. This is an attempt to restate their previous objection to the use of Borusan's home market sales based on allegations that they are outside the ordinary course of trade and are part of a fictitious market. *See* Maverick Cmts. at 7–15; U.S. Steel Cmts. at 10. Those arguments were previously considered and rejected in *Maverick*, 107 F. Supp. 3d at 1328–29, 1330–31, 1332–33, and the court adheres to its prior holding that Commerce's determination that the sales are legitimate is supported by substantial evidence.

[12] Maverick also argues Commerce properly denied Yücel's duty drawback adjustment. Maverick Cmts. at 2–4.

other respondent, *see, e.g.*, *Atar S.r.L. v. United States*, 730 F.3d 1320, 1327 (Fed. Cir. 2013), in this case, Commerce has refined its methodology to prevent the disclosure of BPI. By combining the confidentially calculated individual Selling Expense and CV Profit rates derived from Borusan's BPI into an aggregate total, Commerce has adequately concealed Borusan's BPI. *See* Yücel Final Analysis Memo at 2; *see also Remand Results* at 17–18; 19 U.S.C. § 1677f(b)(1)(A). After considering the risk of disclosing BPI, Commerce fashioned a method of protecting Borusan's data, which when combined with the Administrative Protective Order ("APO") already in place in this case, sufficiently protects Borusan's BPI by identifying only the aggregate figure in all relevant documentation. *See Remand Results* at 17, 18 & n.44; *see also* Yücel Final Analysis Memo at 2; *cf. SNR Roulements v. United States*, 13 CIT 1, 6, 704 F. Supp. 1103, 1108 (1989). This method of relying on BPI data without disclosing such data mitigates Commerce's prior concern with using alternative (ii) in situations where there is only one other respondent. In the light of the particular facts of this case, the court holds that Commerce's calculation of Yücel's AD duty margin based on the aggregate Selling Expenses and CV Profit rate is supported by substantial evidence.

Petitioners' do not challenge Commerce's actual calculation under alternative (ii), rather they challenge only Commerce's selection of alternative (ii). They argue that the *Remand Results* represent an abandonment of Commerce's longstanding practice of avoiding alternative (ii) to calculate Selling Expenses or CV Profit in cases where there is only one respondent with available home market data. *See* Maverick Cmts. at 4–5; *see also* U.S. Steel Cmts. at 3–8. U.S. Steel, in particular, cites to three cases where the court approved this prior practice based on concerns about the disclosure of BPI. *See* U.S. Steel Cmts. at 5–8 (citing *Atar*, 730 F.3d at 1327; *Geum Poong Corp. v. United States*, 28 CIT 1089, 1091–92, 163 F. Supp. 2d 669, 674 (2001); *Thai Plastic Bags Indus. Co v. United States*, 904 F. Supp. 2d 1326, 1335 (CIT 2011)). U.S. Steel also contends that Commerce specifically rejected the aggregation method used in this case in a prior decision. *Id.* at. 8 (citing *Notice of Final Determination of Sales at Less Than Fair Value: Polyethylene Retail Carrier Bags from Thailand*, 69 Fed. Reg. 34,122 (Dep't of Commerce June 18, 2004) ("*Carrier Bags from Thailand*")). These arguments are unpersuasive.

Commerce is allowed "flexibility to change its position provid[ed] that it explains the basis for the change and provid[ed] that the explanation is in accordance with law and supported by substantial evidence." *Cultivos Miramonte, S.A. v. United States*, 21 CIT 1059,

1064, 980 F. Supp. 1268, 1274 (1997) (footnotes omitted); *accord Nippon Steel Corp. v. U.S. Int'l Trade Comm'n*, 494 F.3d 1371, 1377 n.5 (Fed. Cir. 2007); *see also Motor Vehicle Mfrs. Ass'n of the U.S. v. State Farm Mut. Auto. Ins.*, 463 U.S. 29, 57 (1983) (holding that an agency must give a reasoned analysis for a change from prior practice). For Commerce's explanation to be satisfactory, it must state "*why* it is changing course, not merely *that* it is changing course." *See Huvis Corp. v. United States*, 31 CIT 1803, 1813, 525 F. Supp. 2d 1370, 1380 (2007) (citing *Nippon Steel Corp.*, 494 F.3d at 1377 n.5). Here, Commerce adequately explained its revised calculation based on a methodology that mitigated prior concerns of disclosing BPI underling its prior decisions not to use alternative (ii) in situations where there were only two respondents.

In the *Remand Results*, Commerce properly distinguished the methodology used to calculate Selling Expenses and CV Profit in its prior decisions from the aggregation method used in this case. *See Remand Results* at 16. Furthermore, Commerce adequately explained that its Consol. Court No. 14–00244 Page 14 prior decisions did not preclude it from utilizing a respondent's BPI pursuant to alternative (ii) in all cases where there is only one respondent with viable home market data. *See id.* ; *Cf.* Issues and Decision Memorandum for the Final Determination of the Antidumping Duty Investigation of Polyethylene Retail Carrier Bags from Thailand at 23, A-549–821 (June 18, 2004), *available at* http://enforcement.trade.gov/frn/summary/thailand/04–13814–1.pdf (last visited Apr. 27, 2016) ("*Carrier Bags from Thailand I&D Memo*") ("Even if the [Commerce] has not used ranged public data to calculate CV selling expenses and profit in the past . . . this does not preclude [Commerce] from using this type of data now."). Commerce sufficiently supported its reasoning by relying on its prior decision in *Certain Steel Nails from the Republic of Korea: Final Determination of Sales at Less Than Fair Value*, 80 Fed. Reg. 28,955 (Dep't Commerce May 20, 2015) ("*Steel Nails from Korea*"), which stated that using one of two respondents' BPI under alternative (ii) most closely simulates the statutorilypreferred method for calculating Selling Expenses or CV Profit.[13] *SeeRemand Results* at 15–16; *see also* Certain Steel Nails from the Republic of Korea: Issues and Decision Memorandum for the Final Determination of Sales at Less Than Fair Value at 13–14, A-580–874

[13] Although, as U.S. Steel argues, the facts of *Steel Nails from Korea* are not the same as those presented here, Commerce's reliance on that decision is still proper for the underlying proposition that the use of Borusan's BPI under alternative (ii), even in cases where there is only one respondent with viable home market data, best reflects the "actual experience of a company subject to the investigation as it pertains to the production and sale of OCTG in Turkey." *See* U.S. Steel Cmts. at 9–10; *Remand Results* at 15–16

(May 13, 2015), *available at* http://enforcement.trade.gov/frn/summary/korea-south/2015–12257–1.pdf (last visited Apr. 27, 2016).

Contrary to petitioners' arguments, Commerce's use of alternative (ii) is also supported by its determination in *Carrier Bags from Thailand*. There, Commerce preliminarily used alternative (iii) to calculate CV profit and Selling Expenses for one of two respondents by using the financial statements of a non-respondent Thai company and dispensing with the profit cap requirement. *See Carrier Bags from Thailand I&D Memo* at 21–23. In its final determination, Commerce again rejected alternative (ii) in favor of alternative (iii), but revised its calculation using the ranged public data, derived from BPI, of the only other respondent, determining that it was the best information available on the record. *Id.* Similar to Commerce's decision in *Carrier Bags from Thailand*, here, Commerce used the BPI of the sole other respondent in this case, Borusan, and rather than simply ranging the data, Commerce obscured the BPI by aggregating Selling Expenses and CV Profit into a single figure. This methodology added a layer of protection, rendering it impossible for Yücel to ascertain which fraction of the figure was attributable to either Selling Expenses or CV Profit. *See Remand Results* at 17–18.

Petitioners argue that it is mathematically possible for Yücel to "back out" its own BPI to reveal Borusan's BPI, yet, they have not demonstrated how in fact such a calculation is possible with the information available in this case. *See* Maverick Cmts. at 4; U.S. Steel Cmts. at 8. Given the numerous combinations of Selling Expenses and CV Profit rates capable of producing the combined 7.38 percent, Commerce's conclusion that Borusan's BPI is sufficiently protected is supported by substantial evidence. Finally, Borusan has not challenged Commerce's use of its data, further supporting Commerce's determination that its methodology adequately protects BPI. In sum, Commerce often has difficult choices to make in calculating profit, particularly where it finds a respondent's own data flawed and data from non-subject countries is also Consol. Court No. 14–00244 Page 16 problematic. Here, petitioners' BPI concerns are unpersuasive and they also have not challenged the actual calculation under alternative (ii). Accordingly, the court finds Commerce's revised calculation to be supported by substantial evidence and in accordance with law.

II. Duty Drawback

In evaluating whether a respondent is entitled to a duty drawback adjustment, Commerce typically employs a two-part test under which the respondent is required to demonstrate:

> (1) that the rebate and import duties are dependent upon one another, or in the context of an exemption from import duties, that the exemption is linked to the exportation of the subject merchandise, and (2) that there are sufficient imports of the raw material to account for the duty drawback on the exports of the subject merchandise.

Saha Thai Steel Pipe, 635 F.3d at 1340 (quoting *Saha Thai Steel Pipe Co. v. United States*, 33 CIT 1541, 1542 (2009)); *see also Allied Tube & Conduit Corp. v. United States*, 29 CIT 502, 506, 374 F. Supp. 2d 1257, 1261 (2005). On remand, however, Commerce did not reach the two-part test, but rather, determined based on the unique factual scenario where Yücel admitted that none of the inputs for which duties were exempted were used, or capable of being used, in the production of subject merchandise (i.e., OCTG), that Yücel was not entitled to a duty drawback adjustment.[14] *Remand Results* at 25–28; *see also* Çayirova Sec. D Quest. Resp. at 22, PD 105 (Nov. 25, 2013) ("All J55 coil, which is the direct material for OCTG, was purchased from domestic sources."); Çayirova Sec. D Suppl. Quest. Resp. at 21–22, barcode 3174811–01 (Jan. 21, 2014). In support of its determination, Commerce relied on the U. S. Court of Appeals for the Federal Circuit's decision in *Saha Thai Steel*, 635 F.3d at 1338, which states "if a foreign country would normally impose an import duty on an input *used to manufacture the subject merchandise*, but offers a rebate or exemption from the duty if the input is exported to the United States, then Commerce will increase [export price] to account for the rebated or unpaid import duty." (emphasis added). *See Remand Results* at 25, 26. Commerce also based its determination on the fact that the AD statute "generally provides a mechanism to examine prices and costs associated with subject merchandise (or foreign like product)." *Id.* at 25–26 & nn.67–68 (citing Tariff Act of 1930, 19 U.S.C. §§ 1677a(a), (c), 1677b(a), (2); 19 C.F.R. § 351.401).

Çayirova contends that Commerce improperly denied Yücel a duty drawback adjustment by adding an unwarranted additional hurdle to

[14] The Turkish drawback system does not require parties to directly link an input exempted from duty to the export of subject merchandise "so long as the inputs that are used in the production of exports fall within the same [eight]-digit HTS classification as the inputs for which the company claimed the exemption." *Remand Results* at 26. Commerce has previously determined that the Turkish drawback system can satisfy the requirements of its duty drawback test, and limited its present determination to the specific facts as related to Yücel. *Id.* ("We note that this is not a pronouncement on the Turkish duty drawback system as a whole . . .[r]ather, this determination is limited to these unique facts—*i.e.*, that Yücel's inputs at issue are not capable of being used in the production of subject merchandise—which has rarely been faced by [Commerce] in prior antidumping proceedings involving Turkey, and, indeed, were not facts raised by the situation of the other respondent, Borusan, for whom [Commerce] granted a duty drawback adjustment." (footnote omitted)).

the analysis. Çayirova Cmts. at 3, 6–11. Çayirova argues that Commerce attempted to impose a similar "suitability" requirement for duty drawback adjustments in *Far East Machinery Co. v. United States*, 12 CIT 428, 688 F. Supp. 610 (1988) ("*FEMCO I*"), which the court rejected, and asks the court to do so again. *Id.* at 3–11. Çayirova also argues that Commerce's new "threshold test" is inconsistent with its longstanding, court-approved, two-part test. *Id.* at 3–11. Çayirova also argues that the court has rejected previous attempts to add additional substantive hurdles to the drawback analysis not required by the statute. *Id.* at 6 (citing *Chang Tieh Indus. Co. v. United States*, 17 CIT 1314, 1320, 840 F. Supp. 141, 147 (1993); *Allied Tube*, 29 CIT at 507, 374 F. Supp. 2d at 1262). Çayirova also argues that Commerce's reliance on *Saha Thai Steel Pipe* is misplaced. *Id.* at 9–11. Finally, Çayirova argues the new "threshold test" constitutes an impermissible change in the legal theory in the midst of litigation, which caused Yücel to be treated differently from the other respondent, Borusan.[15] *Id.* at 3, 11–15.

Under 19 U.S.C. § 1677a(c)(1), "the price used to establish export price and constructed export price shall be—increased by . . . (B) the amount of any import duties imposed by the country of exportation which have been rebated, or which have not been collected, *by reason of the exportation of the subject merchandise* to the United States." (emphasis added). Although the court has determined that this provision is unambiguous in certain respects,[16] the court has yet to

[15] In its comments on the draft remand results before Commerce, Çayirova also argued that Commerce's complete reconsideration of Yücel's duty drawback adjustment exceeded the scope of the remand opinion and order. *See Remand Results* at 28–29. Çayirova has not raised specifically such argument before the court and accordingly has waived the argument. *See Novosteel SA v. United States*, 284 F.3d 1261, 1273–74 (Fed. Cir. 2002). Çayirova's argument that Commerce changed legal theories late in the litigation is distinct from, and does not encompass, a challenge to the scope of the remand order, which the court expressly indicated Çayirova was permitted to bring in challenging the *Remand Results*. Clarification Order at 2.

[16] In *Allied Tube*, the court stated, "[t]he Court finds that the statute is clear on its face." 29 CIT at 510, 374 F. Supp. 2d at 1264. There, however, the parties challenging the duty drawback adjustment sought to introduce a requirement that the party requesting the adjustment show that the duty exempted by reason of the exportation of subject merchandise was actually imposed on inputs for sales in the home market. *Id.* at 507, 374 F. Supp. 2d at 1261–62. The statute says nothing about home market sales and the court concluded that "the clear language of 19 U.S.C. § 1677a(c)(1)(B) does not require an inquiry into whether the price for products sold in the home market includes duties paid for imported inputs." *Id.* at 507, 374 F. Supp. 2d at 1262. The court reached the same conclusion in *Chang Tieh*, 17 CIT at 1320, 840 F. Supp. at 147, and *Wheatland Tube Co. v. United States*, 30 CIT 42, 62, 414 F. Supp. 2d 1271, 1288 (2006), *rev'd on other grounds* 495 F.3d 1355 (Fed. Cir. 2007). As these cases did not concern whether the exempted duties were for inputs incapable of being used to produce subject merchandise, they are clearly distinguishable and Çayrova's reliance on them is misplaced.

address the specific question before the court, namely, whether inputs exempted from duty under a drawback regime, which could not have been used in the production of subject merchandise, are eligible for a duty drawback adjustment.[17] Nothing in the plain language of the statute addresses whether rebated or exempted duties must be on inputs capable of being used in the production of subject merchandise, however, the statute's purpose and context, as well as precedent, support Commerce's denial of Yücel's duty drawback adjustment.

Although the text does not specifically require that the duty exempted inputs must be of a type capable of use in the production of subject merchandise, the duty drawback adjustment and AD statute generally are concerned with valuing the costs of producing the subject merchandise. *See, e.g.*, 19 U.S.C. § 1677(35)(A) (describing "dumping margin" as the difference between normal value and export price "*of the subject merchandise*"); § 1677a(a) (defining export price as "the price *at which the subject merchandise* is first sold"); § 1677b ("In determining under this subtitle *whether subject merchandise* is being, or is likely to be, sold at less than fair value, a fair comparison shall be made between the export price or constructed export price and normal value.") (emphases added). Commerce's regulations also describe the concern with valuing costs associated with subject merchandise. *See* 19 C.F.R. § 351.401(c) (describing price adjustments as those "reasonably attributable to the *subject merchandise*" (emphasis added)). The duty drawback adjustment was also intended to enable Commerce to make "a fair comparison" between export price and normal value. *See* Uruguay Round Agreements Act, Statement of Administrative Action, H.R. Doc. No. 103–316, vol. 1, at 820 (1994),

[17] Çayirova incorrectly argues that the court addressed and rejected an "appropriateness" test for duty drawback adjustments in *FEMCO I*. Çayirova Cmts. at 6–8. In *FEMCO I*, the court remanded Commerce's denial of a duty drawback adjustment when it imposed an additional hurdle to the two-part test that the imported raw materials "must have been appropriate for incorporation into the exported subject merchandise," while rejecting data that might have satisfied the requirement. 12 CIT at 432, 688 F. Supp. at 612. The court explained that the ITA adopted the two-part test, specifically the second prong and substitution principles, "to relieve it of the difficult, if not impossible, task of determining whether the raw materials used in producing the exported merchandise actually came from imported or domestic sources." *Id.* at 431, 688 F. Supp. at 612. Here, the task is not difficult, let alone impossible, as Yücel expressly stated that the raw materials used in producing the exported merchandise came from domestic sources. Çayirova Sec. D Quest. Resp. at 22; Çayirova Suppl. Sec. D Quest. Resp. at 21, 22.

Additionally, after a remand, the court sustained Commerce's determination that the respondent had in fact imported a sufficient quantity of coil of the correct specification during the relevant period to make the exported pipe. *Far East Mach. Co. v. United States*, 12 CIT 972, 975, 699 F. Supp. 309, 312 (1988). Thus, the court never had to evaluate whether the "appropriateness" test was proper.

reprinted in 1994 U.S.C.C.A.N. 4040, 4161–63; 140 Cong. Rec. E2386–01 (1994) ("It is expected that Commerce will ensure that a fair, apples-to-apples comparison is made in all cases."); *cf. Florida Citrus Mut. v. United States*, 550 F.3d 1105, 1111 (Fed. Cir. 2008) ("[T]he purpose of adjusting U.S. price . . . is to enable a fair 'apples-to-apples' comparison between foreign and domestic price."). Commerce's use here of costs associated with subject merchandise is consistent with this statutory purpose and context.

Contrary to Çayirova's contention, Commerce's determination here does not conflict with precedent and in fact finds support therein. The cases discussing duty drawback adjustments have consistently referred to the adjustment as being for inputs on which duties were exempted that were used in the production of subject merchandise. *See, e.g.*, *Saha Thai Steel*, 635 F.3d at 1338 ("In other words, if a foreign country would normally impose an import duty on an input *used to manufacture the subject merchandise*, but offers a rebate or exemption from the duty if the input is exported to the United States, then Commerce will increase [export price] to account for the rebated or unpaid import duty.");[18] *Wheatland Tube Co. v. United States*, 30 CIT 42, 60, 414 F. Supp. 2d 1271, 1286 (2006), *rev'd on other grounds* 495 F.3d 1355 (Fed. Cir. 2007) ("In addition, the first prong enables Commerce to verify that the home country allows rebates or exemptions *only* for those imported inputs *used to produce* exported merchandise." (second emphasis added)); *Hornos Electricos de Venez. v. United States*, 27 CIT 1522, 1525, 285 F. Supp. 2d 1353, 1358 (2003) ("The purpose of a duty drawback adjustment is to prevent dumping margins from arising because the exporting country rebates import duties and taxes for raw materials *used in* exported merchandise." (emphasis added)); *Allied Tube*, 29 CIT at 506, 374 F. Supp. 2d at 1261 ("[The] duty drawback adjustment is meant to prevent dumping margins that arise because the exporting country rebates import duties and taxes that it had imposed on raw materials *used to produce merchandise that is subsequently exported*." (emphasis added)). Additionally, in at least two cases, the court stated that the imports exempted from duties in those cases were in fact used to produce the subject merchandise. *Allied Tube*, 29 CIT at 509, 374 F. Supp. 2d at 1263; *Chang Tieh*, 17 CIT at 1320, 840 F. Supp. at 147.

[18] Çayirova argues that *Saha Thai Steel* is inapposite because the issue was distinct and the language quoted is dicta. Although the issues are different, *Saha Thai Steel* refers to the duty drawback adjustment as for inputs used to manufacture subject merchandise and thus further supports the reasonableness of Commerce's interpretation in this case.

Thus, to comply with the statutory mandate to calculate the most accurate dumping margins possible, Commerce properly denied Yücel's duty drawback adjustment as the duty exemptions claimed were not related to costs incurred in producing subject merchandise. *See Rhone Poulenc, Inc. v. United States*, 899 F.2d 1185, 1191 (Fed. Cir. 1990). Under *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842–43 (1984), Commerce's interpretation of the statute as requiring the exempted inputs to be capable of being used in the production of subject merchandise is thus reasonable and a permissible construction of the statute, which does not speak to the precise question at issue.[19]

Finally, Çayirova's argument that Commerce has improperly changed legal theories on remand is unpersuasive. Commerce complied with the court's remand order to determine Yücel's duty drawback using its normal methodology as applied to the particular facts pertaining to Yücel and thus did not impermissibly change legal theories. The case cited by Çayirova do not suggest a different result. *See Oy v. United States*, 23 CIT 257, 262 (1999) (rejecting a new methodology introduced "after a court-ordered remand to apply the methodology professed by the agency before remand"); *Royal Thai Government v. United States*, 18 CIT 277, 286, 850 F. Supp. 44, 51 (1994) (refusing to "entertain Commerce's new rationale" after a remand which was "to be limited to the evidence and analysis underlying the agency's [prior] decision"). Here, although the remand order did not permit Commerce to determine that Turkey's system as a whole was lacking, the remand did permit Commerce to consider arguments raised by petitioners. It was clear from the court's Clarification Order that Commerce was permitted to evaluate whether Yücel's imports were suitable for use in producing subject merchandise, and Çayirova also has failed to challenge the scope of the remand order.[20]

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[19] This matter does not call upon the court to decide whether Commerce generally should inquire, as to foreign substitution drawback systems which permit drawback for imports which may not necessarily be suitable for production of the exported merchandise, whether the imports are in fact suitable. The court decides only that where it has become apparent that the imports are not suitable that Commerce reasonably administers the statute in rejecting the drawback adjustment.

[20] Çayirova's additional argument that the *Remand Results* treat it differently from Borusan is also unpersuasive. Borusan's duty drawback adjustment was not subject to the court's remand and unlike Yücel, Borusan did not state that it sourced its OCTG raw materials from only domestic sources or had only imports unsuitable for OCTG production. Thus, the court's holding that Commerce's determination that Borusan's duty drawback adjustment, based on the fact that it imported sufficient quantities of coil capable of being used to produce OCTG to account for its exports, was supported by substantial evidence stands. *Maverick*, 107 F. Supp. 3d at 1334–35.

CONCLUSION

For the foregoing reasons, the *Remand Results* are sustained and judgment will issue accordingly.

Dated: May 10, 2016
New York, New York

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

Slip Op. 16–47

THE TIMKEN COMPANY, Plaintiff, v. UNITED STATES, Defendant, NSK LTD., NSK CORPORATION, NSK PRECISION AMERICA, INC., NTN BEARING CORP. OF AMERICA, NTN CORPORATION, NTN BOWER, INC., NTN DRIVESHAFT, INC., AMERICAN NTN BEARING MANUFACTURING CORP., JTEKT CORPORATION, JTEKT NORTH AMERICA, INC., NACHI-FUJIKOSHI CORPORATION, NACHI AMERICA, INC., NACHI TECHNOLOGY, INC., NSK BEARINGS EUROPE, LTD., NSK EUROPE LTD., Defendant-Intervenors.

Before: Jane A. Restani, Judge
Consol. Court No. 14–00155

[Commerce's Final Results of Remand Redetermination in antidumping duty administrative review sustained.]

Dated: May 10, 2016

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Diane A. MacDonald, Riggle and Craven, of Chicago, IL, argued for defendant-intervenors NTN Bearing Corp. of America, NTN Corporation, NTN Bower, Inc., NTN Driveshaft, Inc., and American NTN Bearing Manufacturing Corp. With her on the brief was *David J. Craven*.

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OPINION

Restani, Judge:

This matter is before the court following the U.S. Department of Commerce's ("Commerce") Final Results of Remand Redetermination, ECF No. 85 ("*Remand Results*"). The court remanded to Commerce to apply its differential pricing ("DP") analysis in he 2009–2010 annual antidumping duty ("AD") administrative review of imports of ball bearings and parts thereof from Japan and the United Kingdom. *Timken Co. v. United States*, 79 F. Supp. 3d 1350, 1352, 1361 (CIT 2015) ("*Timken*"). Commerce has complied with the court's remand order and, for the reasons stated below, Commerce's *Remand Results* are sustained.

BACKGROUND

The facts of this case have been documented in the court's previous opinion, and the court presumes familiarity with that opinion. *See id.* at 1351–55. There, The Timken Company ("Timken") contested Commerce's decision not to apply its DP analysis in the challenged administrative reviews. *See id.* at 1352; *see also Ball Bearings and Parts Thereof from Japan and the United Kingdom: Final Results of Antidumping Duty Administrative Reviews and Rescission of Review in Part; 2009–2010*, 79 Fed. Reg. 35,312 (Dep't Commerce June 20, 2014) ("*Final Results*"). The court agreed that Commerce had abused its discretion by departing from its routine practice of applying the DP analysis rather than the *Nails* test to address potential targeted dumping. *Timken*, 79 F. Supp. 3d at 1352, 1361. Thus, on October 8, 2015, Commerce published, under protest, its *Remand Results*, in which it applied its DP analysis. *Remand Results* at 1, 2. The court's reasoning in its prior opinion fully addresses the issue and will not be addressed further here.

Commerce uses its DP analysis to "determine whether an alternative comparison methodology is appropriate." *Id.* at 3. Typically, in administrative reviews, Commerce uses the average-to-average ("A-A") methodology, without zeroing,[1] as the default methodology to calculate weighted-average dumping margins. *Antidumping Proceedings: Calculation of the Weighted-Average Dumping Margin and As-*

[1] Under the average-to-average ("A-A") methodology without zeroing, Commerce compares "monthly weighted-average export prices with monthly weighted-average normal values, and . . . grant[s] an offset for all such comparisons that show export price exceeds normal value in the calculation of the weighted-average margin of dumping." *Antidumping Proceedings: Calculation of the Weighted-Average Dumping Margin and Assessment Rate in Certain Antidumping Duty Proceedings; Final Modification*, 77 Fed. Reg. 8,101, 8,102 (Dep't Commerce Feb. 14, 2012) ("*Final Modification*").

sessment Rate in Certain Antidumping Duty Proceedings; Final Modification, 77 Fed. Reg. 8,101, 8,101–03 (Dep't Commerce Feb. 14, 2012) ("*Final Modification*"). Relevant to this case, Commerce also sometimes uses the average-to-transaction ("A-T") alternative comparison methodology, with zeroing,[2] to calculate a weighted-average dumping margin. *Id.* at 8,101.

In performing the DP analysis, Commerce uses two tests to determine whether there is "a pattern of [export prices] or [constructed export prices] for comparable merchandise that differs significantly among purchasers, regions, or time periods." *Remand Results*at 3. "This pattern is commonly referred to as 'targeted dumping.'" *Timken*, 79 F. Supp. 3d at 1352. First, Commerce uses the "Cohen's d test" to measure "the extent of the difference between the mean of a test group and the mean of a comparison group." *Remand Results* at 4. Commerce may calculate a Cohen's d coefficient only when "the test and comparison groups of data each have at least two observations, and when the sales quantity for the comparison group accounts for at least five percent of the total sales quantity of the comparable merchandise." *Id.* When evaluating "the extent to which the net prices to a particular purchaser, region or time period differ significantly from the net prices of all other sales of comparable merchandise," Commerce considers the difference significant if the calculated Cohen's d coefficient "is equal to or exceeds the large (*i.e.*, 0.8) threshold." *Id.* Second, Commerce uses the "ratio test" to determine "the extent of the significant price differences for all sales." *Id.* Under this test, Commerce determines if the value of sales to purchasers, regions, and time periods that pass Cohen's d falls between the 0 to 33 percent range, 33 to 66 percent range, or the 66 to 100 percent range of total sales. *Id.* at 4–5. Respectively to the percent range calculated, Commerce will either apply A-A to all sales, A-A to the sales that don't pass Cohen's d and A-T to the sales that do pass Cohen's d (i.e., "mixed methodology"), or A-T to all sales. *See id.* at 5.

Next, Commerce "examine[s] whether using only the [A-A] method can appropriately account for such differences" by determining "whether using an alternative method . . . yields a meaningful difference in the weighted-average dumping margin as compared to" A-A without zeroing. *Id.* Commerce considers a difference "meaningful" if "there is a 25 percent relative change in the weighted-average dumping margin between the [A-A] method and the appropriate alterna-

[2] Under the average-to-transaction ("A-T") methodology with zeroing, Commerce compares "the weighted-average normal value to the export price of individual transactions for comparable merchandise . . . [and does not] offset the results of the comparisons for which export price was less than normal value by the results of comparisons for which export price exceeded normal value." *Id.* at 8,101 (footnote omitted).

tive method when both rates are above the *de minimis* threshold, or . . . the resulting weighted-average dumping margin moves across the *de minimis* threshold." *Id.* If the difference is meaningful as defined by Commerce, then Commerce determines that the default A-A without zeroing methodology cannot account for the price differences and that use of an alternative method is appropriate. *Id.*

Relevant to this appeal, after applying the DP analysis, Commerce calculated weighted-average dumping margins for NTN Corporation and NTN Kongo Corporation of 6.37 percent, for NSK Japan of 2.79 percent, and for NSK UK of 6.47 percent.[3] *Remand Results* at 41, 42. For each of these companies, Commerce determined that under the Cohen's d test, prices differed significantly, and it determined that under the ratio test, the value of sales that passed the Cohen's d test fell between 33 percent and 66 percent of total value. *Id.* at 7–8. Commerce then concluded that A-A without zeroing could not appropriately account for such price differences for each of the companies. *Id.* Thus, the margins increased from the *Final Results*, where Commerce had assigned zero margins to all companies from Japan and the United Kingdom. *Final Results*, 79 Fed. Reg. at 35,313–14.

NTN Precision America, Inc., NTN Bearing Corp. of America, NTN Corporation, NTN Bower, Inc., NTN Driveshaft, Inc., and American NTN Bearing Manufacturing Corp. (collectively, "NTN"[4]) challenge Commerce's *Remand Results*. NTN argues that Commerce deprived it of a meaningful opportunity to comment on the Draft Results of Remand Redetermination, bar code 3296505–01 (Aug. 6, 2015) ("*Draft Remand Results*"). Def.-Intrvnr. NTN's Cmts. on Final Results of Remand Redetermination 2–7, ECF No. 118 ("NTN Cmts."). NTN also argues that Commerce abused its discretion by applying the DP

[3] For the antidumping duty ("AD") order for Japan, Commerce assigned to the non-selected respondents a rate of 4.58 percent, which was "the simple-average of the weighted average dumping margin of NSK Japan and NTN, the two mandatory respondents[.]" Final Results of Remand Redetermination 9, ECF No. 85 ("*Remand Results*"). In addition, Commerce individually reviewed Asahi Seiko Co., Ltd. ("Asahi") and Mori Seiki Co., Ltd. ("Mori Seiki"), applying the differential pricing ("DP") analysis to calculate a margin. *Id.* at 5–6. After determining that each company had a pattern of prices for comparable merchandise that differed significantly and that under the ratio test the value of sales that passed the Cohen's d test fell between 33 percent and 66 percent of total value, Commerce assigned a weighted-average dumping margin of 1.33 percent to Asahi and of 0.65 percent to Mori Seiki. *Id.* at 40, 41. For the AD order for the United Kingdom, Commerce assigned to "responding companies which [it] did not select for individual examination" a margin of 6.47 percent, which was the margin assigned to NSK UK—the only company that was individually examined. *Id.* at 9.

[4] The court includes NTN Kongo Corporation, for which Commerce calculated an AD rate, when it refers to "NTN" as there is no meaningful difference between the entities for the purposes of this opinion.

analysis because the methodology itself is erroneous, *id.* at 22–24, 28–29, and Commerce's specific application of its DP analysis in this case to NTN's sampled sales database[5] was unlawful, *id.*at 7–22. NTN further contends that Commerce failed to adequately explain why the default methodology could not take into account price differences, *id.* at 24–28.[6]

The government and Timken respond that NTN was provided sufficient notice of Commerce's application of its DP analysis and therefore had a meaningful opportunity to respond to the *Draft Remand Results*. Def.'s Resp. to Cmts. Regarding the Remand Redetermination 4–6, ECF No. 109 ("Gov. Resp."); Pl.'s Cmts. in Supp. of the Final Results of Remand Redetermination 7–12, ECF No. 110 ("Timken Resp."). They maintain that Commerce's DP analysis is lawful, refuting each of NTN's general challenges, Gov. Resp. at 6–9, 13–15; Timken Resp. at 6–7, 23–27, and arguing that application of the DP analysis to NTN's sampled database was proper, Gov. Resp. at 16–25; Timken Resp. at 16–22, 27–30. They add that certain of NTN's arguments were not properly exhausted. Gov. Resp. at 22; Timken Resp. at 12–16. The government also responds that Commerce properly explained why the default methodology could not account for the pattern of prices that differed significantly. Gov. Resp. at 9–11.

JURISDICTION AND STANDARD OF REVIEW

The court has jurisdiction pursuant to 28 U.S.C. § 1581(c) (2012). The court upholds Commerce's determination in an administrative review 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).

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[5] In this case and in most of the previous reviews under the AD order for imports of ball bearings, Commerce has employed a sampling methodology for U.S. sales where it randomly selects a total of six-weeks over the 52-week period of review, selecting one week from each two-month period of the period of review. *See Remand Results* at 14 n.25, 18; NTN's Cmts. on Draft Remand Redetermination at Ex. 1, bar code 3299960–01 (Aug. 20, 2015) ("NTN Draft Remand Cmts."). The respondents then report U.S. sales information for the selected six weeks, only.

[6] NSK Ltd., NSK Corporation, NSK Precision America, Inc., NSK Bearings Europe, Ltd., and NSK Europe Ltd. (collectively, "NSK") and NTN continue to disagree with the court's remand order, and they argue that Commerce was not required to apply its DP analysis in this case. Cmts. on the Dep't's Results of Remand Redetermination on Behalf of NSK 1–2, ECF No. 90 ("NSK Cmts."); Def.-Intrvnr. NTN's Cmts. on Final Results of Remand Redetermination 1–2, ECF No. 118 ("NTN Cmts."). As indicated, the court has already held that Commerce acted arbitrarily by not applying its DP analysis and finds no reason to revisit that decision. *See Timken*, 79 F. Supp. 3d at 1357–60. NSK and NTN have not provided the court with any additional reasons as to why its prior holding is incorrect. Further, NSK acknowledges that Commerce's "Remand Results are consonant with this Court's Opinion and order." NSK Cmts. at 2.

DISCUSSION

I. NTN's Extension Request

NTN argues that it was deprived of a meaningful opportunity to comment on the *Draft Remand Results* because it did not receive electronic notification of the filing of the *Draft Remand Results* and, NTN should have been provided more than seven days to comment because Commerce's DP methodology is a complicated scientific technique not previously applied in administrative reviews of this AD order. NTN Cmts. at 2–7. Thus, NTN requests remand and for the court to order reopening of the record so that it may further develop its arguments. *Id.* at 7. The government and Timken respond that Commerce corrected for the lack of electronic notification by restarting the original seven-day comment period, and NTN provided substantive comments. Gov. Resp. at 6; Timken Resp. at 9–12. The government also contends that NTN had notice that Commerce would apply the then well-known DP analysis, pursuant to the court's remand order. Gov. Resp. at 4–5; *see also* Timken Resp. at 7–9.

Commerce's discretion in setting time limits to comment on draft results of redetermination is broad, as there is no statute or regulation governing its conduct in this situation.[7] When Commerce, however, provides interested parties an opportunity to comment, as it did here, Commerce's discretion is limited because "[w]here a right to be heard exists, due process requires that right be accommodated at a meaningful time and in a meaningful manner." *See Mid Continent Nail Corp. v. United States*, 34 CIT 512, 517, 712 F. Supp. 2d 1370, 1375 (2010) (quoting *Barnhart v. U.S. Treasury Dep't*, 588 F. Supp. 1432, 1438 (CIT 1984) (alteration in original)).

Commerce provided NTN with a meaningful opportunity to comment on the *Draft Remand Results*. Based on the facts of this case, NTN's argument, regarding the failure of Commerce's electronic filing system, ACCESS, to send automated notification to NTN's counsel, is irrelevant. When Commerce filed its *Draft Remand Results* on ACCESS on August 6, 2015, it provided interested parties seven days to comment; and when Commerce learned of the electronic notification issue after receiving extension requests from NTN and Asahi Seiko Co., Ltd. ("Asahi"), it granted a seven-day extension until August 20,

[7] Neither the court's order nor the statute expressly required Commerce to issue its *Draft Remand Results*: Commerce was required to file only its final *Remand Results* with the court. *See Golden Dragon Precise Copper Tube Grp., Inc. v. United States*, Slip Op. 16–17, 2016 WL 720659, at *3 (CIT Feb. 22, 2016) ("Commerce is permitted to establish remand procedures encouraging parties to meaningfully participate in the administrative proceeding.") (citing *Vt. Yankee Nuclear Power Corp. v. Nat. Res. Def. Council, Inc.*, 435 U.S. 519, 543–44 (1978)).

2015 to file comments. *Draft Remand Results* at 12; Letter from Commerce to All Interested Parties at 1, bar code 3298225–01 (Aug. 13, 2015). Commerce provided a remedy that fully addressed the lack of earlier electronic notification. Moreover, although Commerce provided NTN with only seven days to comment on the *Draft Remand Results*, this amount of time was not unreasonable. *See, e.g.*, *Sichuan Changhong Elec. Co. v. United States*, 30 CIT 1886, 1892, 466 F. Supp. 2d 1323, 1329 (2006) (upholding a four-day comment period). NTN knew more than a month before comments were initially due that the court had ordered Commerce to apply the DP analysis. *See Timken*, 79 F. Supp. 3d at 1350, 1361. NTN, therefore, had an opportunity to familiarize itself with that methodology. Indeed, NTN submitted thoughtful comments regarding the DP analysis in general and specifically as to its application to NTN's sampled database.[8] *See* NTN's Comments on Draft Remand Redetermination at 3–14, bar code 3299960–01 (Aug. 20, 2015) ("NTN Draft Remand Cmts."); *see also Mid Continent Nail*, 34 CIT at 517, 712 F. Supp. 2d at 1375 ("If, however, a [party] makes thoughtful comments that Commerce addresses in its determination, then, 'as a practical matter [the party] was not substantially deprived of an opportunity to be heard before the agency.'" (quoting *Borden Inc. v. United States*, 23 CIT 372, 375 n.3 (1999))). Accordingly, NTN was provided an opportunity and actually did meaningfully comment on Commerce's *Draft Remand Results*; therefore, its request to remand again and order reopening of the record is denied.

II. Differential Pricing

Commerce's regulations provide that in an administrative review it will use the A-A method "unless [it] determines another method is appropriate in a particular case." 19 C.F.R. § 351.414(c)(1) (2013). To determine whether an alternative comparison methodology is appropriate, Commerce has decided that its "examination of this question in the context of administrative reviews, . . . is, in fact, analogous to

[8] In addition, Commerce's regulations provide that "[u]nless expressly precluded by statute, [Commerce] may, for good cause, extend any time limit established by this part." 19 C.F.R. § 351.302(b) (2013). As discussed above, however, time limits to comment on draft results of redetermination are not provided for in Commerce's regulations, meaning they are not "established by this part." Therefore, in the present situation, it is not clear, and the parties have not argued, whether it is Commerce's practice to grant extensions for "good cause." Nevertheless, Commerce did grant a seven-day extension, for what is presumably good cause due to the failure of Commerce's electronic notification system. *See* Letter from Commerce to All Interested Parties at 1, bar code 3298225–01 (Aug. 13, 2015). NTN has not established that there was good cause to extend the deadline for an *additional* seven days, given that NTN knew Commerce would be applying its DP methodology as ordered by the court.

the issue in antidumping investigations." *Remand Results* at 3; *see also Final Modification*, 77 Fed. Reg. at 8,102 ("[W]hen conducting reviews under the modified methodology, [Commerce] will determine on a case-by-case basis whether it is appropriate to use an alternative comparison methodology by examining the same criteria that [Commerce] examines in original investigations pursuant to section 777A(d)(1)(A) and (B) of the Act."). Therefore, the statutory language governing investigations is instructive.

The statute provides that Commerce may determine whether dumping is occurring—that is "the subject merchandise is being sold in the United States at less than fair value"—by using the A-T method if: "(i) there is a pattern of export prices (or constructed export prices) for comparable merchandise that differ significantly among purchasers, regions, or periods of time, and (ii) [Commerce] explains why such differences cannot be taken into account using" A-A or transaction-to-transaction ("T-T").[9] 19 U.S.C. § 1677f-1(d)(1)(B). Because the statute is silent with regard to which comparison methodology Commerce is to use in administrative reviews and how Commerce should determine which alternative methodology to use, *see JBF RAK LLC v. United States*, 790 F.3d 1358, 1368 (Fed. Cir. 2015), Commerce's approach is deemed lawful if its "methodology and procedures are reasonable means of effectuating the statutory purpose, and there is substantial evidence in the record supporting [its] conclusions," *Ceramica Regiomontana, S.A. v. United States*, 10 CIT 399, 404–05, 636 F. Supp. 961, 966 (1986), *aff'd* 810 F.2d 1137 (Fed. Cir. 1987).

A. Commerce's Methodology

1. General Challenges

NTN argues that Commerce's DP analysis is "fatally flawed" because it double counts the sales that "pass" the Cohen's d test, NTN Cmts. at 22–23; it captures tiny differences such as exchange rate fluctuations that are not the result of targeted dumping, *id.* at 23–24; and it compares prices between CONNUMs rather than comparing prices to particular customers, regions, or time periods, *id.* at 24. NTN also challenges the methodology as unlawfully incorporating zeroing in administrative reviews, arguing that zeroing is World Trade Organization ("WTO") inconsistent. *Id.* at 28–29.

[9] Under the transaction-to-transaction ("T-T") methodology, which Commerce uses "in unusual situations," Commerce "compar[es] normal values of individual transactions to the export prices of individual transactions for comparable merchandise." *Final Modification*, 77 Fed. Reg. at 8,101 n.7.

Timken argues that the validity of the DP analysis is not properly before the court, and, in any event, the court has already sustained Commerce's use of DP. Timken Resp. at 23–24. The government and Timken also both disagree with NTN's challenges and respond that the DP analysis does not double count because the value of the sales that pass are only included once in the numerator of the ratio test. Gov. Resp. at 8; Timken Resp. at 25–26. They also contend that even if the DP analysis accounts for tiny differences, the statute does not require Commerce to consider the reason why prices differ significantly. Gov. Resp. at 8–9; Timken Resp. at 24–25. They further dispute NTN's argument relating to CONNUMs as failing to acknowledge that the statutory language, adopted in reviews, guides Commerce to consider a pattern of export prices "for comparable merchandise." Gov. Resp. at 9–10; Timken Resp. at 26–27. Both parties argue that the use of zeroing has been upheld in the DP context and other contexts, with the government arguing that the court is not in a position to determine whether Commerce is violating the United States' WTO obligations. Gov. Resp. at 13–14; Timken Resp. at 6–7.

Timken is incorrect that the validity of the DP analysis is not subject to review by the court. Although Timken is correct that an intervening party is not allowed to bring claims "clearly beyond the scope of the original litigation," *see Torrington Co. v. United States*, 14 CIT 56, 59, 731 F. Supp. 1073, 1076 (1990), the scope of the original litigation centered on whether Commerce should have applied its DP analysis. The validity of Commerce's DP analysis is plainly within the scope of Timken's complaint, which requests that Commerce apply its DP analysis. *See* Compl. ¶ 30, ECF No. 7. If Commerce has constructed the methodology in a way that is invalid and therefore unlawful, Commerce may not apply it. It follows then that NTN, for whom Commerce originally assigned a zero margin when it did not apply the DP analysis, but on remand received a non-*de minimis* margin when Commerce did apply DP, could challenge the validity and application of the DP analysis employed. Thus, NTN has not impermissibly enlarged the scope of the original litigation, as framed by the parties. Further, the validity of the DP methodology as applied to this case could not be addressed by the court until it actually was applied to the facts of this case.[10]

NTN's general challenges to Commerce's DP analysis, however, fail. First, NTN's double counting claim is unpersuasive. The purpose of

[10] It was appropriate, however, for NTN to have raised some general, non-case specific arguments prior to remand, most particularly its zeroing arguments. Such arguments, which are essentially facial challenges, were known and are deemed waived, but they are addressed here for completeness.

Commerce's DP analysis is to find a pattern of prices that differ significantly; therefore, in NTN's example situation[11] where there are only two purchasers, A and B, if the prices to purchaser A differ significantly from prices to purchaser B and vice-versa, then it is reasonable that sales to both purchasers will be counted as passing Cohen's d. As Commerce explains, these sales are then included in both the numerator and the denominator of the ratio, and, importantly, the *value* of these sales is included only once in the numerator and once in the denominator. *See Remand Results* at 26–27. Under Commerce's methodology, even if some sales are included in a test group and later in a comparison group, their value is counted only once in the numerator of the ratio if they pass Cohen's d. Moreover, NTN's concern that the number of sales that pass Cohen's d will be artificially inflated cannot be taken as a truism because, as Commerce correctly explains, if in the hypothetical above, sales to purchasers A and B both do not pass Cohen's d, then the value of both will be included in the denominator of the ratio test. *See id.* at 27. Therefore, in the second situation, sales passing Cohen's d will be reduced.

Second, NTN has not established that Commerce's DP analysis, which may capture differences in prices that are not the result of targeted dumping, is unlawful. Despite guidance from the Statement of Administrative Action ("SAA"), which indicates that A-T was typically used to avoid potentially concealing targeted dumping under an A-A methodology, *see* Uruguay Round Agreements Act, Statement of Administrative Action, H.R. Doc. No. 103–316, vol. 1, at 843, *reprinted in* 1994 U.S.C.C.A.N. 4040, 4177–78, the U.S. Court of Appeals for the Federal Circuit ("Federal Circuit") has made clear that the statute does not require Commerce "to determine the reasons why there is a pattern of export prices for comparable merchandise that differs significantly," *JBF RAK*, 790 F.3d at 1368. Therefore, in the light of the Federal Circuit's decision, whether NTN's U.S. sales were not intentionally targeted or whether the price differences were due to an external factor, such as shifting exchange rates, Commerce's methodology lawfully identifies a pattern of export prices that differ significantly. *See Remand Results* at 24–25 ("The court has already

[11] NTN's example provides:

> If there are two customers (A and B) for a CONNUM, [Commerce] compares sales to each customer. If sales to A differ significantly from sales to B, sales to A pass the Cohen's d test. Then, however, [Commerce] examines sales to B, which, because they differ significantly from sales to A, will also pass the test. This effectively applies the test to the same sales twice (one with a positive Cohen's d and one with the negative Cohen's d of the same value) . . . [and] unfairly inflates the number of sales that "pass" the Cohen's d test.

NTN Cmts. at 23.

found that the purpose or intent behind an exporter's pricing behavior in the U.S. market is not relevant to [Commerce's] analysis.").[12]

Third, Commerce's decision to compare purchasers, regions, and time periods by analyzing CONNUMs appears reasonable. The government correctly recognizes that the statute governing investigations is helpful because it directs Commerce to use A-T when there is a "pattern of export prices (or constructed export prices) *for comparable merchandise* that differ significantly among purchasers, regions, or periods of time." *See* Gov. Resp. at 9 (quoting 19 U.S.C. § 1677f-1(d)(1)(B)(ii)). Thus, in reviews as well as in investigations, Commerce looks for a pattern of prices for comparable merchandise, a term that Commerce identifies by "product control number[, i.e. CONNUM,] and any characteristics of the sales, other than purchaser, region and time period, that [Commerce] uses in making comparisons between [export price] or [constructed export price] and [normal value] for the individual dumping margins." *Remand Results* at 3. Then, Commerce compares the prices for comparable merchandise for a particular purchaser, region, or time period to prices for all other purchasers, regions, or time periods. *Id.* at 29. NTN fails to demonstrate that using CONNUMs as a basis for establishing "comparable merchandise" is unreasonable; instead, it incorrectly believes that Commerce cannot limit its price comparisons to comparable merchandise. *See* NTN Cmts. at 24. But, as discussed, NTN's argument cannot be reconciled with the statutory language for investigations, which guides Commerce's practice here.

Fourth, Commerce lawfully employed zeroing as part of its DP analysis. The courts have repeatedly held that zeroing is lawful in administrative reviews. *See Union Steel v. United States*, 713 F.3d

[12] NTN only provides a hypothetical and does not provide evidence that the price differences in *its* sales were solely due to an external factor totally beyond an exporter's control, such as exchange rates, and not targeting. The Federal Circuit's opinion in *JBF RAK* does not appear to speak to a situation where a respondent actually demonstrates that the price differences are not the result of targeting. Although the Federal Circuit expressed concern that "requiring Commerce to determine the intent of a targeted dumping respondent would create a tremendous burden on Commerce that is not required or suggested by the statute," *JBF RAK*, 790 F.3d at 1368 (internal quotation marks omitted) (quoting *JBF RAK LLC v. United States*, 991 F. Supp. 2d 1343, 1355 (CIT 2014)), such a burden might not exist where a respondent itself provides that information. Indeed, faced with the Statement of Administrative Action's ("SAA") clear expression that the alternative comparison methodology is typically employed to address targeted dumping, the substantial evidence standard might require a different result. Uruguay Round Agreements Act, Statement of Administrative Action, H.R. Doc. No. 103–316, vol. 1, at 843, *reprinted in* 1994 U.S.C.C.A.N. 4040, 4177–78 ("New section [19 U.S.C. § 1677f1(d)(1)(B)] provides for a comparison of average normal values to individual export prices or constructed export prices in situations where an average-to-average or transaction-to-transaction methodology cannot account for a pattern of prices that differ significantly among purchasers, regions, or time periods, *i.e.*, where targeted dumping may be occurring."). This is not the case before the court.

1101, 1103, 1104 (Fed. Cir. 2013); *Timken Co. v. United States*, 354 F.3d 1334, 1342 (Fed. Cir. 2004).[13] The use of zeroing here is no different. Here, NTN's concern derives from the fact that when Commerce uses its "mixed methodology," Commerce uses A-T with zeroing on sales that pass Cohen's d and then it allegedly applies zeroing again when it determines the final AD margin by not allowing negative dumping margins to offset positive margins for the targeted sales. NTN Cmts. at 28–29. But, as the court has recognized correctly, the goal of measuring the effect of a pattern of prices that differ significantly is effectuated by using A-T with zeroing at both stages and not by somehow diluting the A-T margin when it is aggregated. *See Apex Frozen Foods Private Ltd. v. United States*, Slip Op. 16–9, 2016 WL 471948, at *20–21 (CIT Feb. 2, 2016). Commerce, in applying its mixed methodology, reasonably and "proportionately applies the remedy across the sales." *Id.* Substantial record evidence, such as the 54.7 percent of NTN's sales that pass Cohen's d, *Remand Results* at 8, supports the proposition that zeroing should be applied to those 54.7 percent sales so that Commerce may measure the effect of the concealed dumping. *See Apex*, 2016 WL 471948, at *18 ("[W]ithout zeroing the A-A and A-T comparison methodologies would always be mathematically equivalent, obviating any benefit derived from having an alternative comparison methodology in the statute." (internal quotation omitted)). Thus, NTN's general challenges to Commerce's DP analysis in this case are without merit.

2. Application to NTN's Sampled Sales Database

NTN challenges Commerce's application of its DP analysis to NTN's sampled sales database, arguing that the sampled database is not representative of NTN's overall sales. NTN Cmts. at 7–13. NTN also argues that Commerce was required to test the validity of the sampled sales database under general statistical principles before it

[13] These cases also address NTN's argument that the application of zeroing is inconsistent with the United States' World Trade Organization ("WTO") obligations. *See* NTN Cmts. at 29; Def.-Intrvnr. NTN's Reply Cmts. in Opp'n to the Final Results of Remand Redetermination 7, ECF No. 116 ("NTN Reply") (citing Panel Report, *United States—Anti-Dumping and Countervailing Measures on Large Residential Washers from Korea* ¶ 8.1.a.xii, WT/DS464/T (Mar. 11, 2016) ("*United States—Washers from Korea*")). In the case cited by NTN, the WTO Panel simply extends the same reasoning for why it believed zeroing to be WTO-inconsistent in the past. *See United States—Washers from Korea* at ¶ 7.206 ("We consider that the use of zeroing in the context of the [A-T] comparison methodology would not lead to a fair comparison, . . . [and] therefore find that the use of zeroing in the context of the [A-T] comparison methodology is 'as such' inconsistent with Article 2.4."). The Federal Circuit has rejected this same reasoning as unpersuasive to show that Commerce's practice of zeroing in reviews is unreasonable under the U.S. statute. *Timken Co. v. United States*, 354 F.3d 1334, 1343–44 (Fed. Cir. 2004).

could use the database in its DP analysis. *Id.* at 13–16. It further contends that Commerce abused its discretion by applying the DP analysis to a subset of sales because certain portions of the DP analysis requires consideration of a respondent's total sales, *id.*at 20–22, and that Commerce could not ascertain a pattern from the data provided in the six-week sample, *id.* at 17–20.

The government and Timken respond that NTN failed to exhaust certain arguments by failing to raise them before Commerce. Gov. Resp. at 17, 22; Timken Resp. at 12–16, 21. They dispute NTN's arguments pertaining to the statistical validity of the sample and the general statistical principles. Gov. Resp. at 16, 21–25; Timken Resp. at 21–22, 27–30. They also argue that Commerce did not abuse its discretion in applying its DP analysis to a sampled sales database and that the application in this case was lawful. Gov. Resp. at 18–21; Timken Resp. at 18–21.

As a preliminary matter, NTN did fail to exhaust certain arguments in its comments on Commerce's *Draft Remand Results*. The court "shall, where appropriate, require the exhaustion of administrative remedies." 28 U.S.C. § 2637(d). Exhaustion "protect[s] administrative agency authority and promote[s] judicial efficiency." *Itochu Bldg. Prods. v. United States*, 733 F.3d 1140, 1145 (Fed. Cir. 2013) (citing *McCarthy v. Madigan*, 503 U.S. 140, 145 (1992)). Before the court, NTN asserts that Commerce's methodology of randomly selecting six weeks of sampled sales[14] is not statistically valid, NTN Cmts. at 7–13, and argues that Commerce's use of an unrepresentative sampled database in its DP analysis is unlawful because the database must fulfill key statistical "assumptions of normality, independence of observations, [and] variances," *id.* at 13–16. Neither of these arguments were properly raised and developed before Commerce.[15] *See* NTN Draft Remand Cmts. at 1–14. Issues pertaining to Commerce's sampling and DP methodologies are areas where requiring exhaus-

[14] Here, Commerce employed the same random six-week sampling methodology that it employed in the 1990–1991 administrative review of the AD order on ball bearings. *See Nachi-Fujikoshi Corp. v. United States*, 19 CIT 914, 916, 917, 890 F. Supp. 1106, 1108–09 (1995); *see also* NTN Draft Remand Cmts. at Ex. 1 (providing Commerce's current sampling methodology). NTN attempts to discredit Commerce's sampling methodology by pointing out that in the 2010– 2011 administrative review (i.e., the review immediately following the present review), Commerce stopped sampling and used each respondents' entire sales database. NTN Cmts. at 11–12. But, Commerce's change in methodology is insufficient to show its present sampling methodology is unlawful. *See Apex Frozen Foods Private Ltd. v. United States*, 37 F. Supp. 3d 1286, 1302 n.7 (CIT 2014) ("If an agency practice reasonably complies with statute, that practice is not rendered invalid simply because the agency replaces it with an equally defensible policy.").

[15] With regards to the statistical validity, the statute provides that Commerce may use "statistically valid samples, if there is a significant volume of sales of the subject merchandise" and Commerce has the exclusive "authority to select . . . statistically valid samples."

tion is especially appropriate because these issues relate to "complex economic and accounting decisions of a technical nature, for which agencies possess far greater expertise than courts." *See Fujitsu Gen. Ltd. v. United States*, 88 F.3d 1034, 1039 (Fed. Cir. 1996). Therefore, the court declines to consider these arguments.

Further, Commerce did not abuse its discretion when it applied the DP analysis to a subset of sales. Although NTN points to language from Commerce's explanation of its DP methodology to argue that Commerce can conduct a DP analysis only when it has all sales data, *see* NTN Cmts. at 20–22, the sampled sales database is the universe of sales on the record and Commerce reasonably applied its DP analysis to the sales information that it had.[16] NTN knew before remand that Commerce had a sampled database, even objecting to the DP analysis as invalid based on that limitation, NTN Draft Remand Cmts. at 5, but it did not ask Commerce to reopen the record to obtain full reporting of sales and it did not ask the court to require it. It never offered its full database and cannot now complain about its absence.[17]

Given that the court has already upheld Commerce's sampling methodology employed in this case as a basis for calculating a weighted-average dumping margin, it appears reasonable for Commerce to use the same six-week sample for purposes of calculating a weighted-average dumping margin when conducting a DP analysis. The relevant statutory language, covering targeting in investigations, does not require a different conclusion as it does not limit the type or representativeness of databases that Commerce may use in

19 U.S.C. §§ 1677f-1(a), (b). NTN did state in its comments before Commerce that Commerce

> has never stated that these sample [six] weeks are in any way representative of the entire year of bearing sales, or that they are statistically-valid samples, and it [sic] unlikely that they ever could be. The sample weeks are chosen by [Commerce] without knowledge of the entire universe of sales, are different each year, and are not evenly spaced throughout the year.

NTN Draft Remand Cmts. at 5. NTN, however, in its comments before Commerce, does not cite to 19 U.S.C. § 1677f-1(a) or (b), does not provide factual support from the record to explain why Commerce's approach is not statistically valid, and does not attempt to establish the limitations imposed by the phrase "statistically valid." Therefore, it does not appear that NTN's statement was sufficient to apprise Commerce of the fact that NTN was attempting to challenge the sampling methodology as a violation of 19 U.S.C. § 1677f-1(a) or (b) and any such challenge is waived. Regardless, absent any fact-based argument which would cause it to reach a different conclusion, the court adheres to *Nachi-Fujikoshi*, which held that Commerce's bearings sampling methodology employed in this case, where Commerce randomly selects one week from each two-month interval of the period of review, is a reasonable exercise of agency discretion under a previous, but similarly-worded version of the statute. *See* 19 CIT at 918–19, 890 F. Supp. at 1109–10.

[16] Thus, where the DP methodology calls for Commerce to consider "total sales" or "all sales," Commerce has interpreted that to mean total or all reported sales (i.e., all sales covered in the six sampled weeks). *See Remand Results* at 4–5.

[17] In fact, it has not established that it exists.

its pattern analysis. *See* 19 U.S.C. § 1677f-1(d)(1)(B).

NTN's argument that Commerce cannot ascertain a "pattern" from the sampled database in this case fails. As explained, Commerce's methodology requires that the test group and the comparison group *each* have two observations before Commerce can compare the two groups. *Remand Results* at 4. If they do not have at least two observations each, then Commerce cannot compare the two groups and the value of the sales in those groups is included in the denominator of the ratio test. Thus, NTN's argument that Commerce used "point estimates" and "discerned a 'pattern' based on the comparison of one sale to one other sale" is incorrect.[18] *See* NTN Cmts. at 17–18. Instead, Commerce disqualified those sales and, by putting their value in the denominator of the ratio test, *decreased* the likelihood that the DP analysis would show a pattern of prices that differed significantly.[19] Commerce's application of its DP analysis to NTN's sales was lawful.[20]

B. Commerce's Explanation Requirement

NTN requests that the court remand the case to Commerce because it argues that Commerce has not explained why the default methodology, A-A without zeroing, cannot account for the price differences.

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[18] NTN also argues that a pattern discerned from comparing two point estimates would be "unreliable for projecting generalizations for the entire year of pricing behavior." NTN Cmts. at 18. NTN fails to provide information on how often Commerce's DP analysis relied on only two observations for each group. Regardless, NTN's argument also relies on the mistaken belief that Commerce was required to determine a pattern for all sales. As the court has explained, Commerce properly treated the sampled sales database as the universe of sales in conducting its DP analysis.

[19] This situation differs importantly from a challenge to Commerce's DP analysis that required remand by the court. There, a domestic producer successfully challenged Commerce's explanation of its ratio test thresholds because Commerce's inclusion of disqualified sales in the denominator of the ratio test decreased the benefit derived by the domestic producer by decreasing the overall value of sales that might receive the A-T remedy. *See U.S. Steel Corp. v. United States*, No. 14–00263, Slip Op. 16–44, at *14–17 (CIT May 5, 2016). NTN, on the other hand, stands to benefit from Commerce's disqualification of these sales, and Timken, the domestic producer, does not challenge Commerce's approach. In addition, although NTN argues that significant quantity of sales CONNUMs had only one or two observations, NTN Cmts. at 17, sales *value* is what is important for the ratio test. As Commerce recognized, the sales value for these disqualified sales that were included in the denominator was quite small as a percentage of overall sales value, *see Remand Results* at 20, and is insufficient in this case to render Commerce's decision unlawful.

[20] NTN couches many of its challenges to Commerce's DP analysis using the terms "representative" and "statistically valid." These terms appear to derive from the portions of the statute that discuss the method by which Commerce may select samples (or may average). *See* 19 U.S.C. §§ 1677f-1(a)–(b). In fact, the word "representative" does not appear in the current version of the statute but instead derives from an old version. *See* 19 U.S.C. § 1677f-1(b) (1984). Regardless, once Commerce appropriately selects a sample, these provisions do not speak to how Commerce must use that sample (e.g., in a DP analysis). Therefore, these statutory provisions do not further NTN's argument.

NTN Cmts. at 24–27. NTN also argues that any difference in the margin derived from each of the methods is mostly attributable to the effect of zeroing used in A-T. *Id.* at 27–28. The government responds that its explanation, where it explained by reference to an example, in this case was adequate. Gov. Resp. at 11–13.

Commerce's explanation of why A-A cannot account for the price differences here is adequate.[21] The present case is different from other cases where the court determined that Commerce provided a conclusion rather than an adequate explanation under 19 U.S.C. § 1677f1(d)(1)(B)(ii). *See, e.g.*, *Beijing Tianhai Indus. Co. v. United States*, 106 F. Supp. 3d 1342, 1351 (CIT 2015) (rejecting Commerce's explanation because it relied on "confirmation bias" where it in essence reasoned that "because substantial dumping was not found using A-A, but [was] found using A-T, it was permissible for [Commerce] to use the alternative A-T methodology."); *Beijing Tianhai Indus. Co. v. United States*, 7 F. Supp. 3d 1318, 1332 (CIT 2014) (holding that Commerce failed to adequately explain where Commerce simply stated that A-T was necessary because any pattern of price differences was hidden using A-A). Commerce has explained that "there must be a significant and meaningful difference in U.S. prices in order to resort to an alternative comparison method," indicating that an alternative comparison is appropriate where, in comparing the alternative methods, "the weighted-average dumping margin will change by at least 25 percent or the weighted-average dumping margin will change [from non-*de minimis*] to be *de minimis*."[22] *Remand Results* at 33.

According to Commerce, in such instances, "the normal value is in the middle of the range of individual U.S. prices such that there is both a significant amount of dumping and a significant amount of offsets generated from non-dumped sales," *id.* at 32, and, therefore,

[21] Although the statute for investigations also requires Commerce to explain why the transaction-to-transaction ("T-T") methodology cannot account for the pattern of prices that differ significantly, *see* 19 U.S.C. § 1677f-1(d)(1)(B)(ii), Commerce, in the present administrative review, has only provided a reason why A-A is not appropriate. No party has argued that Commerce was required by its practice to explain why T-T is not an appropriate comparison method in an administrative review and it is fairly obvious that this product is not the kind of large-scale item for which T-T might be used.

[22] In reviews, Commerce treats "as de minimis any weighted-average dumping margin . . . that is less than 0.5 percent ad valorem, or the equivalent specific rate." 19 C.F.R. § 351.106(c). Moreover, at oral argument, the government noted that NTN's non-*de minimis* rate of 6.37 percent using A-T with zeroing constituted more than a 25 percent relative change in the dumping margin. As discussed in the *Remand Results*, NTN's rate also crossed over from *de minimis* using A-A without zeroing to non-*de minimis* using A-T with zeroing. *Remand Results*at 8. NTN does not refute that the change in its dumping margin was meaningfully or significantly different, as defined by either of Commerce's criteria.

Commerce will "find that the A-A method is not appropriate," *id.* at 33. Commerce reasons that in this situation A-T is appropriate because the significant differences in U.S. price are "large enough" such that "not only is there a non-*de-minimis* amount of dumping, but that there also is a meaningful amount of offsets to impact the identified amount of dumping." *Id.* at 33. Commerce's rationale, therefore, recognizes that in this situation, A-T can account for this by not allowing these offsets to dilute the weighted-average dumping margin in the same way that A-A might. *See id.* at 31 ("The comparison of a dumping margin based on weighted-average U.S. price . . . precisely examines the impact on the amount of dumping which is hidden or masked."). Such an explanation is reasonable and demonstrates why Commerce believes A-A, which allows for offsets and might mask significant price differences, cannot account for these price differences. *See Apex*, 2016 WL 471948, at *17 n.24 ("The court can discern from Commerce's explanation that A-A cannot account for the pattern of significant price differences because A-A masked the dumping that was occurring as revealed by the A-T calculated margin.").

NTN's other arguments also lack merit. As previously discussed, although NTN argues that Commerce's use of zeroing with A-T creates artificially higher dumping margins, NTN Cmts. at 27–28, NTN has not explained why the use of zeroing in this context is unlawful. Indeed, Commerce's methodology appears to be a lawful attempt to effectuate the goal of the statute by measuring the effect of the pattern of prices that differ significantly. *See Apex Frozen Foods Private Ltd. v. United States*, 37 F. Supp. 3d 1286, 1296 (CIT 2014) ("[B]y comparing Apex's nonzeroed A-A rate to its zeroed A-T rate, the agency found the precise amount of dumping—including dumping from the targeted sales—that A-A masked. Commerce could then decide whether that dumping was great enough to merit an exceptional remedy."). Moreover, NTN's citation to *United States—Anti-Dumping and Countervailing Measures on Large Residential Washers from Korea*, WT/DS464/T (Mar. 11, 2016) ("*United States—Washers from Korea*") is unconvincing. There, the WTO Panel interpreted a similarly-worded but ultimately different provision, Article 2.4.2 of the Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994 ("AD Agreement"). *United States—Washers from Korea*¶ 7.73. The differences in the two provisions is evident: the WTO Panel clarified that Article 2.4.2 requires "an investigating authority [to] analyse the prevailing factual circumstances in order to consider the possibility that something other than targeted dumping is responsible for these relevant price differences,"

id., but the Federal Circuit has made clear that the U.S. statute does not require Commerce to investigate why a pattern of prices that differ significantly exists, *JBF RAK*, 790 F.3d at 1368. In any event, whatever light a WTO decision might eventually shed, the WTO Panel's decision in *United States—Washers from Korea* is not final as it has been appealed by the United States. *U.S. Appeals Panel Report on Large Residential Washers from Korea*, *World Trade Organization: 2016 News Items* (Apr. 19, 2016), *available at* https://www.wto.org/english/news_e/news16_e/ds464apl_19apr16_e.htm (last visited Apr. 22, 2016). Thus, NTN's reliance on the WTO's interpretation of Article 2.4.2 is misplaced.

CONCLUSION

For the reasons stated above, Commerce's *Remand Results* are sustained. Judgment will enter accordingly.

Dated: May 10, 2016
New York, New York

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