

U.S. Court of International Trade

Slip Op. 17–10

IKEA SUPPLY AG, Plaintiff, v. UNITED STATES, Defendant, and ALUMINUM EXTRUSIONS FAIR TRADE COMMITTEE, Defendant-Intervenor.

Before: Richard W. Goldberg, Senior Judge
Court No. 15–00152

[Plaintiff's motion for reconsideration is denied.]

Dated: February 3, 2017

Kristen S. Smith, Arthur K. Purcell, Mark R. Ludwikowski, and Michelle L. Mejia, Sandler Travis & Rosenberg, P.A., of Washington, DC, for plaintiff.

Douglas G. Edelschick, Trial Attorney, Commercial Litigation Branch, Civil Division, U.S. Department of Justice, of Washington, DC, for defendant. With him on the brief were *Benjamin C. Mizer*, Principal Deputy Assistant Attorney General, *Jeanne E. Davidson*, Director, and *Reginald T. Blades, Jr.*, Assistant Director. Of Counsel on the brief was *James H. Ahrens II*, Office of the Chief Counsel for Trade Enforcement and Compliance, U.S. Department of Commerce.

Alan H. Price, Robert E. DeFrancesco, III, and Derick G. Holt, Wiley Rein LLP, of Washington, DC, for defendant-intervenor.

OPINION AND ORDER

Goldberg, Senior Judge:

On July 5, 2016, this court sustained the determination of the U.S. Department of Commerce (“Commerce”) that the scopes of two anti-dumping and countervailing duty orders (“the Orders”) include cabinet/drawer handles imported by Plaintiff IKEA Supply AG (“IKEA”). See *IKEA Supply AG v. United States (IKEA Supply II)*, Slip Op. 16–66, 2016 WL 3670476 (CIT July 5, 2016). Also on July 5, 2016, this court issued an opinion in a separate case that sustained Commerce’s determination that the scopes of the Orders cover IKEA’s imported towel racks. See *IKEA Supply AG v. United States (IKEA Supply I)*, 40 CIT, 180 F. Supp. 3d 1202 (2016). In *IKEA Supply II*, this court adopted the reasoning of *IKEA Supply I* to conclude that the Orders, which deal with aluminum extrusions from the People’s Republic of China, cover the cabinet/drawer handles at issue in *IKEA Supply II* for the same reasons that the Orders covered the towel racks at issue in *IKEA Supply I*.

On August 4, 2016, IKEA invoked USCIT Rule 59 in moving for

reconsideration of *IKEA Supply II*. Pl. Mot. for Reconsideration of J. on the Agency R., ECF No. 38; Br. in Supp. of Pl. Mot. for Reconsideration of J. on Agency R., ECF No. 38-1 (“IKEA Br.”). In its motion to reconsider *IKEA Supply II*, IKEA maintains that “the court based its ruling on another ruling that requires reconsideration [*i.e.*, *IKEA Supply I*]; therefore, reconsideration of . . . [*IKEA Supply II*] is necessary to prevent a manifest injustice.” IKEA Br. 2. IKEA also insists that “Commerce erred in its determination that the cabinet/drawer handles are within the scope of” the Orders. IKEA Br. 3. According to IKEA, the alleged error is that the “cabinet/drawer handles meet all of the elements to be excluded from the scope of [the Orders] as a ‘finished goods kit.’” *Id.*

On October 31, 2016, Defendant United States (“the Government”) filed a response in opposition to IKEA’s motion for reconsideration. Def. Resp. to Pl. Mot. for Reconsideration, ECF No. 45 (“Gov’t Resp.”). Defendant-Intervenor Aluminum Extrusions Fair Trade Committee joined the Government’s opposition to IKEA’s motion. Def.-Intervenor Resp. to Pl. Mot. for Reconsideration, ECF No. 46.

The court presumes familiarity with the prior proceeding, *IKEA Supply I*, and *IKEA Supply II* and denies IKEA’s motion for reconsideration.

DISCUSSION

This court has discretion to grant or to deny a motion for reconsideration. “The major grounds justifying a grant of a motion to reconsider a judgment are an intervening change in the controlling law, the availability of new evidence, the need to correct a clear factual or legal error, or the need to prevent manifest injustice.” *Ford Motor Co. v. United States*, 30 CIT 1587, 1588 (2006). However, “[t]he purpose of a rehearing is not to relitigate the case.” *Asociacion Colombiana de Exportadores de Flores v. United States*, 22 CIT 724, 725, 19 F. Supp. 2d 1116, 1118 (1998). Rather, the purpose is “to direct the Court’s attention to some material matter of law or fact which it has overlooked in deciding a case, and which, had it been given consideration, would probably have brought about a different result.” *Target Stores, Div. of Target Corp. v. United States*, 31 CIT 154, 159, 471 F. Supp. 2d 1344, 1349 (2007) (citation omitted).

Here, there is no proof that IKEA satisfied any of the foregoing grounds for reconsideration. IKEA cites no intervening change in controlling law, no new evidence, no clear factual or legal error, and no instance of manifest injustice.

As explained above, IKEA first insists that reconsideration of *IKEA Supply II* is necessary because the opinion relied on *IKEA Supply I*, which itself requires reconsideration, according to IKEA. But this court denied IKEA's motion for reconsideration in *IKEA Supply I*. See *IKEA Supply AG v. United States*, 41 CIT , Slip Op. 17–8 (Jan. 31, 2017). Thus, IKEA's first argument is now inapplicable. IKEA's second argument—that Commerce erred by failing to deem the cabinet/drawers handles eligible for the “finished goods kit” exclusion—also fails. IKEA raised this argument in its initial motion for judgment on the agency record, and it now points to no error in the court's rejection of that argument. Mem. in Supp. of Pl. Mot. for J. on Agency R. 13–15, ECF No. 28–1. And because “the purpose of a rehearing is not to relitigate the case,” this court will not again consider the argument.

Accordingly, IKEA provides no adequate basis for reconsideration, and it is hereby ORDERED that IKEA's motion for reconsideration is DENIED.

Dated: February 3, 2017
New York, New York

/s/ Richard W. Goldberg

RICHARD W. GOLDBERG
SENIOR JUDGE

Slip Op. 17–11

SHANDONG RONGXIN IMPORT & EXPORT Co., LTD., Plaintiff, v. UNITED STATES, Defendant, and DIXON TICONDEROGA COMPANY, Defendant-Intervenor.

Before: Gary S. Katzmann, Judge
Court No. 15–00151
PUBLIC VERSION

[Commerce's Results of Redetermination Pursuant to Court Remand are sustained in part and remanded in part. Plaintiff's Motion for Judgment on the Agency Record is denied in part.]

Dated: February 3, 2017

John J. Kenkel, deKieffer & Horgan, PLLC, of Washington, DC, argued for plaintiff. With him on the brief were *J. Kevin Horgan* and *Judith Holdsworth*.

Robert M. Norway, Trial Attorney, Commercial Litigation Branch, Civil Division, U.S. Department of Justice, of Washington, DC, argued for defendant. With him on the brief were *Benjamin C. Mizer*, Principal Deputy Assistant Attorney General, *Jeanne E. Davidson*, Director, *Patricia M. McCarthy*, Assistant Director, and *Erica A. Hixon*, Trial Counsel. Of counsel on the brief was *Amanda T. Lee*, Office of the Chief Counsel for Trade Enforcement and Compliance, U.S. Department of Commerce, of Washington, DC. Of counsel on the Supplemental Authority was *Emily R. Beline*, Office of the Chief Counsel for Trade Enforcement and Compliance, U.S. Department of Commerce, of Washington, DC.

Felicia Leborgne Nowels, Akerman LLP, of Tallahassee, FL, argued for defendant-intervenor. With her on the brief was *Sheryl D. Rosen*.

OPINION AND ORDER

Katzmann, Judge:

This is a case about pencils. It is also a case about judicial review of administrative action, the use of social media in agency proceedings, and trade relief in the form of duties that are imposed by law on imports that are sold in the United States at less than fair value (“dumped”) and materially harm American industry or threaten it with material harm. Plaintiff, Shandong Rongxin Import & Export Co., Ltd. (“Rongxin”), an exporter of pencils from the People’s Republic of China (“PRC”) brought this action against Defendant, the United States, on May 22, 2015, disputing certain aspects of the final administrative review results issued by the U.S. Department of Commerce in *Certain Cased Pencils from the People’s Republic of China*, 80 Fed. Reg. 26,897 (Dep’t Commerce May 11, 2015) (final results of antidumping duty administrative review, 2012–2013) (“*Final Results*”); Issues and Decision Memorandum for Certain Cased Pencils from the People’s Republic of China, A-570–827 at 2 (Apr. 30, 2015) (“*IDM*”); Pl.’s Conf. Mot. for J. upon Agency R., Aug. 28, 2015, ECF No. 24 (“*Pl.’s Br.*”). Defendant and Defendant-Intervenor, Dixon Ticonderoga Company (“Dixon”), oppose Rongxin’s Motion. Def.’s Conf. Opp’n., Dec. 18, 2015, ECF No. 30. (“*Def.’s Br.*”); Def.-Inter.’s Opp’n, Dec. 18, 2015, ECF No. 34 (“*Def. Interv.’s Br.*”). Rongxin argues that Commerce was not authorized to reopen the record on remand, and that it erred in finding that Dixon is a producer of domestic like product possessing interested party status with standing to request an administrative review. Rongxin also argues that it has shown it is not subject to PRC control and is entitled to an antidumping duty rate separate from the PRC-wide rate assessed by Commerce on companies in nonmarket economy (“NME”) countries.¹ Dixon is an American corporation alleging, under Section 771(9)(C) of the Tariff Act of 1930, as amended (“Act”), 19 U.S.C. § 1677(9)(C) (2012),² interested party status as a producer of domestic like product to request administrative review of Rongxin, a foreign exporter. For the reasons set forth below, the court denies in part Rongxin’s motion for judgment on the agency record and sustains Commerce’s Results of Redetermina-

¹ “The term ‘nonmarket economy country’ means any foreign country that the administering authority determines does not operate on market principles of cost or pricing structures, so that sales of merchandise in such country do not reflect the fair value of the merchandise.” 19 U.S.C. § 1677(18)(A) (2012).

² Further citations to the Tariff Act of 1930 are to the relevant portions of Title 19 of the U.S. Code, 2012 edition, and all applicable amendments thereto, unless otherwise noted.

tion Pursuant to Court Remand finding that Dixon is a domestic producer and interested party, and thus has standing to request an administrative review; the court remands for further proceedings consistent with this opinion regarding whether Rongxin is entitled to a separate rate.

BACKGROUND

Commerce is required to impose antidumping duties on foreign goods that are being or are likely to be sold in the United States at less than fair value. 19 U.S.C. § 1673(1); *Micron Tech. Inc. v. United States*, 243 F.3d 1301, 1303 (Fed. Cir. 2001). Administrative reviews of antidumping duties are conducted in accordance with 19 U.S.C. § 1675. On December 21, 1994, the U.S. International Trade Commission (“ITC”) published its determination that an industry in the United States is materially injured or threatened with material injury by reason of imports from the PRC of certain cased pencils that Commerce had determined to be sold in the United States at less than fair value. *Certain Cased Pencils from the People’s Republic of China*, USITC Pub. 2837, Inv. No. 731-TA-669, 59 Fed. Reg. 65,788 (Dec. 21, 1994) (final determination). On December 28, 1994, Commerce published the antidumping duty order covering certain cased pencils from China. *Certain Cased Pencils from the People’s Republic of China*, 59 Fed. Reg. 66,909 (Dep’t Commerce Dec. 28, 1994) (final results of antidumping duty order) (“*Cased Pencils/China*”).

On December 3, 2013, during the anniversary month of the *Cased Pencils/China* antidumping duty order, Commerce notified interested parties of their opportunity to request an administrative review of the order in accordance with 19 C.F.R. § 351.213 (2013). *Antidumping or Countervailing Duty Order, Finding, or Suspended Investigation*, 78 Fed. Reg. 72,636 (Dep’t Commerce Dec. 3, 2013) (notice of opportunity to request administrative review).

On December 20, 2013, Dixon filed a request for administrative review of Rongxin. Req. for Administrative Review, PR 1 (Dec. 20, 2013). Dixon’s request stated that “[a]s a United States importer and manufacturer of subject merchandise, Petitioner is an interested party under 19 U.S.C. § 1677(9) who may make this request for administrative review pursuant to 19 C.F.R. § 351.213(b).”³ *Id.* at 1. The request was accompanied by a company certification, signed by Dixon’s Chief Executive Officer (“CEO”), Timothy Gomez, which stated that the information contained in the submission is accurate.

³ The actual basis upon which Dixon sought to establish interested party status during the administrative proceedings here was as a manufacturer and producer in the United States of domestic like product.

Id. at 3.

In accordance with its Articles of Association, Rongxin is a corporation owned by eleven shareholders and directed by a six-member board. Revised Rongxin Articles of Association, PR 40 (Oct. 16, 2014) (“*Articles*”); Rongxin’s Section A Response Ex. A-2 Shareholders. Slightly more than a majority of Rongxin⁴ is owned by Shandong International Trade Group (“SITG”), which in turn is wholly-owned by the State-Owned Assets Supervision and Administration Commission (“SASAC”).⁵ Rongxin’s Section A Questionnaire Response at 2, PR 22–26, CR 23–24 (Apr. 3, 2015). The remainder⁶ of Rongxin is owned by ten Rongxin employees. *Id.*

On February 3, 2014, Commerce initiated an administrative review of Rongxin. The Period of Review (“POR”) covered by the administrative review is December 1, 2012, through November 30, 2013. *IDM* at 1.

During the administrative review, Rongxin argued that, first, Rongxin deserves a separate rate because it can demonstrate the absence of government control both in law (*de jure*) and in fact (*de facto*), and second, Commerce should rescind the initiation of the administrative review because there is no evidence on the record that Dixon is a U.S. manufacturer entitled to request a review. Rongxin’s Case Brief, PR 48; CR 27 (Feb. 2, 2015).

The Department issued a Section A Questionnaire to Rongxin on February 28, 2014. Rongxin’s Section A Questionnaire Response, PR 22–26; CR 4–15 (Apr. 3, 2015). Rongxin submitted its Section A response on April 3, 2014. *Id.* Commerce issued a First Supplemental Section A Questionnaire to Rongxin on September 18, 2014. DOC Supplemental Section A Questionnaire, PR 37; CR 22 (Sep. 18, 2014). Rongxin submitted its response to the First Supplemental Section A Questionnaire on October 16, 2014. Rongxin First Suppl. Questionnaire Resp. CR 23–24 at 4 (Oct. 16, 2014) (“*Questionnaire Resp.*”). Commerce published its Preliminary Results on December 31, 2014, having determined that Rongxin is not eligible for a separate rate. *Certain Cased Pencils from the People’s Republic of China: Preliminary Results of Antidumping Duty Administrative Review and Partial Rescission; 2012–2013*, 79 Fed. Reg. 78,795 (Dep’t. Commerce Dec. 31, 2014) (preliminary determination). Rongxin filed its Case Brief on February 2, 2015. Rongxin’s Case Brief, PR 48; CR 27 (Feb. 2, 2015).

⁴ [[]]

⁵ Plaintiff has disclosed SITG’s majority ownership of Rongxin, as well as SITG’s whole ownership by SASAC. *See Pl.’s Br.* at 4 (mentioning “SITG (the government-owned company which owns a small majority of Rongxin”).

⁶ [[]]

Dixon filed its Rebuttal Brief on February 4, 2015. Dixon's Rebuttal Brief, PR 49; CR 28 (Feb. 4, 2015).

Commerce published the *Final Results* of its administrative review on May 11, 2015. In the *Final Results*, Commerce found that there was no evidence "on the record that undermines or calls into question Dixon's certification [that it is an interested party]." *IDM* at 9. As to the question of whether Rongxin deserves a separate rate, Commerce found that evidence provided by Rongxin demonstrated an absence of de jure government control. *Id.* at 7. Commerce continued to find that Rongxin had not demonstrated an absence of de facto government control. *Id.* at 8.

This matter came before Judge Tsoucalas on Rongxin's Rule 56.2 Motion for Judgment on the Agency Record. *Pl.'s Br. In Shandong Rongxin Import & Export Co., Ltd., v. United States*, 40 CIT ____, ____, 163 F. Supp. 3d 1249, 1254–55 (2016) ("*Remand Order*"), the court remanded this case for further explanation or reconsideration as may be appropriate with regard to the issue of whether Dixon is an interested party with standing to request an administrative review of Rongxin. The court declined to reach the issue of whether Rongxin deserves a separate rate until the threshold issue of standing was resolved. *Id.* at 1254.

To resolve the issue on remand, Commerce issued two supplemental questionnaires to Dixon, the first on April 8, 2016. Commerce's Supplemental Questionnaire, PR 1 (Apr. 8, 2016). Dixon submitted its response on April 18, 2016. Dixon's Response to Supplemental Questionnaire, PR 7 (Apr. 18, 2016). Rongxin filed rebuttal comments. Rongxin's Rebuttal Comments on Dixon's Response to Supplemental Questionnaire, PR 10–13 (Apr. 22, 2016). Commerce issued a Second Supplemental Questionnaire to Dixon on April 28, 2016. Commerce's Second Supplemental Questionnaire, PR 19 (Apr. 28, 2016). Dixon submitted its response the next day. Dixon's Response to Second Supplemental Questionnaire, CR 21–25 (Apr. 29, 2016). Rongxin again filed rebuttal comments. Rongxin's Rebuttal Comments on Dixon's Response to Second Supplemental Questionnaire, PR 27 (May 6, 2016).

Commerce filed its remand results on June 17, 2016. Final Results of Redetermination Pursuant to Court Remand, ECF No. 50 ("*Remand Results*"). Commerce continued to find that Dixon is a producer of domestic like product and, as such, is an interested party with standing to request an administrative review. *Id.* at 1. Dixon and Rongxin filed comments on June 19, 2016. *Pl.'s Comments*, July 19, 2016, ECF No. 56 ("*Rongxin Comments*"); *Def.-Interv. Comments*,

July 19, 2016, ECF No. 53 (“*Dixon Comments*”). The United States filed its response on August 18, 2016. Def.’s Resp., Aug. 18, 2016, ECF No. 59. On September 21, 2016, following the retirement of Judge Tsoucalas, the Chief Judge reassigned the case to a different Judge. Order of Reassignment, Sept. 20, 2016, ECF No. 62.

JURISDICTION AND STANDARD OF REVIEW

The Court has jurisdiction over this action pursuant to 28 U.S.C. § 1581(c) (2012), and 19 U.S.C. § 1516a(a)(2)(A)(i)(I).

The Court will sustain Commerce’s antidumping determinations unless they are “unsupported by substantial evidence on the record, or otherwise not in accordance with law.” 19 U.S.C. § 1516a(b)(1)(B)(i); *Changzhou Wujin Fine Chem. Factory Co., Ltd. v. United States*, 701 F.3d 1367, 1374 (Fed. Cir. 2012). Where Commerce’s methodology is questioned for its accordance with law, “Commerce’s decision will be set aside if it is arbitrary and capricious.” *Id.* Both prongs of review are relevant to the instant case. We take note of each in turn, setting forth first the standard of substantial evidence.

(a). “The specific factual findings on which [Commerce] relies in applying its interpretation are conclusive unless unsupported by substantial evidence.” *United States v. Eurodif S.A.*, 555 U.S. 305, 316 n.6 (2009). Substantial evidence is “more than a mere scintilla,” but “less than the weight of the evidence.” *Altx, Inc. v. United States*, 370 F.3d 1108, 1116 (Fed. Cir. 2004).

Substantial evidence is “such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.” *Huaiyin Foreign Trade Corp. v. United States*, 322 F.3d 1369, 1374 (Fed. Cir. 2003). “[S]ubstantial evidence’ must be measured by a review of the record as a whole, ‘including whatever fairly detracts from the substantiality of the evidence.’” *Juancheng Kangtai Chem. Co., Ltd. v. United States*, 39 CIT ____, ____, Slip Op. 15–93 (Aug. 21, 2015) (quoting *Atl. Sugar, Ltd. v. United States*, 744 F.2d 1556, 1562 (Fed. Cir. 1984)). “Moreover, any determination as to the substantiality of the evidence ‘must take into account whatever in the record fairly detracts from its weight,’ including ‘contradictory evidence or evidence from which conflicting inferences could be drawn.’” *Nan Ya Plastics Corp., Ltd. v. United States*, 39 CIT ____, ____, 128 F. Supp. 3d 1345, 1355 (2015) (quoting *Suramerica de Aleaciones Laminadas, C.A. v. United States*, 44 F.3d 978, 985 (Fed. Cir. 1994)).

However, “the fact that a plaintiff can point to evidence that detracts from the agency’s conclusion or that there is a possibility of

drawing two inconsistent conclusions from the evidence does not preclude the agency's finding from being supported by substantial evidence." *ABB Inc. v. United States*, 190 F. Supp. 3d 1159, 1166–67 (2016) (citing *Matsushita Elec. Indus. Co. v. United States*, 750 F.2d 927, 933 (Fed. Cir. 1984)). "The court may not 'reweigh the evidence or . . . reconsider questions of fact anew.'" *Id.* (quoting *Downhole Pipe & Equip., L.P. v. United States*, 776 F.3d 1369, 1377 (Fed. Cir. 2015)).

(b). To determine whether Commerce's interpretation and application of the statute is in accordance with law, the Court asks whether "Congress has directly spoken to the precise question at issue."⁷ *Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 842 (1984). If the Court determines that the statute is silent or ambiguous with respect to the specific issue, the question then becomes what level of deference is owed Commerce's interpretation, the traditional second prong of the Chevron analysis. *Id.* at 842–43; see *United States v. Mead Corp.*, 533 U.S. 218, 228 (2001). "Chevron requires us to defer to the agency's interpretation of its own statute as long as that interpretation is reasonable." *Koyo Seiko Co., Ltd. v. United States*, 36 F.3d 1565, 1573 (Fed. Cir. 1994); see *Kyocera Solar, Inc. v. United States Int'l Trade Comm'n*, 844 F.3d 1334 (Fed. Cir. 2016).

"[A]n agency's finding may be supported by [A] substantial evidence," yet "nonetheless reflect arbitrary and capricious action." *Changzhou Wujin Fine Chem. Factory Co., Ltd.*, 701 F.3d at 1377 (quoting *Bowman Transp., Inc. v. Arkansas-Best Freight Sys., Inc.*, 419 U.S. 281, 284 (1974)). While "the substantial evidence standard applies to review of factual determinations[,] where "we are evaluating the agency's reasoning . . . [we] review[] under the arbitrary and capricious (or contrary to law) standard." *Id.* (citing *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 48–49 (1983)); see Administrative Procedure Act, 5 U.S.C. § 706(2)(A) (2012) (directing that the Court shall "hold unlawful and set aside agency action, findings, and conclusions found to be arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law."). "[W]here the agency is vested with discretion to set the procedure by which it administers its governing statute, the court reviews such decisions for abuse of discretion. . . . In abuse of discretion review, 'an agency action is arbitrary when the agency offers insufficient reasons for

⁷ "In order to determine whether a statute clearly shows the intent of Congress in a Chevron step one analysis, we employ traditional tools of statutory construction and examine 'the statute's text, structure, and legislative history, and apply the relevant canons of interpretation.'" *Heino v. Shinseki*, 683 F.3d 1372, 1378 (Fed. Cir. 2012) (quoting *Delverde, SrL v. United States*, 202 F.3d 1360, 1363 (Fed. Cir. 2000)).

treating similar situations differently.” *Jiangsu Jiasheng Photovoltaic Tech. v. United States*, 38 CIT ____, ____, 28 F. Supp. 3d 1317, 1323 (2014) (quoting *SKF USA Inc. v. United States*, 263 F.3d 1369, 1382 (Fed. Cir. 2001)).

DISCUSSION

I. Dixon is an Interested Party

A. Commerce was Authorized to Reopen the Record on Remand

Rongxin argues that Commerce lacked the authority to reopen the record on remand without specific direction from the court, which was not given. *Rongxin Comments* at 11. This argument flows from the proposition that “constant reopening and supplementation of the record would lead to inefficiency and delay in finality.” Rongxin’s Comments on Draft Remand Results at 12, CR 27 (June 3, 2016) (citing *Essar Steel Ltd. v. United States*, 678 F.3d 1268, 1277 (Fed. Cir. 2012)). Rather, Rongxin asserts, Commerce could have requested, or the court could have ordered, that the record be reopened, and even then, the court could only reopen it where “the original record was tainted by fraud,” or the agency decision was “based on inaccurate data.” *Id.* at 12–13. Rongxin thus requests that Dixon’s proffered evidence on remand be excised from the record and not considered. *Rongxin Comments* at 11.

Rongxin misreads *Essar Steel* and the prevailing law. The Court may remand with instructions for Commerce to decide whether to reopen and supplement the record, in order to obtain necessary information or resolve ambiguities, per its discretion. *Essar Steel*, 678 F.3d at 1278. Alternately, Commerce could request permission of the Court to reopen the record. *Id.* However, this Court may not *order* an administrative agency to reopen the record on remand in the absence of extraordinary circumstances. *Id.*

Contrary to Rongxin’s reading of *Essar Steel*, that case does not prescribe a formula for granting Commerce permission to reopen the record. *Id.* In the instant *Remand Order*, the court remanded to Commerce “for further explanation or reconsideration as may be appropriate.” *Remand Order* at 1254. Prior cases support the proposition that specific language directing Commerce to decide whether to reopen the record on remand is unnecessary. “Commerce generally may reopen the administrative record on remand.” *Fresh Garlic Producers Ass’n v. United States*, 40 CIT ____, ____, 190 F. Supp. 3d 1302, 1306 (2016). “As long as the Court does not forbid Commerce from considering new information, it remains within Commerce’s discre-

tion to request and evaluate new data.” *NTN Bearing Corp. of America v. United States*, 25 CIT 118, 124, 132 F. Supp. 2d 1102, 1107 (2001); see *Laclede Steel Co. v. United States*, 19 CIT 1076, 1078 (1995) (“Any decision to expand the administrative record upon remand is well within [Commerce’s] discretion, absent express language from the court barring such action.”); *Elkton Sparkler Co. v. U.S. Dep’t of Commerce*, 17 CIT 344, 346 (1993) (holding that since the remand order did not bar Commerce from investigating certain factor information, and since plaintiff raised the issue in its complaint, Commerce did not exceed the scope of the remand order by investigating information in the remand proceeding). In the instant case, the *Remand Order* did not bar reopening of the record. Therefore, Commerce was authorized to reopen and supplement the record on remand.

B. Commerce’s Findings Were Based on Substantial Evidence

When Congress has entrusted an agency to administer a statute that demands inherently fact-intensive inquiries, the agency’s conclusions fall only if the record contains evidence “so compelling that no reasonable factfinder” could reach the same conclusion. *INS v. Elias-Zacarias*, 502 U.S. 478, 483–84 (1992), cited in *Sucocitrico Cutrale Ltda. v. United States*, 36 CIT ____, ____, Slip Op. 12–71 at *1 (June 1, 2012) (“This Court affords Commerce’s factual finding a tremendous amount of deference.”). Rongxin alleges inconsistencies and even opacity in Dixon’s evidence on remand, and proffers its own evidence allegedly supportive of a finding that Dixon was not a domestic producer of pencils during the POR. *Rongxin Comments* at 2–9. As discussed below, it cannot be said that the agency’s findings that Dixon is a domestic producer of pencils possessing interested party status were unreasonable.

i. Dixon’s Work Orders and Production Screenshots

In 2012 and 2013, Dixon generated five work orders currently in the record. Exhibit RSQA-1 to Dixon’s Response to Supplemental Questionnaire, CR 2 (Apr. 14, 2016). Dixon represents that these work orders, in sequence, describe orders for: 1. Gluing wood slats; 2. Trimming wood slats; 3. Shaping pencils; 4. Painting pencils; and 5. Packing finished pencils. Dixon’s Response to Supplemental Questionnaire at 4, PR 7 (Apr. 18, 2016). These work orders are accompanied in the record by corresponding production entries, in the form of screenshots. On the first three of these work orders, the “requested date” and the “start date(s)” predate the POR, while the requested date and start dates on the fourth and fifth work orders occur within

Commerce reasonably accorded this production evidence significant weight, and found Dixon's explanation of work order details and alleged inconsistencies illuminating. *Remand Results* at 17–18. The fact that some fields on the work orders lack data does not mean that relevant production data is absent from the orders, or that the value for those blank fields is zero.¹¹ *Id.* ; Rongxin's Rebuttal Comments on Dixon's Response to Second Supplemental Questionnaire at 8, CR 26 (May 5, 2016). Commerce's fact-finding in antidumping proceedings is not to be overturned barring a result that no reasonable factfinder could reach. *See Sucocitrico Centrale Ltda.*, Slip Op. 12–71; *Elias-Zacarias*, 502 U.S. at 483–84.

Rongxin posits that a certain amount of Dixon's production process must consist of foreign or prefabricated materials, and thus Dixon does not, under the Act, produce pencils at the Macon facility. *Rongxin Comments* at 8. Rongxin argues that the evidence in the record must demonstrate bona fide production during the POR, and that Dixon might be a "screwdriver operation." *Id.* at 2–8. Notably, Rongxin does not present legally relevant standards supportive of these de minimis production arguments for the purposes of "interested party" status. *Id.* Neither the statute nor its legislative history indicate that Commerce must narrow the range of potential interested parties by applying the inquiry that it uses in new shipper reviews to determine whether a firm has a bona fide domestic production operation. A domestic "interested party" is "a manufacturer, producer, or wholesaler in the United States of a domestic like product." 19 U.S.C. § 1677(9)(C). The terms "manufacturer, producer, or wholesaler" are not defined by statute. *Id.* The legislative history of the domestic interested party provision states that "standing requirements should be administered to provide an opportunity for relief for an adversely affected industry and to prohibit petitions filed by persons with no stake in the result of the investigation." *Brother Indus. (USA), Inc. v. United States*, 16 CIT 789, 794, 801 F. Supp. 751, 757 (1992) (quoting S. Rep. No. 96–249, 96th Cong., 1st Sess. 63 (1979), reprinted in 1979 U.S.C.C.A.N. 381, 449) (internal citation and alteration omitted). The standing requirement is thus intended to be construed liberally. *Id.* Even if a bona fide production standard were applied, Commerce correctly noted that Rongxin has not precluded a reasonable finding that Dixon was in fact a bona fide producer during the POR, as the actual production dates listed on the work orders and production screenshots demonstrate a sequential five-step pencil production process. *Remand Results* at 16.

¹¹ Counsel for Dixon noted at oral argument that the labor hours category incorporates time spent running machinery.

Commerce likewise reasonably refuted Rongxin's characterization of Dixon as a "screwdriver operation," as that assertion was based on supposition rather than evidence in the record that would detract from Commerce's findings. *Remand Results* at 17; *Rongxin Comments* at 8. Besides, information regarding the substantial transformation of raw materials into pencils is unnecessary for the Department to determine whether Dixon is a domestic interested party, since 19 U.S.C. § 1677(9) does not include a requirement that a domestic interested party add a specific value to the total product in the United States.

ii. Rongxin's Proffered Evidence

Commerce reasonably concluded that photographs of the pencils Rongxin's counsel purchased from four major retailers, and of another brand¹² of pencils found in counsel's office, do not preclude a determination that Dixon produced pencils in the United States during the POR. Rongxin's Rebuttal Comments on Dixon's Response to Supplemental Questionnaire at Exhibits 1–5, PR 10–13 (Apr. 22, 2016) ("*photographs*"); *Remand Results* at 5. The *photographs* "represent only a miniscule, non-representative sample of all Dixon pencils sold in the United States," and further do not speak to the question of Dixon's domestic manufacturing during the POR. *Remand Results* at 5. Rongxin characterizes this conclusion as "not based on any evidence on the record, much less substantial evidence," and claims that "Dixon has not placed an iota of evidence on the record that it sells anywhere in the world pencils manufactured in the U.S." *Rongxin Comments* at 7. However, Rongxin conflates the actual inquiry on remand—whether Dixon is an interested party—with the inquiry it seems to pose in its comments, which is whether the four major retailers from which Rongxin purchased the Dixon pencils are representative of Dixon's manufacturing in the U.S. during the POR. *Id.* Rongxin improperly challenges Commerce to prove a negative: that substantial evidence in the record demonstrates that a given amount of pencils purchased from four major retailers are *not* representative of Dixon's pencil manufacturing during the POR. In reality, the *photographs* are substantial evidence only of the fact that Dixon manufactured *at least some* pencils outside of the United States, at an unclear point in time. This does not preclude domestic pencil production during the POR. Rongxin attempts to place a burden that it

¹² [[]]

should carry onto Commerce's shoulders. See *Zenith Elecs. Corp. v. United States*, 18 CIT 1145, 1150, 872 F. Supp. 992, 996 (1994) (“[T]he burden of production of evidence to rebut standing has been allocated by the Federal Circuit to the party challenging standing.”) (citing *Minebea Co. v. United States*, 984 F.2d 1178, 1181 (Fed. Cir. 1993)).

Rongxin submitted to Commerce an Occupational Safety and Health Administration (“OSHA”) press release describing that agency’s inspection of Dixon’s Macon, Georgia facility, and its fining Dixon \$64,085 for twenty-three safety and health violations found there. Rongxin’s Rebuttal Comments on Dixon’s Response to Supplemental Questionnaire at Exhibit 6, PR 10–13 (Sep. 26, 2011) (“*OSHA Press Release*”). Rongxin also submitted a local news story published on <http://macon.13wmaz.com> and dated September 27, 2011. *Id.* at Exhibit 7 (Sep. 27, 2011) (“*local news story*”). The OSHA Press Release states that “[t]he Macon plant prints custom designs onto pens, pencils and other writing instruments,” while the local news story states that “Company CEO Tim Gomez says the site is not a factory; but they run a screening operation in 5,000 square feet of the 200,000-square-foot distribution center.”¹³ *OSHA Press Release* at 1; *local news story* at 2. Commerce discounted this evidence as nondispositive to the question of domestic production during the POR, noting that the two articles were issued before the POR began and that the information was prepared by third party sources for purposes other than Commerce’s administration of the Act.¹⁴ *Remand Results* at 5–6, 19–20.

Commerce here considered the relevant statements in the *OSHA*

¹³ The court notes that, contrary to the statement attributed to Dixon CEO Timothy Gomez in the *local news story*, the very first sentence of the *OSHA Press Release* refers to the site as a “factory.”

¹⁴ *Zenith Electronics Corp. v. United States*, 18 CIT 1145, illuminates the instant case. In *Zenith*, Zenith asserted it was a domestic producer of color television receivers and petitioned Commerce to conduct a review of a relevant antidumping duty order. *Zenith*, 18 CIT at 1146. In May 1992, Commerce published a notice of initiation of an administrative review, covering the period from April 1, 1991 to March 31, 1992. *Id.* Respondent challenged Zenith’s standing on June 11, 1992, by presenting, among other items, a Zenith press release dated October 29, 1991, indicating that U.S. operations were being moved to Mexico. *Id.* Zenith on June 16, 1992 submitted an affidavit from its vice president and general counsel stating that at least some production would remain in the United States. *Id.* Commerce found that the press release could not be read to indicate that Zenith had withdrawn from U.S. color television receiver (“CTV”) production, but only that it planned to consolidate CTV final assembly in Mexico sometime after March 22, 1992; even had that occurred, it would not necessarily indicate that Zenith had moved all domestic production. *Id.* at 1146–47. In its final results of the administrative review, Commerce reiterated that Respondents had produced insufficient evidence to call Zenith’s standing into question so as to require further investigation. *Id.* at 1148.

“The question is what degree of evidence should prompt Commerce to commence an investigation into standing in an administrative review.” *Id.* at 1149. The court reasoned that because Respondents would not be granted admission to investigate production facilities, Commerce thus had an obligation to consider seriously factual information released by

Press Release and *local news story*. *Remand Results* at 5–6. Critically, those two pieces of evidence were issued fourteen months prior to the POR. *Id.* Even if the operative factual assertions therein were entirely true when made, they would not preclude that Dixon produced pencils in the Macon, Georgia facility during the POR, nor render patently unreasonable Commerce’s finding of domestic production during the POR.

Rongxin also placed in the record screenshots of Dixon’s page on Wikipedia.org, which states that “Dixon Ticonderoga Pencils are no longer made in the USA,” and a list of Dixon’s “top” twenty-five employees generated on LinkedIn.com, which does not obviously contain an employee who would have overseen pencil production at the Macon facility during the POR. Rongxin’s Rebuttal Comments on Dixon’s Response to Supplemental Questionnaire at Exhibits 8–9, PR 10–13 (Apr. 22, 2016). Commerce discounted the Wikipedia article because of its vagueness and lack of an authoritative citation. *Remand Results* at 6. Several courts have recognized the dangers of citing Wikipedia entries as legally probative evidence. *See United States v. Lawson*, 677 F.3d 629, 650 (4th Cir. 2012) (collecting cases). Wikipedia cautions that its open-source editorial policy means that entries can be “easily vandalized” and include unverified information. *Id.* (quoting Wikipedia’s “about” entry); *see also Bing Shun Li v. Holder*, 400 F. App’x 854, 857–58 (5th Cir. 2010) (expressing “disapproval of [an immigration judge’s] reliance on Wikipedia and [warning] against any improper reliance on it or similarly unreliable internet sources in the future”); *Badasa v. Mukasey*, 540 F.3d 909, 910–11 (8th Cir. 2008) (criticizing an immigration judge’s use of Wikipedia and observing that an entry “could be in the middle of a large edit or it could have been recently vandalized”).

Similarly, Commerce found unavailing Rongxin’s proffered list from LinkedIn of the “top” twenty-five Dixon employees. *Remand Results* at 6. This evidence does not speak to Dixon’s domestic production during the POR. *Id.* Rongxin again attempts to shift its own burden to Commerce, challenging the agency to find, based on substantial evidence, that the lack of a certain hypothetical employee, such as a “U.S. production manager,” on the LinkedIn list is *not* preclusive of domestic production during the POR. Rongxin’s Rebuttal Comments on Dixon’s Response to Supplemental Questionnaire at 11, PR 10–13 (Apr. 22, 2016). The court further notes that LinkedIn, like Wikipedia, is often an unreliable evidentiary source. *E.g.*, *Shannon v. GFK Custom Research LLC*, 4:13-CV-682 CAS, 2013 WL 2395009, at *2

Petitioner in news releases. *Id.* at 1150. The court held that Commerce did sufficiently consider Respondents’ charge, and could “not fault the agency for accepting the sworn statements of present fact over prior statements of intent.” *Id.*

(E.D. Mo. May 30, 2013) (citing *Badasa*, 540 F.3d at 909–10); see also *Am. Auto Logistics, LP v. U.S.*, 117 Fed. Cl. 137, 224 (Fed. Cl. 2014), *aff'd mem.*, pursuant to Fed. Cir. R. 36, 599 F. App'x 958 (Fed. Cir. 2015) (noting “obvious, potential evidentiary issues raised by protestor’s attachment of website images,” including LinkedIn pages, “as exhibits”).

In sum, the court concludes that Commerce’s findings regarding Rongxin’s proffered evidence were reasonable.

iii. Dixon’s CDSOA Materials

On July 11, 2013, in accordance with the *Notice of Intent to Distribute Offset*, 78 Fed. Reg. 32,718 (Dep’t Homeland Security May 31, 2013) (notice of intent to distribute assessed antidumping or countervailing duties), Dixon submitted a claim to the United States Customs and Border Protection Revenue Division (“CBP”) for a Continued Dumping and Subsidy Offset Act of 2000, 19 U.S.C. § 1675c (2000) (repealed 2006) (“CDSOA”) distribution¹⁵ under the *Cased Pencils/China* antidumping duty order. Exhibit 2SQR-2 to Dixon’s Response to Second Supplemental Questionnaire, CR 23 (July 11, 2013). Dixon claimed \$149,691,306. *Id.* Attached to Dixon’s claim was an affirmation that Dixon “remains in operation and continues to produce the product covered by the antidumping duty order [sic] which the distribution is sought.” *Id.* On December 6, 2013, Dixon received a check for \$139,111.72 from the United States Treasury Department. *Id.* On June 6, 2014, Dixon submitted a claim for another CDSOA distribution, pursuant to the *Notice of Intent to Distribute Offset*, 79 Fed. Reg. 31,414 (Dep’t Homeland Security June 2, 2014) (notice of intent to distribute assessed antidumping or countervailing duties). Exhibit 2SQR-2 to Dixon’s Response to Second Supplemental Questionnaire, CR 23 (June 6, 2014). Dixon again claimed \$149,552,194, but received \$6,418.86, in two payments: \$5,956.70 on December 1, 2014; and \$462.16 on April 24, 2015. *Id.*

Commerce found the CDSOA materials supportive of Dixon’s status as a producer of domestic like product during the POR. *Remand Results* at 18–19. Rongxin contends that the CDSOA materials are not dispositive because they do not directly evidence manufacturing

¹⁵ CDSOA, commonly referred to as the “Byrd Amendment,” “provided for the distribution of antidumping duties collected by the United States to ‘affected domestic producers’ of goods that are subject to an antidumping duty order.” *Pat Huval Rest. & Oyster Bar, Inc. v. Int’l Trade Comm’n*, 785 F.3d 638, 640 (Fed. Cir. 2015) (citations omitted). The Byrd Amendment was repealed in 2006, effective for entries of goods made and filed on or after October 1, 2007. “The repealing statute provided that any duties paid on goods that entered the United States prior to the date of repeal would continue to be distributed in accordance with the pre-repeal statutory scheme.” *Id.*; see Deficit Reduction Act of 2005, Pub. L. No. 109–171, § 7601, 120 Stat. 4, 154 (Feb. 8, 2006).

of domestic like product during the POR, but rather only show that Dixon was an “affected domestic producer,” which is not legally identical to a producer of domestic like product for interested party purposes. *Rongxin Comments* at 8; *Rongxin’s Comments on Draft Remand Results* at 5, CR 27 (June 3, 2016). Assuming *arguendo* that the CDSOA information is not dispositive for these reasons, it regardless buttresses Commerce’s finding, and certainly does not detract from it. “Affected domestic producer” need not be identical to “producer of domestic like product” for CDSOA certifications to evidence production of the relevant product covered by the underlying antidumping duty order during a specific fiscal year. 19 U.S.C. § 1675c(b)(1); *Remand Results* at 18–19. “[A]n ‘affected domestic producer’ . . . means any manufacturer [or] producer . . . that remains in operation continuing to produce the product covered by the antidumping duty order” 19 C.F.R. § 159.61(b)(1). Here the product is cased pencils, produced during the two fiscal years overlapping the POR. Exhibit 2SQR-2 to Dixon’s Response to Second Supplemental Questionnaire, CR 23 (July 11, 2013). A company that “did not manufacture that product at all during the fiscal year that is the subject of the disbursement is not an affected domestic producer.” 19 C.F.R. § 159.61(b)(2)(i). Dixon’s CDSOA certifications for fiscal years 2013 and 2014, made under penalty of law and with knowledge that they were subject to verification by CBP, as well as the proof of payments resulting from those certifications, thus serve as evidence that Dixon manufactured pencils domestically during the POR. *Remand Results* at 18; Exhibit 2SQR-2 to Dixon’s Response to Second Supplemental Questionnaire at 9, 19, CR 23 (July 11, 2013) (“The information contained in this certification is true and accurate to the best of the undersigned certifier’s knowledge and belief under penalty of law.”); *see* 19 C.F.R. § 159.63(d) (2012) (“Certifications are subject to verification.”). A reasonable factfinder thus could find “affected domestic producer” status relevant to the inquiry of domestic production during the POR.

As to each piece of evidence, and the record as a whole, Commerce’s findings were “reached by ‘reasoned decision-making,’ including . . . a reasoned explanation supported by a stated connection between the facts and the choice made.” *Elec. Consumers Res. Council v. Fed. Energy Regulatory Comm’n*, 747 F.2d 1511, 1513 (D.C. Cir. 1984) (citing *Burlington Truck Lines v. United States*, 371 U.S. 156, 168 (1962); *Memphis Light, Gas and Water Div. v. FPC*, 504 F.2d 225, 230 (D.C. Cir. 1974)). Even assuming that Commerce could have decided otherwise, the possibility of two contradictory conclusions, each based on substantial evidence, does not necessarily invalidate either. *See*

Consolo v. Fed. Mar. Comm'n, 383 U.S. 607, 620 (1966); see also *Elias-Zacarias*, 502 U.S. at 483–84. In short, Commerce analyzed the record as a whole, including Rongxin’s proffered evidence. The court concludes that Commerce’s determination that Dixon did produce pencils in the Macon, Georgia facility during the POR, and consequently that Dixon is an interested party, is based on substantial evidence. See *Elias-Zacarias*, 502 U.S. at 483–84.

C. Commerce’s Method of Resolving the Interested Party Dispute was in Accordance with Law

Rongxin argues that Commerce failed to apply its “standard procedure” in determining whether Dixon is a producer of domestic like product. *Rongxin Comments* at 10–11. Specifically, Rongxin argues that in order for Commerce to find interested party status, it must determine that Dixon passes a six-factor ITC test,¹⁶ per *Brother*, 16 CIT 789, and that Dixon performs “some important or substantial manufacturing operation” related to cased pencil manufacturing in the United States, per *Eurodif S.A. v. United States*, 411 F.3d 1355, 1361 (Fed. Cir. 2005).¹⁷ *Rongxin Comments* at 10–11.

The statute is silent as to a methodology Commerce must use in determining whether a petitioner is a producer in the United States of domestic like product. See 19 U.S.C. §§ 1677(9)(C), (10). As has been noted above, *supra* pp. 8–10, when Commerce’s methodology is challenged on the ground that it is not “in accordance with law,” we look to see whether the agency’s decision was “arbitrary and capricious,” reviewing that decision under “the Administrative Procedure Act and any other applicable law.” *Changzhou Wujin Fine Chem. Factory Co.*, 701 F.3d at 1374 (citations omitted).

The Court must be able to “discern whether Commerce’s finding on the issue is contrary to its past practice or supported by substantial evidence,” or else vacate and remand. *NMB Sing. Ltd. v. United States*, 557 F.3d 1316, 1331 (Fed. Cir. 2009). Rongxin meanwhile

¹⁶ (1) the extent and source of [the petitioner’s] . . . capital investment; (2) the technical expertise involved in the production activity in the United States; (3) the value added to the product in the United States; (4) employment levels; (5) the quantity and types of parts sourced in the United States; and (6) any other costs and activities in the United States directly leading to production of the like product. . . . No single factor is determinative, nor is the list of criteria exhaustive.

16 CIT at 791 (citing *Rescission of Initiation of Antidumping Duty Investigation and Dismissal of Petition: Certain Portable Electric Typewriters from Singapore*, 56 Fed. Reg. 49,880 (Dep’t Commerce Oct. 2, 1991) (rescission of initiation of investigation)).

¹⁷ Not to be confused with *Eurodif S.A. v. United States*, 555 U.S. 305 (2009), which considered a different issue. Per Rongxin, “[i]n essence, *Eurodif* requires *bona fide* manufacturing operations.” *Rongxin Comments* at 11. See the court’s discussion of the applicability of a *bona fide* manufacturing test in *supra* section I.B.i.

“must show that Commerce consistently followed a contrary practice in similar circumstances and provided no reasonable explanation for the change in practice.” *Consol. Bearings Co. v. United States*, 348 F.3d 997, 1007 (Fed. Cir. 2003).

Rongxin fails to meet its burden, having “confused the Department’s inquiry into whether a domestic firm is an interested party with the inquiry of whether a domestic party has sufficient industry support to file a petition.” *Remand Results* at 21. In *Brother*, Commerce chose to apply the six-factor ITC test to determine whether a domestic petitioner, BIUSA, was an “interested party” filing “on behalf of” a domestic industry pursuant to 19 U.S.C. § 1673a(b)(1) (1988), noting counterarguments that BIUSA was merely an assembler of relevant products rather than a manufacturer or producer. 16 CIT at 790. Commerce thereby found that BIUSA was not an interested party under the statute. *Id.* This court determined that Commerce’s finding could not be sustained because the agency had misapplied the test by focusing disproportionately on the intrinsic nature of the product rather than on the nature of production in the United States, and thereby disobeying its statutory mandate. *Id.* at 795. The agency erred in application, not methodological selection. Indeed, “[Commerce] has discretion to utilize any methodology reasonably suited to fulfilling the statutory goals.” *Id.* Rongxin reads the ITC six-factor test as Commerce’s “standard procedure,” as approved in *Brother*. *Rongxin Comments* at 10. But the case itself does not describe the test that way, and no case has been cited supporting that proposition. Commerce “has elected to use the ITC analysis to determine whether or not a party is a manufacturer,” said the court in *Brother*. 16 CIT at 795. “If [Commerce] chooses to use the ITC test, as it has done here, it must do so fairly and with regard to statutory language.” *Id.* (emphasis added). The court’s language is conditional because Commerce has discretion to employ a suitable analysis. Rongxin has thus failed to demonstrate that the ITC test is Commerce’s “standard procedure” such that the agency must sufficiently explain departure from its use. Regardless, counter to Rongxin’s argument,¹⁸ Commerce reasonably justified why it chose not to apply the six-factor ITC test. *Remand Results* at 21–22.

Commerce explained its reasons for not applying the *Eurodif* standard: the analysis in that case pertains to whether there was sufficient domestic industry support to initiate antidumping and countervailing investigations, consistent with the purpose of 19 U.S.C. §

¹⁸ “Here, Commerce has provided no justification for *not* using that test.” *Rongxin Comments* at 10 (emphasis in original).

1673a(c)(4)(A) (2000).¹⁹ 411 F.3d at 1360–61; *Remand Results* at 22. This is a reasonable explanation for Commerce’s decision not to apply the standard set forth in *Eurodif*, which, furthermore, Rongxin has not shown is a regular agency practice for determining whether a petitioner is a producer of domestic like product possessing interested party status with standing to request an administrative review. Therefore, Commerce has not acted in an arbitrary and capricious manner.

II. Separate Rate

As articulated by Commerce:

In proceedings involving non-market economy (NME) countries, the Department begins with a rebuttable presumption that all companies within the PRC are subject to government control, and, thus, should be assessed a single antidumping duty rate. It is the Department’s policy to assign all exporters of the mer-

¹⁹ Rongxin misses the importance of context in *Eurodif*. In that case, Appellants wanted Commerce to consider American utility companies “producers” for the purposes of determining whether a petitioner had sufficient industry support to trigger Commerce’s antidumping and countervailing duty investigation per the requirements of 19 U.S.C. § 1673a(c)(4)(A). 411 F.3d at 1360. Appellants argued that Commerce’s tolling regulation, 19 C.F.R. § 351.401(h) (2004), should apply to the industry support determination, making them “producers,” and that Commerce inconsistently applied the tolling regulation by using it to determine the export price of low enriched uranium but not using it to make the industry support determination. *Id.* Essentially, incorporating American utilities under the “producer” definition would have diluted industry support for the petition such that the dictates of § 1673a(c)(4)(A) would not have been met. *Id.* This definition was contrary to Commerce’s determination in the underlying administrative proceeding that, in order to be a producer, an entity must have a “stake” in the domestic industry in question. *Id.* Commerce interpreted having a “stake” as requiring that a company “perform some important or substantial manufacturing operation.” *Id.* at 1361. This is the standard that Rongxin would like Commerce to apply to Dixon in the instant case via the definition of “domestic producer.” *Rongxin Comments* at 11. However, the very next line in the *Eurodif* opinion belies Rongxin’s argument: “There is no basis to conclude that Commerce’s interpretation *in this context* is unreasonable or not in accordance with law.” 411 F.3d at 1361 (emphasis added).

Thus, the Federal Circuit agreed with this court, which had “sustained Commerce’s interpretation of the term ‘producer’ for the purpose of an industry support determination as well as its refusal to apply the tolling regulation to encompass American utilities within the definition of the term ‘producer.’” *Id.* at 1360 (emphasis added). The Federal Circuit further found that definition reasonable. *Id.* at 1361.

The statutory provisions containing the “domestic producers” term that Commerce interpreted in the *Eurodif* administrative proceeding were themselves qualified by percentages: a petition may be filed on behalf of an industry if “the domestic producers or workers who support the petition account for at least 25 percent of the total production of the domestic like product,” and “more than 50 percent of the production of the domestic like product produced by that portion of the industry expressing support for or opposition to the petition.” *Id.* at 1359, citing 19 U.S.C. § 1673a(c)(4)(A). This is relevant because it illustrates Commerce’s interpretation of “stake” in domestic production, and thus “producer,” for the purposes of domestic industry support of a petition. Neither 19 U.S.C. § 1677(9)(C), defining “interested party,” nor 19 U.S.C. § 1675, the administrative review provision, contain any such quantitative language that would support Rongxin’s desired application to Dixon of the standard described in *Eurodif*.

chandise subject to review in NME countries a single rate unless an exporter can affirmatively demonstrate an absence of government control, both in law (*de jure*) and in fact (*de facto*), with respect to exports.

IDM at 5 (emphasis in original); see generally *AMS Assoc., Inc. v. United States*, 719 F.3d 1376, 1379–81 (Fed. Cir. 2013). The validity of the presumption is not challenged by Rongxin and is not in issue here. Rather, Rongxin argues that Commerce mistakenly determined that it did not pass Commerce’s *de facto* test with respect to government control over exports, which resulted in a denial of a separate rate for Rongxin. *IDM* at 3; *Pl.’s Br.* at 20. As an initial matter, the court notes that only *de facto* control of Rongxin is at issue in this case, since Commerce conceded that *de jure* government control is absent.²⁰

As Commerce noted, in determining whether an exporter is entitled to a separate rate,

the Department . . . considers four factors in evaluating whether a respondent is subject to *de facto* government control of its export functions: (1) whether the export prices are set by, or are subject to the approval of, a government agency; (2) whether the respondent has authority to negotiate and sign contracts and other agreements; (3) whether the respondent has autonomy from the government in making decisions regarding the selection of management; and (4) whether the respondent retains the proceeds of its export sales and makes independent decisions regarding the disposition of profits or financing of losses.

IDM at 7; see also *AMS Assoc., Inc.*, 719 F.3d at 1379.

In its responses to Commerce’s questionnaires, Rongxin provided various statements relating to all four factors:

1. *Export price:*

“Once Rongxin receives a detailed inquiry from a client, Rongxin has Guangming [Rongxin’s supplier of pencils] evaluate all the costs and determine a price quote. Then, Rongxin determines a reasonable profit and make a price quote to the client.” Rongxin’s First Supplemental Questionnaire Response at 7, PR 40; CR 23–24 (Oct. 16, 2014). “Rongxin did not confer with SITG or SP to establish the pencil price sold to the United States during the POR.” *Id.* at 4. “Prices are set via direct competitive negotiations directly with customers. The

²⁰ “Upon further examination of Rongxin’s responses, the Department finds that the evidence provided by the company demonstrates an absence of *de jure* control” *IDM* at 7.

prices are not subject to review or guidance by any governmental organization. Exhibit A-5 contains an example of negotiation of a sale in the POR.” Rongxin’s Section A Questionnaire Response at 6, PR 22–26; CR 4–5 (April 3, 2015).

2. *Authority to negotiate and sign contracts:*

“The head of the department five (Stationery and Tools),²¹ . . . has the authority to bind the company on sales of pencils. She negotiates directly with the U.S. customer.” *Id.*

3. *Management:*

“The management is selected by the board of directors, all of whom are employees. Rongxin is not required to notify any government entity of the names of the management. Exhibit A-6 contains a document indicating the selection of the general manager.” *Id.* at 7.

4. *Proceeds of export sales/profits:*

“Export profits are calculated by subtracting all expenses from the gross sales price. These profits are disposed of in accordance with the dictates of the board of directors at the annual meeting. . . . There was a profit in 2012 and a profit in 2013.” *Id.* at 8.

After Rongxin had responded to the questionnaires and provided the information noted above, Commerce announced a new formulation for determination of separate rate, stating that based on its interpretation of *Advanced Technology & Materials Co. v. United States*, 37 CIT ____, ____, 938 F. Supp. 2d 1342, 1353 (2013), *aff’d mem.*, pursuant to Fed. Cir. R. 36, 581 F. App’x 900 (Fed. Cir. 2014), it was not necessary to consider all four factors; rather, where the respondent exporter had not shown “autonomy from the government in making decisions regarding the selection of management,” the presumption of de facto control over export activities had been established and there was no need to consider the other three prongs in the calculus. *See IDM* at 5–6.²² This court does not read *Advanced Technology* as standing for the proposition now asserted by Commerce. Each case is decided upon its own facts, and *Advanced Technology*, and the basis upon which it was decided, is not precedential nor dispositive, particularly where the court in that case did not address

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²² Following the Court’s reasoning, in recent proceedings, we have concluded that where a government entity holds a majority ownership share, whether directly or indirectly, in the respondent exporter, the majority ownership holding in and of itself means that the government exercises, or has the potential to exercise, control over the company’s operations generally. This may include control over, for example, the selection of management, a key factor in determining whether a company has sufficient independence in its export activities to merit a separate rate. Consistent with normal business practices, we would expect any majority shareholder, including a government, to have the ability to control, and an interest in controlling, the operations of the company, including the selection of management and the profitability of the company.

IDM at 6.

the issue now presented. In *Advanced Technology*, in contrast to the case before us, the respondent exporter had only provided evidence, not deemed persuasive by the court, rebutting the purported absence of autonomy from the government in making decisions regarding the selection of management. 37 CIT at _____. There was an absence of information adduced by the exporter regarding the other three prongs, and under the circumstances, the court determined that with respect to the criterion of autonomy from the government, the respondent had not met its burden to rebut the presumption of de facto control. *Id.* *Advanced Technology* does not hold that the failure of a respondent to meet its burden with respect to that single criterion necessarily ends the analysis and makes unnecessary consideration of information provided regarding the other three prongs. *Id.* In that regard we further note that while the issue was not therein joined, the Federal Circuit, in recounting how Commerce allows the presumption of government control to be overcome, has observed that “[t]he absence of de facto government control can be shown by evidence that the exporter sets its prices independently of the government and of other exporters, negotiates its own contracts, keeps the proceeds of its sales (taxation aside), and selects its management autonomously.” *AMS Assoc., Inc.*, 719 F.3d at 1379. We accordingly remand this case for further determination regarding consideration of the other criteria, as well as a determination of the ultimate calculus, including the impact of the criterion regarding autonomous selection of management. In so doing, this court expresses no view as to whether the question of entitlement to a separate rate is to be determined under a totality of the circumstances, whether a respondent must satisfy each of the four criteria, or whether, for example, the failure to establish autonomy from the government in the selection of management, or a finding of lack of such autonomy, can alone justify denial of a separate rate, even when there is evidence supportive of the exporter offered with respect to the other criteria. These are issues that may be addressed on remand.

While we remand, in the interest of judicial and litigation economy, we do address and sustain Commerce’s determination that Rongxin has not shown that it selects its management autonomously of the PRC government. Rongxin states that Commerce incorrectly found that SITG, the government-owned company owning a majority of Rongxin, has the ability to designate all members of Rongxin’s board of directors, because SITG can only nominate one of the six directors.

Article 12;²³ *Pl.'s Br.* at 29. Moreover, Rongxin maintains that its board members are elected by its eleven shareholders, consisting of SITG and ten employees, voting as individual members. *See* Article 10;²⁴ *see also Pl.'s Br.* at 29. Thus, Rongxin claims that SITG has only “1/11 of the vote of the shareholder meeting and 1/6 of the vote of the board of directors.” *Pl.'s Br.* at 31.

While acknowledging that SITG owns a majority of the shares, Rongxin states that the director appointed by SITG can cast only one vote per Article 16.4.²⁵ *IDM* at 3. Therefore, Rongxin maintains that SITG lacks control over Rongxin’s export activities, as SITG can only cast one vote. *Pl.'s Br.* at 24. Rongxin also claims that its Board did not appoint the manager of the stationery department who it asserts has the power to decide U.S. prices; in its view, pursuant to Article 13.9, the Board has the power to select “*only* three managers: general manager, vice manager, and the financial principal.” *Pl.'s Br.* at 30 (emphasis added).²⁶ In sum, Rongxin asserts that Commerce’s conclusion that Rongxin had not established independent selection of management was not based upon substantial evidence on the record. Furthermore, it contends that Commerce made a clear error in understanding the facts relevant to this review and thus Commerce’s findings are erroneous, citing *Yancheng Baolong Biochemical Products Co., Ltd. v. United States*, 406 F.3d 1377, 1380 (Fed. Cir. 2005). *Rongxin Case Br.* at 11.

Rongxin’s arguments fail for several reasons. Most importantly, Rongxin ignores the fact that although Article 10 requires a specified proportion of the stockholder’s vote in some instances, it is silent as to the number of votes needed to elect the Board.²⁷ *See supra* n.24. Given that the Articles are silent and Rongxin put forth no evidence

²³ Rongxin claims that an alternative translation of Article 12 is the correct translation: [[

]] *Rongxin Case Br.* at 11 n.1. Rongxin maintains that “Commerce has analysts who can confirm this new translation is correct.” *Id.* By comparison, the Revised Articles translate Article 12 as follows: [[

]] Rongxin argues that the Revised Articles inaccurately characterize SITG as having a supervisory role over Rongxin’s operations, whereas the alternative translation omits this phraseology and characterization. Even if the court were to credit Rongxin’s translation, the court’s analysis would remain unchanged.

²⁴ Article 10 [[
]]

²⁵ Article 16.4 [[
]]

²⁶ Article 13.9 [[
]]

²⁷ Article 10 [[
]]

to the contrary, Commerce reasonably concluded that the Board is elected by a majority of the shareholders. Consequently, Commerce found that SITG, as majority shareholder²⁸ which in turn is wholly-owned by the state entity SASAC, has the ability to appoint the other four directors²⁹ who decide on management pursuant to Articles 13.9 and 13.3. *See Advanced Tech.*, 938 F. Supp. 2d at 1353; *see also IDM* at 7. Rongxin provided no evidence to undermine the finding that management here was effectively selected by the PRC.

Rongxin contends that shareholders “vote as individual members” such that SITG has only 1/11 of the voting power in shareholder meetings. *Pl.’s Br.* at 29. However, Article 7.2 suggests that the shareholder’s vote is proportional to shareholding and that the shareholders do not vote as eleven individual members.³⁰ Rongxin argues that Article 7 is limited in scope to the payment of shares by shareholders and not voting rights, because each article discusses a unique topic, and Article 6 is the article which deals exclusively with voting rights. *Pl.’s Reply* at 10–11. The court, however, is persuaded by Commerce’s determination that Article 7.2 encompasses voting rights and on a reasonable interpretation on its face is not limited in the way Rongxin contends.

The court also discerns no merit in Rongxin’s argument, based on its interpretation of Article 13.9, that its Board did not appoint the stationery manager who decides U.S. prices and that autonomy from the government in the selection of management is thereby established. For one thing, on its face, Article 13.9 does not limit the class of managers appointed by the Board in the way Rongxin contends. *See supra* n.26. For another thing, even if the stationery manager were not appointed by the Board, given that SITG owns a majority of Rongxin’s shares and had the responsibility of electing the Board of Directors, Commerce reasonably determined that SITG still had “major input in the selection of Rongxin’s management” under Article 13.3—such that Rongxin does not have autonomy from the government in the selection of management.³¹ Final Separate Rate Analysis Memorandum for Shandong Rongxin Import & Export Co., Ltd. at 5, PR 52; CR 34 (April 30, 2015); *see also Sigma*, 117 F.3d at 1405–06.³²

²⁸ SITG owns [[]]

²⁹ There was one vacancy on the Board of Directors during the POR. *Pl.’s Br.* at 21.

³⁰ Article 7.2 [[]]

³¹ Article 13.3 broadly gives the Board the power to [[]]

³² We note that Commerce maintains that “where a government entity holds a majority ownership share, either directly or indirectly, in the respondent exporter, the majority ownership holding in and of itself means that the government exercises, or has the *potential*

In sum, the court remands this case for further determination regarding consideration of the other separate rate criteria, as well as a determination of the ultimate calculus, including the impact of the finding regarding autonomous selection of management. *See supra* pp. 32–35.

CONCLUSION

For the foregoing reasons, it is hereby

ORDERED that Rongxin’s motion for judgment on the agency record is denied in part; and it is further

ORDERED that Commerce’s determination regarding Rongxin’s eligibility for a separate rate is remanded for further consideration consistent with this opinion; and it is further

ORDERED that Commerce’s Results of Redetermination Pursuant to Court Remand are sustained in all other respects; and it is further

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

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

ORDERED that the parties shall have 15 days thereafter to file replies to comments on the remand determination.

Dated: February 3, 2017

New York, New York

/s/ Gary S. Katzmann

JUDGE

Slip Op. 17–12

CHINA MANUFACTURERS ALLIANCE, LLC and DOUBLE COIN HOLDINGS LTD.,
Plaintiffs, TITAN TIRE CORPORATION, ET AL., Plaintiffs, and GUIZHOU
TYRE CO., LTD. and GUIZHOU TYRE IMPORT and EXPORT CO., LTD.,
Plaintiffs, v. UNITED STATES, Defendant.

Before: Timothy C. Stanceu, Chief Judge
Consol. Court No. 15–00124

[Remanding to the issuing agency a determination in an antidumping duty proceeding]

to exercise control over the company’s operations generally.” *IDM* at 6 (emphasis added) (citing Final Results of Redetermination Pursuant to Remand Order for Diamond Sawblades and Parts Thereof from the People’s Republic of China (May 6, 2013) in *Advanced Tech. & Materials Co., Ltd. v. United States*, 36 CIT ___, 885F. Supp. 2d 1343 (2012), accord. *Advanced Tech. & Materials Co., Ltd. v. United States*, 37 CIT ___, 938 F. Supp. 2d 1342 (2013)). The court in *Jiangsu Jiasheng Photovoltaic Technology Co., Ltd. v. United States*, 38 CIT ___, ___, 28 F. Supp. 3d 1317, 1348 (2014) stated that it is not the “possibility for government control over export activities” which is dispositive of the de facto autonomy inquiry but whether “such control was *in fact reasonably likely* to have been exercised during the period of investigation.” (Emphasis added). Our determination here does not turn on which formulation of the de facto inquiry is adopted.

Dated: February 6, 2017

Daniel L. Porter, Curtis Mallet-Prevost, Colt & Mosle LLP, of Washington, D.C., for plaintiffs China Manufacturers Alliance, LLC and Double Coin Holdings Ltd. With him on the brief were *James P. Durling*, *Matthew P. McCullough*, *Claudia Hartleben*, and *Tung Nguyen*.

William F. Fennell, Stewart and Stewart, of Washington, D.C., for plaintiffs and defendant-intervenors Titan Tire Corporation and the United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied Industrial and Service Workers International Union, AFL-CIO, CLC. With him on the brief were *Terence P. Stewart* and *Nicholas J. Birch*.

Mark E. Pardo, Grunfeld, Desiderio, Lebowitz, Silverman & Klestadt LLP, of Washington, D.C., for plaintiffs Guizhou Tyre Co., Ltd. and Guizhou Tyre Import and Export Co., Ltd. With him on the brief were *Brandon M. Petelin*, *Dharmendra N. Choudhary*, and *Andrew T. Schutz*.

John J. Todor, Senior Trial Counsel, Commercial Litigation Branch, Civil Division, U.S. Department of Justice, of Washington, D.C., for defendant. With him on the brief were *Benjamin C. Mizer*, Principal Deputy Assistant Attorney General, *Jeanne E. Davidson*, Director, and *Franklin E. White, Jr.*, Assistant Director. Of counsel on the brief was *Nanda Srikantaiah*, Senior Attorney, Office of the Chief Counsel for Trade Enforcement & Compliance, U.S. Department of Commerce, of Washington, D.C.

OPINION AND ORDER

Stanceu, Chief Judge:

In this consolidated action,¹ three groups of plaintiffs contest the final determination the International Trade Administration, U.S. Department of Commerce (“Commerce” or the “Department”) issued to conclude the fifth periodic administrative review of an antidumping duty order on pneumatic off-the-road tires from the People’s Republic of China (“China” or the “PRC”). Finding merit in certain of plaintiffs’ claims, the court remands the determination to Commerce for reconsideration and redetermination.

I. BACKGROUND

A. *The Contested Determination*

The determination contested in this litigation is *Certain New Pneumatic Off-the-Road Tires from the People’s Republic of China: Amended Final Results of Antidumping Duty Administrative Review; 2012–2013*, 80 Fed. Reg. 26,230 (Int’l Trade Admin. May 7, 2015) (“*Amended Final Results*”); see *Certain New Pneumatic Off-the-Road Tires from the People’s Republic of China: Final Results of Antidumping Duty Administrative Review; 2012–2013*, 80 Fed. Reg. 20,197 (Int’l Trade Admin. Apr. 15, 2015) (“*Final Results*”). Commerce issued the antidumping duty order (the “Order”) on off-the-road tires from

¹ Consolidated under *China Manufacturers Alliance, LLC et al. v. United States*, Consol. Court No. 15–00124, are *Guizhou Tyre Co., Ltd. et al. v. United States*, Court No.15–00128, and *Titan Tire Corporation et al. v. United States*, Court No. 15–00136.

China (the “subject merchandise”) on September 4, 2008. *Certain New Pneumatic Off-the-Road Tires From the People’s Republic of China: Notice of Amended Final Affirmative Determination of Sales at Less Than Fair Value and Antidumping Duty Order*, A-570–912, 73 Fed. Reg. 51,624 (Int’l Trade Admin. Sept. 4, 2008). The fifth administrative review pertained to import entries of subject merchandise made during the period of review (“POR”) of September 1, 2012 through August 31, 2013. *Final Results*, 80 Fed. Reg. at 20,197.

B. The Parties to this Consolidated Case

The three groups of plaintiffs in this consolidated case are (1) China Manufacturers Alliance, LLC (“CMA”) and Double Coin Holdings Ltd.; (2) Guizhou Tyre Co., Ltd. and Guizhou Tyre Import and Export Co., Ltd.; and (3) Titan Tire Corporation (“Titan”), joined by the United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied Industrial and Service Workers International Union, AFL-CIO CLC (the “USW”).

Commerce considered Double Coin Holdings Ltd. and two Chinese tire producers affiliated with it to be a single company for the purposes of the review, to which it referred as “Double Coin.”² *Final Results*, 80 Fed. Reg. at 20,198. CMA is a U.S. importer of Double Coin’s subject merchandise. Corrected Br. of Resp. Pls. CMA and Double Coin in Supp. of Mot. for J. on the Agency R. (Oct. 5, 2015) 1, ECF No. 49 (“Double Coin’s Br.”). Commerce designated Double Coin, an exporter and producer of subject merchandise, as one of two mandatory respondents in the fifth review. *Final Results*, 80 Fed. Reg. at 20,197.

Commerce designated Guizhou Tyre Co., Ltd. and Guizhou Tyre Import and Export Co., Ltd. (collectively, “GTC” or “Guizhou”), another exporter and producer of subject merchandise, as the other mandatory respondent in the review. *Id.*

Titan, a U.S. producer of off-the-road tires, and the USW were the petitioners in the Department’s investigation culminating in the issuance of the Order. *Certain New Pneumatic Off-The-Road Tires From the People’s Republic of China; Preliminary Determination of Sales at Less than Fair Value and Postponement of Final Determination*, 73 Fed. Reg. 9,278 (Int’l Trade Admin. Feb. 20, 2008). Titan and

² Commerce ruled that “Double Coin Group Jiangsu Tyre Co., Ltd., Double Coin Group Shanghai Donghai Tyre Co., Ltd., and Double Coin Holdings, Ltd. are affiliated pursuant to section 771(33)(E) of the Act [19 U.S.C. § 1677(33)(E)] and should be collapsed together and treated as a single company (collectively, ‘Double Coin’), pursuant to the criteria laid out in 19 CFR 351.401(f).” *Certain New Pneumatic Off-the-Road Tires from the People’s Republic of China: Final Results of Antidumping Duty Administrative Review; 2012–2013*, 80 Fed. Reg. 20,197, 20,198 (Int’l Trade Admin. Apr. 15 2015) (“*Final Results*”).

the USW participated in the fifth administrative review as interested parties. Compl. ¶ 3 (May 6, 2015), ECF No. 6 (Court No. 15–00136).

C. *Proceedings before Commerce*

Commerce initiated the fifth administrative review on November 8, 2013. *Initiation of Antidumping and Countervailing Duty Administrative Reviews and Request for Revocation in Part*, 78 Fed. Reg. 67,104 (Int'l Trade Admin. Nov. 8, 2013). Commerce published the preliminary results of the review (“Preliminary Results”) on October 10, 2014. *Certain New Pneumatic Off-the-Road Tires from the People’s Republic of China: Preliminary Results of Antidumping Duty Administrative Review; 2012–2013*, 79 Fed. Reg. 61,291 (Int'l Trade Admin. Oct. 10, 2014) (“Preliminary Results”), and accompanying *Decision Memorandum for Preliminary Results of Antidumping Duty Administrative Review: Certain New Pneumatic Off the-Road Tires from the People’s Republic of China; 2012–2013*, A-570–912 ARP 12–13 (Int'l Trade Admin. Sept. 30, 2014) (Admin.R.Doc. No. 259), available at <http://enforcement.trade.gov/frn/summary/prc/2014–24275–1.pdf> (last visited Jan. 25, 2017) (“Prelim. I&D Mem.”).

In the Preliminary Results, Commerce preliminarily determined that Double Coin made sales of subject merchandise at less than fair value and calculated for it a preliminary dumping margin of 0.69%. *Preliminary Results*, 79 Fed. Reg. at 61,293. However, upon adopting a rebuttable presumption that all Chinese exporters are subject to control by the government of the PRC, Commerce preliminarily ruled Double Coin to have failed to rebut the Department’s presumption of government control and, therefore, to have failed to qualify for a “separate rate.” On that basis, Commerce considered Double Coin to be part of what it termed the “PRC-wide entity.” *Id.* In the Preliminary Results, Commerce preliminarily assigned the PRC-wide entity a rate of 105.59%, which it obtained by taking a simple average of the individual rate Commerce calculated for Double Coin (0.69%) and the rate Commerce assigned to the PRC-wide entity in the original antidumping duty investigation, which was 210.48%. *Id.* Commerce also preliminarily determined that GTC made sales of subject merchandise at less than fair value and qualified for a separate rate, preliminarily assigning GTC an individually-determined margin of 16.18%. *Id.* at 61,294.

On April 15, 2015, Commerce published the Final Results, incorporating by reference an *Issues and Decision Memorandum for Final Results of Antidumping Duty Administrative Review: Certain New Pneumatic Off-the-Road Tires from the People’s Republic of China; 2012 2013*, A-570–912 ARP 12–13 (Int'l Trade Admin. Apr. 8, 2015)

(Admin.R.Doc. No. 293), available at <http://enforcement.trade.gov/frn/summary/prc/2015-08673-1.pdf> (last visited Jan. 25, 2017) (“*Final I&D Mem.*”). Commerce assigned a margin of 11.34% to GTC and a margin of 105.31% to the PRC-wide entity, which Commerce again determined to include Double Coin based on a finding that Double Coin had not rebutted the Department’s presumption of government control. *Final Results*, 80 Fed. Reg. at 20,199. The PRC-wide rate was the “simple average of the previously assigned PRC-wide rate (210.48 percent) and Double Coin’s calculated margin (0.14 percent).” *Id.* (footnotes omitted).

Following a ministerial error allegation, Commerce published amended final results of the review (“Amended Final Results”) on May 7, 2015. *See Amended Final Results*, 80 Fed. Reg. at 26,230. In the Amended Final Results, Commerce revised GTC’s margin from 11.34% to 11.41%.³ *Id.* at 26,231.⁴ The PRC-wide rate remained 105.31%. *Id.*

D. Proceedings before the Court of International Trade

CMA and Double Coin Holdings Ltd. commenced their action on April 28, 2015. Summons, ECF No. 1; Compl., ECF No. 6. Plaintiffs GTC, and Titan and the USW, commenced their actions thereafter. *See* Compl. (May 1, 2015), ECF No. 6 (Court No. 15–00128); Compl. (May 6, 2015), ECF No. 6 (Court No. 15–00136). Titan and the USW filed a motion to intervene as defendant-intervenors in the cases brought by CMA/Double Coin Holdings Ltd. and GTC. *See* Titan and the USW Consent Mot. to Intervene as of Right (May 12, 2015), ECF No. 12; Titan and the USW Consent Mot. to Intervene as of Right (May 12, 2015), ECF No. 12 (Court No. 15–00128). CMA and Double Coin Holdings Ltd., and GTC, filed motions to intervene as defendant-intervenors in the case brought by Titan and the USW. *See* Double Coin Consent Mot. to Intervene as of Right (May 15, 2015), ECF No. 13 (Court No. 15–00136); Guizhou Consent Mot. to Intervene as of Right (June 2, 2015), ECF No. 18 (Court No. 15–00136).

³ The amended final results were issued following a ministerial error allegation asserting that Commerce failed to include two of GTC’s inputs in the total material cost buildup for normal value. *See Certain New Pneumatic Off-the-Road Tires from the People’s Republic of China: Amended Final Results of Antidumping Duty Administrative Review; 2012–2013*, 80 Fed. Reg. 26,230, 26,231 (*Int’l Trade Admin. May 7, 2015*) (“Amended Final Results”).

⁴ Commerce assigned GTC’s margin as the “all-others” rate to the “separate rate” respondents, i.e., those respondents that Commerce considered independent from the government of China but that did not receive an individually-determined margin, which were Zhongce Rubber Group Company Limited and Weihai Zhongwei Rubber Co., Ltd. *See Certain New Pneumatic Off-the-Road Tires from the People’s Republic of China: Preliminary Results of Antidumping Duty Administrative Review; 2012–2013*, 79 Fed. Reg. 61,291, 61,294 (*Int’l Trade Admin. Oct. 10, 2014*) (“Preliminary Results”); *Final Results*, 80 Fed. Reg. at 20,199; *Amended Final Results*, 80 Fed. Reg. at 26,231.

Before the court are the three motions for judgment on the agency record, filed by each of the three groups of plaintiffs according to USCIT Rule 56.2. *See* Resp. Pls.' Mot. for J. on the Agency R. (Sept. 24, 2015), ECF No. 38; GTC's Mot. for J. on the Agency R. and Br. in Supp. (Sept. 24, 2015), ECF No. 36 ("GTC's Br."); Titan and the USW's Mot. for J. on the Agency R. and Br. in Supp. (Sept. 24, 2015), ECF No. 35 ("Titan's Br."). Defendant opposed all three motions. *See* Def.'s Response to Mots. for J. on the Agency R. (Dec. 7, 2015), ECF No. 60 (Def.'s Opp'n").⁵ The court held oral argument on April 27, 2016.

II. DISCUSSION

A. *Jurisdiction and Standard of Review*

The court exercises jurisdiction under section 201 of the Customs Courts Act of 1980, 28 U.S.C. § 1581(c), pursuant to which the court reviews actions commenced under section 516A of the Tariff Act of 1930 (the "Tariff Act"), *as amended*, 19 U.S.C. § 1516a, including an action contesting a final determination that Commerce issues to conclude an antidumping administrative review.⁶ In reviewing a final determination, the court "shall hold unlawful any determination, finding, or conclusion found . . . to be unsupported by substantial evidence on the record, or otherwise not in accordance with law." 19 U.S.C. § 1516a(b)(1)(B)(i).

B. *The Claims of the Three Groups of Plaintiffs*

CMA and Double Coin claim that Commerce acted unlawfully in determining a 105.31% rate for the PRC-wide entity and assigning this rate to Double Coin. Double Coin's Br. 8–51. They advance several grounds for this claim, which the court addresses below.

GTC raises five claims. First, it claims that Commerce unlawfully made downward adjustments to account for Chinese value-added tax when determining the export prices and constructed export prices at which GTC's subject merchandise was sold in the United States. GTC's Br. 7–23. Second, GTC challenges the Department's choice from among the record data for determining surrogate financial ra-

⁵ Double Coin and GTC each filed an opposition to Titan's and the USW's motion. *See* Def.-intervenor's Response in Opp'n of Pls.' Titan and the USW's Mot. for J. on the Agency R. (Dec. 7, 2015), ECF No. 54; GTC's Response to Titan and the USW's Mot. for J. on the Agency R. (Dec. 7, 2015), ECF No. 59. Titan filed an opposition to Double Coin's and GTC's motions. *See* Response Br. of Titan and the USW (Dec. 7, 2015), ECF No. 56. Double Coin, GTC, and Titan and the USW filed reply briefs in response to the opposition briefs. *See* Reply Br. of Resp. Pls.' CMA and Double Coin in Support of Mot. for J. on the Agency R. (Jan. 19, 2016), ECF No. 76; Reply Br. of Titan and the USW (Jan. 19, 2016), ECF No. 71; Consol. Pl. GTC's Reply Br. (Jan. 19, 2016), ECF No. 75.

⁶ All citations to the United States Code herein are to the 2012 edition and all citations to the Code of Federal Regulations are to the 2015 edition.

tios. *Id.* at 23–31. Third, GTC challenges the surrogate value Commerce used to value steam coal inputs. *Id.* at 31–45. Fourth, GTC contends that Commerce improperly double counted certain costs as domestic brokerage and handling and as ocean freight. *Id.* at 45–51. Finally, GTC claims that the Department’s surrogate value for domestic warehouse costs should have been, but was not, adjusted for inflation. *Id.* at 51–54.

Titan and the USW challenge, first, the 105.31% margin Commerce assigned to Double Coin, arguing that Commerce instead should have assigned the 210.48% margin originally determined in the investigation for the PRC-wide entity and applied in reviews prior to the fifth review. Titan’s Br. 17–24. Second, they claim that Double Coin reported freight distances incorrectly and that Commerce erred in accepting the misreported data. *Id.* at 24–25. Third, Titan and the USW claim that Commerce erred in accepting Double Coin’s reported inventory carrying costs for subject merchandise. *Id.* at 25–27. Finally, they claim that Commerce incorrectly limited (“capped”) the distances used to determine GTC’s surrogate freight costs for material inputs. *Id.* at 27–29.

C. CMA’s and Double Coin’s, and Titan’s and the USW’s, Claims Challenging Assignment of the 105.31% Rate to Double Coin

CMA and Double Coin Holdings Ltd. make four arguments in challenging the 105.31% “PRC-wide” rate Commerce assigned to Double Coin. They argue, first, that Commerce lacked authority to determine a rate for the “PRC-wide entity” because the statute permitted it only to determine a weighted average dumping margin for each individually examined exporter and producer and an estimated “all others” rate for all exporters and producers not individually examined. Double Coin’s Br. 8–16. Second, they argue that Commerce had no authority to apply the 105.31% rate to Double Coin because that rate rests on an outdated presumption that there is a single entity in China consisting of all Chinese exporters under the central control of the PRC government. *Id.* at 16–27. They submit that the presumption, adopted in the early 1990s based on circumstances in China in the late 1980s, is now factually invalid and contradicted by the Department’s own determinations since that time, including its determination that China’s economy is now sufficiently market-oriented that Commerce now considers it appropriate to subject Chinese exports to countervailing duties. *Id.* at 20–25. Third, they argue that the Department’s finding that the government of the PRC controls the export activities of Double Coin is not supported by the evidence of

record. *Id.* at 27–51. Fourth, and finally, they argue that it was unlawful for Commerce to subject Double Coin to the 105.31% rate, rather than a rate determined based on Double Coin’s own data, because Commerce, in doing so, applied a rate determined according to “facts otherwise available” and “adverse inferences.” *Id.* at 51–59. According to their argument, this was impermissible, *inter alia*, “particularly since Commerce found determined [*sic*] that Double Coin’s actual AD [antidumping duty] rate was *de minimis*” and because Commerce found that Double Coin fully cooperated with the review. *Id.* at 51.

CMA and Double Coin Holdings Ltd. have standing to challenge the PRC-wide rate of 105.31% because that rate was applied to Double Coin. The court, therefore, construes their various arguments as constituting a single claim—that Commerce unlawfully assigned this rate to Double Coin—and construes all of its arguments as grounds in support of this claim. For the reasons discussed in this Opinion and Order, the court agrees with the fourth argument they put forth. Therefore, the court does not address the remaining arguments.

Commerce stated in the fifth administrative review that “[t]he Department considers the PRC to be a non-market economy country [“NME”] under section 771(18) of the Act,”⁷ and “[i]n antidumping proceedings involving NME countries, such as the PRC, the Department has a rebuttable presumption that the export activities of all firms within the country are subject to government control and influence.” *Final I&D Mem.* 10. Commerce further stated that “[i]t is the Department’s policy to assign all exporters of the merchandise subject to review in NME countries a single rate unless an exporter can affirmatively demonstrate an absence of government control, both in law (*de jure*) and in fact (*de facto*), with respect to exports.” *Prelim. I&D Mem.* 7.

In the fifth review, Commerce determined that Double Coin failed to rebut the presumption of *de facto* state control and, therefore, found that Double Coin “is a part of the PRC-wide entity.” *Final I&D Mem.* 12. From that finding, Commerce proceeded to a conclusion that Double Coin had not established its entitlement to a “separate rate,” i.e., a rate separate from the rate Commerce would assign to the PRC-wide entity. *Id.* (“Double Coin is ineligible for a separate rate due to its inability to establish independence from government control.”). On this ground, Commerce declined to assign to Double Coin the *de minimis* margin of 0.14%, to which it referred in the Final

⁷ 19 U.S.C. § 1677(18)(A). A “nonmarket economy country” (“NME”) is defined therein as “any foreign country that the administering authority determines does not operate on market principles of cost or pricing structures, so that sales of merchandise in such country do not reflect the fair value of the merchandise.”

Results as Double Coin’s “calculated margin.”⁸ *Final Results*, 80 Fed. Reg. at 20,199; see *Final I&D Mem.* 12 (acknowledging that this was the “calculated final margin for Double Coin”). Instead, Commerce assigned Double Coin a rate of 105.31%, a rate Commerce designated as a newly-established rate for “the PRC-wide entity.” *Final Results*, 80 Fed. Reg. at 20,199.

Titan and the USW claim that Commerce erred in assigning the 105.31% rate to Double Coin on the ground that on the record before it, Commerce should have left unchanged, and applied to Double Coin, the PRC-wide rate of 210.48% determined upon conclusion of the investigation and continued through previous reviews of the Order.

1. Commerce Erred in Assigning Double Coin the 105.31% Rate Instead of the 0.14% De Minimis Margin

The court begins its analysis with the statutory requirements for the conducting of an administrative review of an antidumping duty order. Section 751(a)(1) of the Tariff Act requires Commerce, upon a proper request, to conduct a periodic administrative review at least once during each 12-month period beginning on the anniversary of the date of publication of an antidumping duty order. 19 U.S.C. § 1675(a)(1). In a review, Commerce is directed generally to determine the normal value and U.S. price (i.e., export price or constructed export price) and resulting dumping margin, for “each entry” of the subject merchandise. See 19 U.S.C. §§ 1675(a)(2)(A)(i), (ii).

Commerce designated Double Coin, as an exporter and producer of subject merchandise, to serve as one of the two “mandatory respondents” and maintained this designation throughout the fifth review. Having made this designation, Commerce placed itself under a general obligation to assign Double Coin an “individual weighted average dumping margin.” That much is clear from Section 777A(c)(1) of the Tariff Act, 19 U.S.C. § 1677f-1(c)(1), which provides as a general rule that Commerce, in determining weighted average dumping margins under § 1675(a), “shall determine the individual weighted average dumping margin for each known exporter and producer of the subject merchandise.” *Id.* § 1677f-1(c)(1) (emphasis added). There is a statutory exception to this general rule where “it is not practicable to make individual weighted average dumping margin determinations” because “of the large number of exporters or producers involved in the

⁸ For purposes of depositing and assessing antidumping duties, a margin of 0.14% is disregarded as a *de minimis* margin. See 19 C.F.R. § 351.106(c) (weighted-average dumping margins disregarded as *de minimis* if less than 0.5% *ad valorem*).

investigation or review.” See *id.* § 1677f-1(c)(2). In that circumstance, Commerce

may determine the weighted average dumping margins for a reasonable number of exporters or producers by limiting its examination to . . . a sample of exporters, producers, or types of products that is statistically valid . . . or . . . exporters and producers accounting for the largest volume of the subject merchandise from the exporting country that can be reasonably examined.

Id. § 1677f-1(c)(2). In the fifth review, Commerce expressly invoked this statutory exception, but it did so in deciding to *perform* an individual examination of Double Coin, not to *avoid* doing one. Commerce designated Double Coin and GTC (which Commerce determined was not part of the PRC-wide entity) as its two “mandatory respondents,” i.e., the two respondents to each of which, according to § 1677f-1(c)(2), it would “limit[] its examination.” Citing 19 U.S.C. § 1677f-1(c)(2), Commerce chose Double Coin and GTC as the two “exporters and producers accounting for the largest volume of the subject merchandise from the exporting country,” *id.* § 1677f-1(c)(2)(B). *Prelim. I&D Mem.* 3.

The *de minimis* margin of 0.14% that Commerce calculated for Double Coin qualifies as an “individual weighted average dumping margin” within the meaning of 19 U.S.C. § 1677f-1(c)(1). The rate of 105.31% that Commerce assigned to Double Coin, not having been determined by an individual examination, does not. The record evidence shows that Commerce determined the *de minimis* margin according to the export prices and constructed export prices at which Double Coin’s subject merchandise was sold in the United States and the Department’s own determination of the normal value of that merchandise on the basis of Double Coin’s factors of production and surrogate values, according to the nonmarket economy country procedures of 19 U.S.C. § 1677b(c). As Commerce acknowledged, it was able to calculate an individually-determined margin for Double Coin “[b]ecause Double Coin provided the Department with its verified sales and production data.” *Final Results*, 80 Fed. Reg. at 20,199. Commerce “calculated” the 105.31% rate as “a simple average of the previously assigned PRC-wide rate (210.48 percent) and Double Coin’s calculated margin (0.14 percent).” *Id.* (footnotes omitted).

Even though it calculated the *de minimis* margin based on Double Coin’s own data, during the review Commerce rejected Double Coin’s argument that “the statute requires the Department to assign Double

Coin a rate based on this information.” *Final I&D Mem.* 12. Commerce gave as its reason that “[i]t is the Department’s policy to assign all exporters of the merchandise subject to review in NME countries a single rate unless an exporter can affirmatively demonstrate an absence of government control” and that “Double Coin is ineligible for a separate rate due to its inability to demonstrate the absence of government control.” *Id.* This reason does not suffice. No “policy” can justify an agency’s decision if that policy is applied to conflict with a statutory requirement. Here, the policy Commerce cited cannot serve to reconcile two inconsistent decisions: the Department’s decision to subject Double Coin to individual examination and its decision not to assign Double Coin an individual margin. The plain language of 19 U.S.C. § 1677f-1(c) does not permit such a result. The Statement of Administrative Action (“SAA”) accompanying the Uruguay Round Agreements Act (“URAA”), which enacted § 1677f-1(c), underscores this point. The SAA clarifies that the provision was intended in large part to reflect U.S. law and practice, which it described as follows:

Under existing practice, Commerce attempts to calculate individual dumping margins for all producers and exporters of merchandise who are subject to an antidumping investigation or for whom an administrative review is requested. As a practical matter, however, Commerce may not be able to examine all exporters and producers, for example, when there is a large number of exporters and producers. In such situations, Commerce either limits its examination to those firms accounting for the largest volume of exports to the United States or employs sampling techniques. *Commerce will calculate individual dumping margins for those firms selected for examination and an “all others” rate to be applied to those firms not selected for examination.*

Statement of Administrative Action accompanying the Uruguay Round Agreements Act, H.R. Rep. No. 103–316, Vol. 1 at 872 (1994), *reprinted in* 1994 U.S.C.A.N. 4040, 4200 (emphasis added). As the SAA makes clear, an exporter or producer that is “selected for examination” according to § 1677f-1(c) is one for which Commerce will calculate an individual dumping margin. Therefore, whatever rate Commerce chose to apply to Double Coin—whether or not it also was the rate Commerce chose to apply to whatever it considered to be “the PRC-wide entity”—was required by statute to be an individual dumping margin for Double Coin, unless some statutory exception applied. None did.

Commerce explained, further, that “[t]he Department must calculate a single rate for the PRC-wide entity, and in this review, we do not have the necessary information, *i.e.*, sales and production data, from the remaining unspecified portion of the PRC-wide entity.” *Final I&D Mem.* 12; *see also Final Results*, 80 Fed. Reg. at 20,199. This rationale also fails to justify the Department’s decision not to assign an individually-determined margin to Double Coin. Commerce is permitted to base an individual weighted average dumping margin on substitute information by invoking its authority under 19 U.S.C. § 1677e(a), which directs the use of “facts otherwise available” where “necessary information is not available on the record.” 19 U.S.C. § 1677e(a)(1). Commerce expressly invoked this authority in using the 210.48% rate as a substitute for what it considered to be missing information pertaining to the “unspecified” portion of the PRC-wide entity that it did not consider to consist of Double Coin. *Final Results*, 80 Fed. Reg. at 20,199. However, in the fifth review Commerce was not in a position to use facts otherwise available in determining an individual dumping margin for Double Coin, and even had it been, it could not have used the 210.48% rate for that purpose.

As to Double Coin, Commerce did not make a valid finding, supported by record evidence, that “necessary information,” within the meaning of 19 U.S.C. § 1677e(a), was unavailable on the record. To the contrary, Commerce, by its own acknowledgment, had all the information it needed to determine an individual weighted average dumping margin for Double Coin.

Under § 1677e(a), the information Commerce would use as a substitute for the missing information is information to be used “in reaching the applicable determination under this subtitle.” 19 U.S.C. § 1677e(a). In the Issues and Decision Memorandum for the Final Results, Commerce stated that “[i]n this review, we are seeking to establish a new rate for the [PRC-wide] entity, which is under review, and a *part of which* was selected as a mandatory respondent, but for which we do not have complete information.” *Final I&D Mem.* 13 (emphasis added). In other words, Commerce decided to make an entity it described as the “PRC-wide entity” subject to the fifth review but intentionally declined to designate that entire entity as a mandatory respondent.⁹ By designating only GTC and Double Coin as

⁹ Commerce referred to what it considered the portion of the PRC-wide entity outside of Double Coin as “unspecified.” *Final I&D Mem.* 12. The next sentence in the memorandum indicates that Commerce failed to define the entity it was subjecting to review: “Nor is there information on the record with respect to the composition of the PRC-wide entity.” *Id.* In the Final Results and the accompanying Issues and Decision Memorandum, Commerce did not identify any exporter of subject merchandise other than Double Coin that it considered to be part of the PRC-wide entity. Commerce was attempting to perform an administrative review, but not an individual examination, upon an entity it failed to define and, aside from

mandatory respondents, Commerce decided that it would *not* perform an individual examination upon the PRC-wide entity as a whole. Accordingly, for purposes of 19 U.S.C. § 1677f-1(c)(1), Commerce needed, and obtained, information with which to determine an individual dumping margin for Double Coin, which it designated for individual examination.

On the other hand, because Commerce intentionally declined to designate as a “mandatory,” i.e., individually examined, producer or exporter the non-Double Coin portion of what it considered to be the PRC-wide entity, Commerce had no need for information with which to calculate an individual weighted average dumping margin for that “portion.” Commerce determined that “we do not have the *necessary* information, i.e., sales and production data, from the remaining unspecified portion of the PRC-wide entity,” *Final I&D Mem.* 12 (emphasis added), but this determination of necessity is incorrect. The “sales and production data” to which Commerce referred pertain to an individual weighted average dumping margin. In short, the Department’s review of that “remaining unspecified portion” of the PRC, i.e., the non-Double Coin portion, was governed by an exception authorized by § 1677f-1(c)(2), under which Commerce exercised its discretion not to perform an individual examination, not the general rule of § 1677f-1(c)(1), under which it must perform one. In summary, the finding that Double Coin had failed to rebut the Department’s presumption of government control did not prevent Commerce from assigning Double Coin an individual margin. Instead, Commerce relied on that finding as its sole reason for choosing not to do so.

Even were the court to presume, for the sake of argument, that Commerce could have invoked its authority under 19 U.S.C. § 1677e(a) to use facts otherwise available in determining a margin for Double Coin, it would not have been permissible for it to use the 210.48% rate as facts otherwise available on the record before it. The factual information upon which that rate is based bears no relationship to any sales or import entries—of any party—that are the subject of the fifth review and, in any event, is not on the administrative record of the fifth review.¹⁰

Double Coin, about which it did not have record evidence allowing it to conclude that this entity was an exporter or producer of subject merchandise.

¹⁰ As to the theoretical question of “facts otherwise available” on the record for determining a weighted average dumping margin for the PRC-wide entity, the court finds on the record only one set of data that could be said to have qualified for that purpose: the record data pertaining to an individual examination of the exports of Double Coin, which Commerce actually did examine when it calculated (but declined to apply) a *de minimis* margin for Double Coin. The record contains no data pertaining to any Chinese exporter’s subject merchandise, or even data pertaining to the identity of such an exporter, other than that of Double Coin, that are relevant to the fifth administrative review and that Commerce considered to be a part of the PRC-wide entity. As Commerce conceded, the record did not

Moreover, the 210.48% rate was the result of the Department's invalid attempt to use not only facts otherwise available but also an adverse inference drawn according to 19 U.S.C. § 1677e(b) (to which Commerce refers as "adverse facts available," or "AFA").¹¹ In the fifth review, Commerce could not rely on its § 1677e(b) authority in applying the 105.31% rate to Double Coin. Commerce found Double Coin to be a cooperative respondent in the fifth review. *Prelim. I&D Mem.* 12. It also found the data Double Coin submitted sufficient for the calculation of the final *de minimis* margin. *See Final Results*, 80 Fed. Reg. at 20,199. Commerce did not find the PRC-wide entity, or any portion of it, to be an uncooperative respondent in the fifth review. Nor did it assert that it submitted any requests for information to what it deemed the "PRC-wide entity" (other than those it sent to Double Coin). Instead, in using the 210.48% rate in determining Double Coin's margin, Commerce impermissibly relied on matters not on the record of the fifth review, pointing to a lack of cooperation in the original antidumping duty investigation of what it then considered to be the PRC-wide entity (which at that time Commerce found not to include Double Coin). As Commerce explained:

In this review, to the extent that the application of the pre-existing PRC-wide rate affects the antidumping duties assessed on Double Coin's entries as a result of this review, this rate is not an application of AFA to the entity in this review; rather, it reflects in part the rate applied to the entity based on the actions of the entity in the investigation of which Double Coin is now a part (and unchanged by any subsequent review).

allow it to know the composition of what it termed the "PRC-wide entity." *Final I&D Mem.* 12.

¹¹ As the source for "the previously assigned PRC-wide rate (210.48 percent)," Commerce cited the final less-than-fair-value determination it issued upon concluding the original antidumping duty investigation. *Final I&D Mem.* 12 n.44 (citing *Certain New Pneumatic Off-The-Road Tires from the People's Republic of China: Final Affirmative Determination of Sales at Less Than Fair Value and Partial Affirmative Determination of Critical Circumstances*, 73 Fed. Reg. 40,485, 40,489 (Int'l Trade Admin. July 15, 2008) ("*Final LTFV Determination*"). The cited determination, of which the court takes judicial notice, discloses that the 210.48% rate was the result of the use of facts otherwise available and an adverse inference, *see* 19 U.S.C. § 1677e(b), based on the Department's finding that the PRC-wide entity did not respond to the Department's request for information and thereby failed to cooperate to the best of its ability. *Final LTFV Determination*, 73 Fed. Reg. at 40,487–88. Commerce found Double Coin to be a "Separate Rate Recipient," i.e., a respondent that demonstrated *de jure* and *de facto* absence of government control. *Id.* at 40,487, 40,489. The preliminary LTFV determination, of which the court also takes judicial notice, reveals that the source of the 210.48% rate was "the highest calculated rate from the petition." *Certain New Pneumatic Off-The-Road Tires from the People's Republic of China; Preliminary Determination of Sales at Less Than Fair Value and Postponement of Final Determination*, 73 Fed. Reg. 9,278, 9,285 (Int'l Trade Admin. Feb. 20, 2008).

Final I&D Mem. 13. While Commerce attempts to characterize the 105.31% rate it applied to Double Coin as something other than a rate determined according to “AFA,” this characterization is inaccurate. The 105.31% rate was derived in substantial part from the AFA rate assigned to the PRC-wide entity in the investigation. The authority Congress provided in 19 U.S.C. § 1677e does not extend to the use of an adverse inference against Double Coin, a fully cooperative interested party that Commerce examined individually in the review and for which Commerce calculated (but declined to apply) an individual weighted average dumping margin based on information it found to be sufficient for that purpose.

In the Final Issues and Decision Memorandum, Commerce cited various judicial decisions in an attempt to justify its decision. Commerce relied on a decision of the Court of Appeals for the Federal Circuit (“Court of Appeals”), *Sigma Corp. v. United States*, 117 F.3d 1401, 1405–06 (Fed. Cir. 1997) in arguing that “[t]he Department’s practice of assigning a PRC-wide rate has been upheld by the Federal Circuit” and that in *Sigma Corp.* the Court of Appeals “affirmed that it was within the Department’s authority to employ a presumption for state control in a NME country and place the burden on the exporters to demonstrate an absence of central government control.” *Final I&D Mem.* 10. The issue of the current factual validity of the presumption, although raised by Double Coin, is one the court need not resolve here. The opinion in *Sigma Corp.* did not address the question the court *does* need to resolve, i.e., whether Commerce may refuse to assign an individual weighted average dumping margin to a cooperative exporter or producer upon which it chose to perform an individual examination of sales of subject merchandise. *Sigma Corp.* involved antidumping duty reviews initiated before the 1995 effective date of the Uruguay Round Agreements Act, which enacted 19 U.S.C. § 1677f-1(c). See Pub. L. No. 103–465, § 229(a). That previous version of the Tariff Act of 1930 had provided Commerce authority to use best information available (“BIA”) rather than the authority provided by the current 19 U.S.C. § 1677e, and it was under this “best information available” authority that Commerce had imposed a single rate upon respondents who failed to cooperate with the Department’s investigation.

Commerce reasoned, further, that in *Transcom, Inc. v. United States*, 294 F.3d 1371, 1381–83 (Fed. Cir. 2002), the Court of Appeals affirmed “[t]he application of a PRC-wide rate to all parties which were not eligible for a separate rate” and that “[i]n *Transcom*, the Federal Circuit also found that a rate based on ‘BIA’ (the precursor to facts available and AFA under the current statute) is not punitive.”

Final I&D Mem. 11. *Transcom* also involved a review of an antidumping duty order initiated prior to the effective date of the Uruguay Round Agreements Act, which enacted 19 U.S.C. § 1677f-1(c).

Commerce concluded from *Sigma Corp.* and *Transcom*, and from decisions of this Court that cite the opinions in those two cases, that “contrary to Double Coin’s assertions, the courts have consistently upheld the Department’s authority to apply a presumption of state control in NME countries and to apply a single rate to all exporters that fail to rebut that presumption.” *Final I&D Mem.* 11. Neither case lends support to the decision challenged here, made under a provision of the URAA, in which a cooperative exporter selected for individual examination was not assigned a margin based on the sales of that exporter’s own subject merchandise. Commerce took this action on the basis of a review of an entity—the portion of the “PRC-wide enterprise” that did not include Double Coin—that Commerce did not select for individual examination. Nothing in the Tariff Act authorizes Commerce to do this simply upon a Departmental finding that the entity Commerce *did* select for individual examination, i.e., Double Coin, did not rebut its presumption of government control. This is quite different from the Department’s established practice of subjecting to a “PRC-wide” rate all Chinese exporters that Commerce found to have failed to demonstrate independence from an uncooperative governmental entity and that Commerce, for that reason, considered not to be entitled to individual examination or to a “separate rate.” While the statute does not specify how Commerce is to determine a rate for respondents that, pursuant to 19 U.S.C. § 1677f-1(c)(2), Commerce does not examine individually in an administrative review of an antidumping duty order, it is explicit in directing Commerce to “determine the individual weighted average dumping margin for each known exporter and producer of the subject merchandise” that Commerce selects for individual examination in such a review. 19 U.S.C. § 1677f-1(c)(1). The statute makes no exception to this requirement for exporters or producers Commerce considers controlled by the government of a non-market economy country.

As did Commerce in the Final Issues and Decisions Memorandum, defendant submits that the Department’s decision to apply a country-wide rate to Double Coin in the fifth review is consistent with the decision of the Court of International Trade in *Advanced Technology & Materials Co. v. United States*, 37 CIT __, __, 938 F. Supp. 2d 1342, 1350–51 (2013), which, defendant points out, was affirmed by the Court of Appeals pursuant to Fed. Cir. R. 36 in *Advanced Technology & Materials Co. v. United States*, 541 F. App’x. 1002 (Fed. Cir. 2013). The case is neither precedential nor on point. The segment of the

opinion of this Court on which Commerce and defendant relied concerned a plaintiff, Advanced Technology & Materials Co., Ltd., that was not selected as a mandatory respondent in the antidumping duty investigation that gave rise to that case. *See Advanced Tech. & Materials Co.*, 37 CIT __ at __, 938 F. Supp. 2d at 1350–51; *Final Determination of Sales at Less Than Fair Value and Final Partial Affirmative Determination of Critical Circumstances: Diamond Sawblades and Parts Thereof From the People's Republic of China*, 71 Fed. Reg. 29,303 (May 22, 2006). As a result, the case did not involve the issue presented by this case, in which Commerce disregarded its obligation under 19 U.S.C. § 1677f-1(c) to assign Double Coin, a respondent Commerce selected for individual examination, an individual weighted average dumping margin.

In the Final Issues and Decision Memorandum, Commerce also relied on its regulation, 19 C.F.R. § 351.107(d), which provides that “[i]n an antidumping proceeding involving imports from a nonmarket economy country, ‘rates’ may consist of a single dumping margin applicable to all exporters and producers.” *Final I&D Mem.* 10. This reliance is misplaced. Double Coin’s claim, properly construed, is that Commerce unlawfully assigned Double Coin the 105.31% rate in the particular circumstances of the fifth review. Whether or not another circumstance could allow Commerce to apply a single rate to all exporters and producers of merchandise from a nonmarket economy country is not the issue before the court. Commerce may not exercise the discretion inherent in this regulation, which states that rates “may” consist of a single margin, to apply a single antidumping duty margin to all exporters and producers in a nonmarket economy country in a way that fails to heed the statutory requirement to assign an individual weighted average dumping margin to a fully cooperative exporter or producer it designated for individual examination pursuant to 19 U.S.C. § 1677f-1(c). The court presumes the validity of the regulation, which Double Coin does not challenge. While a court owes deference to an agency’s reasonable construction of its own regulation, a regulation that may be valid on its face is interpreted unreasonably if it is applied contrary to the requirements of the authorizing statute. *See Christopher v. SmithKline Beecham Corp.*, 567 U.S. __, __, 132 S. Ct. 2156, 2166–67 (2012).

Similarly, the court will grant the deference to an agency’s reasonable interpretation of a statutory provision in appropriate circumstances. *See Chevron U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837 (1984). Here, however, Commerce has offered no interpretations of the statutory provision chiefly at issue, 19 U.S.C. § 1677f-1(c), for the court’s consideration; nor did it analyze 19 U.S.C. § 1677e

beyond invoking its authority thereunder to use the 210.48% rate as facts otherwise available. Instead, Commerce has attempted to justify its decision to apply the 105.31% rate to Double Coin according to its inapplicable past practices, a regulation (19 C.F.R. § 351.107(d)) it attempts to apply contrary to a statutory provision, and inapposite judicial decisions.

2. *The Court Denies Relief on Titan's and the USW's Claim that as to Double Coin, Commerce Unlawfully Departed from the Previous 210.48% PRC-Wide Rate*

Titan and the USW claim that the Department's decision to assign the 105.31% rate to Double Coin, instead of the previous PRC-wide rate of 210.48%, was unreasonable and unsupported by substantial record evidence. They base this claim on the state of the record and their interpretations of past Commerce practice and various judicial decisions. Titan's Br. 17–24. The court denies relief on this claim.

As grounds in support of its claim, Titan and the USW argue that this Court has recognized that under Department practice involving nonmarket economy cases, the separate sales behavior of a single member of the PRC-wide entity is not meaningful and no individual inquiry into that behavior is warranted. Titan's Br. 18–19 (citing *Watanabe Grp. v. United States*, 34 CIT 1545, 1551 (2010), *Jiangsu Changbao Steel Tube Co. v. United States*, 36 CIT __, __, 884 F. Supp. 2d 1295, 1312 (2012)). This argument fails because in this case, Commerce decided to designate Double Coin under 19 U.S.C. § 1677f-1(c) for individual examination and, thereby, for assignment of an individual weighted average dumping margin. In light of that decision, an individual inquiry into Double Coin's selling behavior is not only meaningful but also necessary.

Titan and the USW next argue that “[f]or Commerce to be able to calculate a new margin for the PRC-wide entity,” i.e., a revision of the previous 210.48% rate, “it needed data on factors of production and sales for the entity as a whole” and that where such information is not on the record, the Department's standard practice when reviewing a member of the NME-wide entity, as upheld by the courts, “is to apply an AFA rate to the whole entity.” Titan's Br. 20–21. As to the lack of record evidence on the PRC-wide entity as a whole, and alluding to the apparent fact that Commerce did not seek information from the PRC-wide entity as a whole, Titan and the USW argue that “[i]n this review, the onus was on the [PRC-wide] entity, including Double Coin, to submit complete data on the record.” Titan's Br. 20 (citing *Chia Far Indus. Factory Co. v. United States*, 28 CIT 1337, 1354, 343 F. Supp. 2d 1344, 1362 (2004)). In support of this argument, Titan and the

USW contend that “Double Coin was aware of the government control it was under, and on notice it was likely to be held to be part of the PRC-wide entity” but that “Double Coin and that entity chose not to submit a complete set of information for Commerce to review the activities of the entire PRC-wide entity.” Titan’s Br. 20–21. These arguments ignore the record fact that Commerce, although naming Double Coin for individual examination as a mandatory respondent, specifically declined to so designate the PRC-wide entity as a whole.

Notably, Titan and the USW do not claim that the Department’s decision to designate only Double Coin, and not the PRC-wide entity as a whole, as a mandatory respondent was unlawful. Instead, they claim that Commerce was required on the record before it to assign the whole entity, including Double Coin, the 210.48% rate in the fifth review. In support of its argument, these plaintiffs cite *Transcom*, 294 F.3d at 1382, and *Advanced Technology & Materials Co.*, 37 CIT at ___, 938 F. Supp. 2d at 1351, but these cases are inapposite for the reasons the court discussed previously. They also cite *Shandong Huanri (Group) General Co. v. United States*, 31 CIT 1029, 1040, 493 F. Supp. 2d 1353, 1364 (2007), but this decision does not address the issue posed by this case. The discussion in the opinion relates to the Department’s finding of control of the plaintiffs by the PRC government. There is no discussion in the opinion of designation of plaintiffs as mandatory respondents and, accordingly, no discussion of the issue this case presents as to 19 U.S.C. § 1677f-1(c). The decision challenged in the case, *Brake Rotors From the People’s Republic of China: Final Results and Partial Rescission of the Seventh Administrative Review; Final Results of the Eleventh New Shipper Review*, 70 Fed. Reg. 69,937 (Int’l Trade Admin. Nov. 18, 2005), does not discuss the process of selection of mandatory respondents.

Finally, Titan and the USW argue that the 210.48% rate permissibly could be used as facts otherwise available in the application of a rate to the PRC-wide entity, and that the 105.31% rate could not, because only the former, being based on the petition, and not the latter, was relevant to the PRC-wide entity as a whole. Titan’s Br. 22–24. According to Titan and the USW, the rate Commerce selected “was not based on any fact, available or otherwise, but was only an assumption.” *Id.* at 22. They maintain that “[i]n selection among facts otherwise available, 19 U.S.C. § 1677e(b)(2) allows Commerce to select from among (1) the petition, (2) the final determination, (3) any prior review, and (4) any other information on the record” and that “[t]he new PRC-wide margin calculated was based on none of these permissible choices for facts available.” *Id.* Here again, Titan and the USW overlook the point that Commerce designated Double Coin for

individual examination and did not so designate the PRC-wide entity. As the court discussed previously, it was not permissible for Commerce to use facts otherwise available in determining a weighted average dumping margin for Double Coin.

3. *Commerce Must Assign Double Coin the De Minimis Margin Because This Is the Appropriate Remedy for Double Coin's Claim Contesting the Assignment of the 105.31% Rate*

In conclusion, Commerce acted contrary to law in applying the rate of 105.31% to entries of the subject merchandise exported by Double Coin. As a remedy, Double Coin argues that the decision to impose this rate must be set aside, Double Coin's Br. 59, and the court agrees. Double Coin seeks that the court remand the Department's decision with instructions for reissuance "consistent with the court's decision." *Id.* Double Coin thus leaves to the court the specific instructions to be issued in remanding the Department's decision.

Whether or not it was lawful for Commerce to deem Double Coin to be part of what it deemed "the PRC-wide entity," Commerce was required by 19 U.S.C. § 1677f-1(c)(1) to apply to Double Coin's subject merchandise an individual weighted average dumping margin calculated according to the statutory requirements. The only information available on the record of the fifth administrative review that can be used for this purpose is the information provided by Double Coin. This was the information Commerce used to determine the *de minimis* margin that Commerce described as a "calculated" and a "final" margin. Commerce found the information sufficient for that purpose. The court is remanding the contested decision with the directive to assign this 0.14% *de minimis* margin to the subject merchandise of Double Coin because that is the appropriate remedy under the statute.

It might be argued that the court should issue a more general order that does not direct Commerce to assign Double Coin the *de minimis* margin but leaves to Commerce the determination of what margin to assign, so long as that margin is, as the statute requires, an individual weighted average dumping margin. According to such an argument, the court should not foreclose the possibility that Commerce might choose to conduct the review anew as to the PRC-wide entity, reopening the record as necessary to remedy what it acknowledged, see *Final I&D Mem.* 12, as a lack of record evidence on the composition of this entity and on sales and production data pertaining to it. The court decides against this course of action.

As the court discussed previously, Commerce designated Double Coin as a mandatory, i.e., individually examined, respondent, but it expressly avoided this designation for what it considered to be the remainder of the PRC-wide entity, thereby deciding that it would *not* perform an individual examination upon the PRC-wide entity as a whole. Upon judicial review, it is axiomatic that a court may adjudicate only claims that are properly before it. In actions contesting an agency determination, such as this one, the court may adjudicate only claims challenging findings, determinations, and conclusions Commerce reached in the Final Results. The court's remand order, therefore, may include only those directives that are needed to correct the *contested* findings, determinations, and conclusions the court determines to be contrary to law. The court's procedures reflect this limitation on judicial review; *see, e.g.*, USCIT R. 56.2(c).

In this litigation, no party contested the Department's designation of GTC and Double Coin as mandatory respondents. Moreover, no party contested the Department's decision in the Final Results not to also designate as a "mandatory," i.e., individually examined, producer or exporter the entire PRC-wide entity or, precisely, what Commerce considered to be the "unspecified" portion of the PRC-wide entity beyond Double Coin.¹² However illogical it might seem that Commerce found the PRC-wide entity to be a single entity yet also reached a decision to examine individually only what it deemed a portion of it, i.e., Double Coin, that decision is unchallenged in this litigation and, therefore, final and conclusive.¹³ As a result, any prospect of the Department's calculating, in a remand proceeding, an individual weighted average dumping margin for the PRC-wide entity is foreclosed as beyond the scope of this litigation. Accordingly, the court refrains from issuing an order under which Commerce may revisit its

¹² Although CMA and Double Coin Holdings Ltd. argue that Commerce lacked the authority to issue a "PRC-wide" rate in the fifth review, *see* Double Coin's Br. 8–16, the court may not construe this argument as objecting to the Department's selection or non-selection of mandatory respondents. As the court noted earlier, their standing results from the Department's applying the 105.31% margin to Double Coin. Therefore, their claim is properly construed as limited by their standing, under which they may challenge the Department's assignment of the 105.31% rate to Double Coin, and not to any other respondent, real or hypothetical. As a result, CMA and Double Coin Holdings Ltd. are not entitled to a remedy under which the court would order Commerce not to assign an antidumping duty rate to the PRC-wide entity. Under the court's construction of, and adjudication of, their claim, such a rate could have no effect on CMA and Double Coin Holdings Ltd.

¹³ In contrast, the Department's finding that Double Coin is part of the PRC-wide entity *is* challenged in this litigation. Commerce, therefore, is free to alter that finding in complying with the court's order, should it choose to do so, even though a decision to do so or not to do so can have no effect on the margin Double Coin must be assigned in the redetermination. Because the court's adjudication of the claim of CMA and Double Coin Holdings Ltd. does not require review of the validity of that finding, the court is not ordering that the finding be reconsidered.

final decision and reopen the record with the objective of obtaining information that might be used for that purpose. The court is ordering Commerce to assign the 0.14% *de minimis* margin to Double Coin because it is the only possible result that, on the record of the fifth administrative review, could comply with all statutory requirements, in particular 19 U.S.C. § 1677f-1(c).¹⁴

D. GTC's Claims

1. *The Department's Deductions for Value-Added Tax Were Contrary to the Statute*

Section 772(c)(2)(B) of the Tariff Act directs Commerce to reduce “[t]he price used to establish export price and constructed export price” by “the amount, if included in such price, of any export tax, duty, or other charge imposed by the exporting country on the exportation of the subject merchandise to the United States.”¹⁵ 19 U.S.C. § 1677a(c)(2)(B). GTC claims that Commerce exceeded its authority under section 772(c)(2)(B) when it made certain deductions from the starting prices Commerce used to establish the export price (“EP”) and constructed export price (“CEP”) for GTC’s subject merchandise.¹⁶ Commerce made the deductions for what it considered to be Chinese unrefunded value-added tax (“VAT”) incurred on the subject tires that GTC exported to the United States. GTC argues that the Department’s deductions were unauthorized by the plain language of the statute, GTC’s Br. 13–17, and that, even had they been authorized, the methodology Commerce used to calculate them was unreasonable and contrary to record evidence, *id.* at 17–23.

For the Final Results, Commerce described the Chinese VAT system as one in which “some portion of the input VAT that a company pays on purchases of inputs used in the production of exports is not refunded.” *Final I&D Mem.* 28 (footnote omitted). According to Commerce, “[t]his amounts to a tax, duty, or other charge on exports that is not imposed on domestic sales”; Commerce referred to this portion as “irrecoverable VAT.” *Id.* Commerce explained that “[i]rrecoverable VAT, as defined in PRC law, is a net VAT burden that arises solely

¹⁴ Titan and the USW direct two claims to the Department’s calculation of the 0.14% margin. As discussed later in this Opinion and Order, the court does not find merit in either of these claims.

¹⁵ According to 19 U.S.C. 1677a(c)(2)(B), no deduction is made if the export tax, duty or other charge is one described in 19 U.S.C. § 1677(6)(c), which is an export tax, duty, or other charge “levied on the export of merchandise to the United States specifically intended to offset the countervailable subsidy received.” GTC does not contend that this exception applies.

¹⁶ Commerce refers to the unadjusted sales price used to establish export price or constructed export price as the “starting price.” *See* 19 C.F.R. § 351.402(a).

from, and is specific to, exports” and “is VAT paid on inputs and raw materials (used in the production of exports) that is nonrefundable and, therefore, a cost.” *Id.* (footnote omitted). Commerce concluded that, for purposes of 19 U.S.C. § 1677a(c)(2)(B), “[i]rrecoverable VAT is, therefore, an ‘export tax, duty, or other charge imposed’ on exportation of the subject merchandise to the United States.” *Id.* (footnote omitted).

In the Final Issues and Decisions Memorandum, Commerce defined “irrecoverable VAT” as follows: “Irrecoverable VAT is (1) the free-on-board value of the exported good, applied to the difference between (2) the standard VAT levy rate and (3) the VAT rebate rate applicable to exported goods.” *Id.* at 30 (footnote omitted). Commerce stated therein that “[i]nformation placed on the record of this review by both GTC and Double Coin,” which consisted of GTC’s and Double Coin’s responses to the Department’s questionnaire on VAT, “indicates that according to the Chinese VAT schedule, the standard VAT levy is 17 percent and the rebate rate for subject merchandise is nine percent.” *Final I&D Mem.* 28 (footnote omitted). To apply 19 U.S.C. § 1677a(c)(2)(B), Commerce “removed from U.S. price the difference between the rates (*i.e.*, eight percent), which is the irrecoverable VAT as defined under PRC tax law and regulation.” *Id.* at 29. Because GTC had both EP and CEP sales, *see Prelim. I&D Mem.* 19, 22–23, Commerce made the 8% downward adjustments to the starting prices used to calculate both EP and CEP. GTC argues that § 1677a(c)(2)(B) did not allow Commerce to make these deductions from its starting prices for irrecoverable VAT because, under Chinese law, GTC pays no VAT on its exports of subject merchandise and instead pays VAT only on its domestic purchases of inputs used to produce its tires. GTC’s Br. 14–15.

GTC relies on regulations of the PRC, which it placed on the record, as providing that “for taxpayers that export goods, *the tax rate shall be zero.*” *Id.* at 14 (quoting Article 2.3 of the *Interim Regulations of the People’s Republic of China on Value-Added Taxes* (2008) and citing GTC’s Section C Response. at 49–50 and Exhibit C-15 (emphasis in GTC’s Br.)). According to GTC, “[t]his is an *internal tax* related to the cost of acquiring inputs within China, and it is obviously not a tax that is ‘imposed on the exportation of the subject merchandise.’” *Id.* at 15. GTC argues, further, that “since the record plainly shows that the VAT rate for export sales is zero, there is no support for any assumption that VAT is ‘included in the price’ of the export sale as required before Commerce can make any adjustment pursuant to 19 U.S.C. § 1677a(c)(2)(B).” *Id.* at 15 n.16.

GTC maintains that even were Commerce, as a general matter, permitted to make a deduction for irrecoverable VAT, its deduction in this instance was impermissible because “[c]omputing an adjustment based upon the difference between the VAT *rates* paid and refunded is obviously not the same as computing the actual *amount* paid if the applicable input VAT rate and refund rate are applied to a different value basis.” *Id.* at 18 (emphasis in original). Asserting that “the 17% VAT input rate being used by Commerce is only applied to the value of inputs purchased by GTC for the production of its tires, while the 9% refund rate is being applied to the much higher basis of the FOB [free-on-board] value of the finished merchandise,” GTC adds that “it is obvious that 9% of the FOB value of the finished tires could equal or exceed the 17% VAT amount paid on the cost of material inputs (as GTC showed in its VAT supplemental response).” *Id.* (footnote omitted).

For the Final Results, Commerce included in the Final Issues and Decision Memorandum an interpretation of § 1677a(c)(2)(B) that the court reviews according to the analysis outlined by the U.S. Supreme Court in *Chevron*, 467 U.S. at 842–43. The first step in the court’s review is to determine whether Congress has spoken to the precise question presented, because if so, then the answer Congress gave is binding on the agency and on the court. *Id.* If the statutory language is ambiguous or silent on the precise question presented, then a court, upon reviewing an interpretation of a statute made by the agency charged by Congress with its administration, is to give deference to a reasonable interpretation of the statute, even if the interpretation is not the one the court would have preferred. *Id.* at 843–44.

Neither the Final Results nor the incorporated Final Issues and Decision Memorandum includes a specific finding that the PRC government imposed a tax, duty, or other charge in an amount equaling 8% of the free-on-board (“FOB”) value of GTC’s subject merchandise. Therefore, the statutory language presents two questions of interpretation. One question is whether, in the absence of a finding that any sort of “tax, duty or other charge” equivalent to 8% of the FOB value of the exported merchandise actually was “imposed by the exporting country,” it was permissible for Commerce to construe the statute to authorize it to make that deduction from the starting price for EP or CEP. If, and only if, the answer to the first question is yes, does the second question arise. That question is whether a VAT tax imposed on a producer’s domestic manufacturing inputs but not refunded upon the exportation of the finished good can be construed to be an “*export tax, duty, or other charge*” that was “*on the exportation* of the subject merchandise.” 19 U.S.C. § 1677a(c)(2)(B) (emphasis added).

The answer to the court's first question of interpretation is found in the unambiguous language of the statute. Under that language, the deduction from the EP or CEP starting price must be in the actual "amount" of the tax, duty, or other charge that was "imposed" by the government of the country of export. *Id.* (requiring that the price used to establish EP and CEP be reduced by "the amount . . . of any . . . tax, duty, or other charge imposed by the exporting country . . .") (emphasis added). If Commerce finds that a tax, duty, or other charge was so imposed in relation to the subject merchandise, it then would make a finding as to whether the tax, duty, or other charge was "included in such price," i.e., the starting price. If a charge was *not* found to have been so imposed, then under the statute, and as a matter of logic, it cannot be found to have been "included" in that price. Commerce never made either of these two specific findings. Under step one of the *Chevron* analysis, the court must give effect to the unambiguous language of the statute. Because the answer to the court's first question of statutory interpretation is no, the court need not reach the second question.

Instead of finding as a fact that the PRC imposed a tax, duty, or charge—of whatever character—in an amount equivalent to 8% of the FOB value of GTC's subject merchandise, Commerce applied a presumption that goods exported from China are subject to "irrecoverable VAT" in the amount of 8% of the FOB value of the exported good. *Final I&D Mem.* 30 ("Irrecoverable VAT is (1) the free-on-board value of the exported good, applied to the difference between (2) the standard VAT levy rate and (3) the VAT rebate rate applicable to exported goods."). A presumption is, of course, different than a finding of fact. Commerce neither found that China imposed a tax, duty, or other charge on GTC's subject merchandise in an amount equivalent to 8% of the FOB value nor found that China had imposed on that merchandise a charge in any other specific amount. Instead, it stated in the Final Issues and Decisions Memorandum a general finding that "under the PRC's VAT regime, . . . some portion of the input VAT that a company pays on purchases of inputs used in the production of exports is not refunded." *Id.* at 28 (emphasis added) (footnote omitted). Later in the memorandum, Commerce further found that "[i]nformation placed on the record by both GTC and Double Coin indicates that according to the Chinese VAT schedule, the standard VAT levy is 17 percent and the rebate rate for subject merchandise is nine percent." *Final I&D Mem.* 29 (footnote omitted). Under the plain language of 19 U.S.C. § 1677a(c)(2)(B), these findings do not suffice. They are not findings of an "amount" of a tax, duty, or other charge that was imposed by the exporting government in relation to GTC's

exported merchandise. Commerce next stated that “[f]or purposes of these final results, therefore, we removed from U.S. price the difference between the rates (*i.e.*, eight percent), which is the irrecoverable VAT as defined under PRC tax law and regulations.” *Id.* (footnote omitted). This also was insufficient as it is not a finding of any specific amount of a tax, duty, or other charge imposed in relation to GTC’s subject exports. Having failed to reach a finding that § 1677a(c)(2)(B) required, Commerce had no statutory authority to make a deduction from GTC’s EP and CEP starting prices. Those deductions, therefore, were contrary to law and must be set aside. Defendant, and Titan and the USW, put forth arguments to the contrary, but the court finds their arguments unpersuasive. The court addresses their principal arguments below.

After discussing record evidence consisting of GTC’s responses to the Department’s questionnaires on VAT, defendant argues that “Commerce properly relied on the information on the record, which demonstrated that the irrecoverable VAT for the subject merchandise was eight percent.” Def.’s Opp’n. 60. This argument is erroneous. Having failed to state the finding the statute required as to GTC’s subject merchandise, Commerce cannot be said to have relied on record information “which demonstrated that the irrecoverable VAT for the subject merchandise was eight percent.” *Id.* (emphasis added). In the absence of the statutorily-required finding, the decision to make the deductions from the EP and CEP starting prices cannot be sustained. The court, therefore, need not reach the question of whether Commerce *could* have made such a finding on the record before it. Without deciding that question, the court notes that Commerce refused to consider certain record evidence probative on the question and, overall, failed to provide an adequate explanation of the reasoning underlying its decision to make the 8% deductions from the EP and CEP starting prices.

Commerce concluded that under Chinese law irrecoverable VAT “is VAT paid on inputs and raw materials (used in the production of exports)” *Final I&D Mem.* 28 (footnote omitted). Commerce also concluded that under Chinese law “the standard VAT levy is 17 percent and the rebate rate for subject merchandise is nine percent.” *Id.* at 29 (footnote omitted). Commerce fails to explain how, in light of these two conclusions, a presumption of GTC’s having incurred an “irrecoverable VAT” charge in the amount of 8% of the value of the subject exports could have been plausible. A simplified example illustrates this point. Based on the Department’s two conclusions about Chinese VAT, as stated above, a subject off-the-road tire exported from China to the United States with an FOB export value of \$100 (to

take a round number) would contain “inputs and raw materials” that were subject to VAT at the rate of 17% applicable to those inputs and raw materials, and the exportation of the tire would have qualified GTC for a VAT rebate of \$9.00. In order for GTC to have incurred a “tax, duty, or other charge,” based on unrefunded VAT, of \$8.00 (in accordance with the Department’s presumption that the irrecoverable VAT was 8% of export value), the actual VAT imposed on the “inputs and raw materials” used in the production of the tire would have had to have been \$17.00, i.e., the \$9.00 in refunded VAT plus the \$8.00 in unrefunded VAT. But for the VAT on the inputs and raw materials to have been \$17.00, those VAT-subject inputs and raw materials would have had to have been valued at \$100, which was the *entire FOB value of the exported tire*. The FOB export values could have included no other costs (for example, no cost of labor, no factory overhead, no selling, general, administrative, or any other expenses), and no profit. In other words, the implication of the Department’s presumption that GTC incurred a net VAT charge of 8% on the value of its subject exported tires is that the 17% standard VAT levy was applied to the entire FOB export value of the tire, with 9% subsequently rebated (for a net VAT charge of 8% of the export value), and not merely to the VAT-subject inputs and raw materials used in production. This appears to be in contradiction with the Department’s own conclusion that the VAT was “paid on inputs and raw materials (used in the production of exports).” *Id.* at 28. The Issues and Decision Memorandum offers no explanation to resolve this apparent contradiction.

Moreover, the record contains evidence consisting of GTC’s responses to the Department’s VAT questionnaires that is probative on the issue of whether GTC possibly could have incurred a net charge for VAT that was in an amount equivalent to 8% of the FOB value of its subject merchandise. This evidence included twelve monthly VAT tax returns (copies of which GTC submitted to Commerce for the record), a calculation of the total VAT incurred on production inputs, and an allocation of that amount to export sales on the basis of sales value. *GTC’s Supplemental VAT Questionnaire Response 1–3 & Exhibits 2–3* (May 28, 2014), ECF No. 45–1. In the review, GTC informed Commerce that “. . . during the POR GTC’s VAT refund based upon the 9% refund rate for export sales exceeded the amount of VAT paid for inputs attributable to exported merchandise.” *Id.* at 3; see GTC’s Br. 18. Commerce refused to consider this evidence because it concluded that GTC “did not provide the reconciliation” the Department requested, that the reconciliation it did provide “would result in an adjustment to irrecoverable VAT based on non-product specific

data” and that “[f]or the calculation of irrecoverable VAT we will not consider allocations across all company sales or across products with different VAT schedules.” *Final I&D Mem.* 30 (footnote omitted).

The record evidence indicates that the Department’s refusal to consider GTC’s submitted evidence was, at least in part, the result of the way that GTC maintained its VAT-related business records in the company’s SAP accounting system.¹⁷ In this regard, GTC points out that VAT was owed on domestic sales, not export sales, on which the VAT rate was zero. GTC’s Reply 4–5. It argues that, consequently, its monthly VAT tax returns necessarily reflect VAT payments on domestic sales made each month and, as a result, “a reconciliation limited to subject merchandise would not be possible”; it also argues that Commerce did not request such. *Id.* at 8. GTC disputes the Department’s finding that GTC’s allocation was over multiple products with different VAT rates and asserts that, with the exception of certain natural rubber (for which GTC alleges there was a lower VAT rate) the VAT rate for its domestic input purchases was 17%. *Id.* at 7. Also, GTC argues that the Department’s refusal to consider GTC’s VAT reconciliation conflicted with 19 C.F.R. 351.401(g)(4) (“The Secretary will not reject an allocation method solely because the method includes expenses incurred . . . with respect to sales of merchandise that does not constitute subject merchandise.”). *Id.* at 8.

It is not necessary that the court accept or reject each of these various arguments as to GTC’s VAT reconciliation. As the court concluded above, Commerce, contrary to the premise of defendant’s argument, relied on a presumption rather than an actual finding of fact that GTC incurred a net VAT charge equivalent to 8% of the FOB value of its subject exports. Had Commerce made an actual finding,

¹⁷ Commerce stated as follows:

In our questionnaires to Double Coin and GTC we asked that if the irrecoverable VAT amount reported is not directly derived as the difference between the VAT tax rate applicable to domestic purchases and inputs and the refund rate for export sales of subject merchandise, then they need to: 1) explain in detail why and provide worksheets demonstrating how to calculate the irrecoverable VAT; 2) reconcile the worksheets to the translated VAT tax returns provided and provide a detailed narrative explanation that describes the calculations shown in the worksheets; and 3) for each reconciling item reported in the worksheets, provide documentation and a citation to Chinese laws and regulations to fully support the reason for the reconciling item. However, the respondents did not provide this information, and the limited information they did provide would result in an adjustment to irrecoverable VAT based on non-product specific data. For the calculation of irrecoverable VAT we will not consider allocations across all company sales or across products with different VAT schedules.

Final I&D Mem. 30 (footnote omitted). Commerce rejected “GTC’s assertion that it provided the exact type of reconciliation to its VAT tax returns that the Department requested” on the ground that the reconciliation was to GTC’s tax returns and not its VAT tax returns. *Id.*

such a finding would have been subjected to judicial review based on the record evidence viewed as a whole, including the evidence Commerce refused to consider.

Defendant also argues that the Department's construction of 19 U.S.C. § 1677a(c)(2)(B) warrants *Chevron* deference, Def.'s Opp'n. 53–57, and that “[n]either the statute nor the statute’s legislative history defines ‘export tax, duty or other charge imposed’ for purposes of this provision,” *id.* at 54. This argument does not address the flaw the court has identified, i.e., the absence of a finding that a charge, of any character, in an amount equal to 8% of export value was imposed and was specific to GTC’s subject merchandise. That is why the court need not reach the question of whether any unrefunded VAT charge that Commerce might have found to have been incurred would have qualified as an “export” tax, duty, or other charge within the meaning of the statute. The statute is not reasonably construed to allow Commerce to substitute a presumption for a finding required by the plain statutory language.

Titan and the USW argue that the statute is silent on how Commerce is to adjust EP and CEP prices for export duties, taxes, and other charges and, in particular, “is silent on how this adjustment should be applied to exports from a non-market economy.” Resp. Br. of Titan and the USW (Dec. 7, 2015) 38, ECF No. 55 (“Titan’s Opp’n”). According to Titan and the USW, having “examined the Chinese VAT system to determine how best to implement the statute and [having] reviewed GTC’s VAT payments and refunds in this case,” Commerce “has made a reasonable determination to apply a rate-based adjustment to U.S. prices for the Chinese government’s imposition of irrecoverable VAT specifically to GTC’s exports of subject merchandise.” *Id.* This argument, too, is unpersuasive.

The presumptive “rate-based adjustment” to which Titan and the USW refer was contrary to the statute, under which a reduction from the starting price for EP or CEP must be in the *amount* of a tax, duty, or other charge imposed by the exporting country in relation to the subject merchandise. Their argument that the statute is silent on how the adjustment is applied to exports from a nonmarket economy country is unavailing because 19 U.S.C. § 1677a(c)(2)(B) makes no mention of nonmarket economy countries. Although the statute has an exception allowing normal value to be determined differently when the exports are from a nonmarket economy country, *see* 19 U.S.C. § 1677b(c), there is no parallel exception for export price or constructed export price, *see* 19 U.S.C. § 1677a(c)(2)(B). In other words, § 1677a(c)(2)(B) applies to a “tax, duty, or other charge imposed by the exporting country” without regard to whether or not that

country is a nonmarket economy country. In either event, Commerce must base any deduction from the EP or CEP starting price on a finding of an amount of a tax, duty, or other charge that is specific to the subject exported merchandise. Rather than do so, Commerce employed a general presumption based on a formula it gleaned from Chinese regulations.

Nor can the court conclude that Commerce has made, in Titan's and the USW's words, a "reasonable determination." The court has discussed certain flaws in the Final Issues and Decision Memorandum, including the lack of an essential finding of fact, but another flaw is the inconsistency in describing the effect of the Department's presumption. At certain points, the memorandum appears to treat the presumption as irrebuttable for any Chinese exporter, as is demonstrated by the following blanket statement:

Irrecoverable VAT is (1) the free-on-board value of the exported good, applied to the difference between (2) the standard VAT levy rate and (3) the VAT rebate rate applicable to exported goods. The first variable, export value, is unique to each respondent and sale while the rates in (2) and (3), as well the formula for determining irrecoverable VAT, are each explicitly set forth in Chinese law and regulations.

Final I&D Mem. 30. This "formula for determining irrecoverable VAT" appears to leave no possibility for a Chinese exporter to rebut the presumption that it has incurred a net VAT cost equal to 8% of the value of the exported goods.¹⁸ The Final Issues and Decision Memorandum also cites a 2012 issuance, *Methodological Change for Implementation of Section 772(c)(2)(B) of the Tariff Act of 1930, as Amended, In Certain Non-Market Economy Antidumping Proceedings*, 77 Fed. Reg. 36,481, 36,482–83 (June 19, 2012), in which Commerce announced a methodology by which it would begin making section 772(c)(2)(B) deductions from export price or constructed export price for goods exported from nonmarket economy countries, including China. In citing this issuance, the Final Issues and Decision Memorandum states that "[w]here the irrecoverable VAT is a

¹⁸ As a source for the presumption and the formula, Commerce cited its own decision in *Prestressed Concrete Steel Rail Tie Wire from the People's Republic of China: Issues and Decision Memorandum for the Final Determination of Sales at Less Than Fair Value*, A-570990, POI 12–13, 5, 9 n.35 (Apr. 28, 2014), available at <http://enforcement.trade.gov/frn/summary/prc/2014-10240-1.pdf> (last visited Jan. 25, 2017). The decision cites a "Circular," Article III.3.4 of Circular 7, as setting forth the formula for calculating irrecoverable VAT on export sales as follows: "irrecoverable VAT = (FOB export value – bonded imports) * (standard VAT levy rate – VAT rebate applicable to exported goods)." The decision memorandum in the cited antidumping duty investigation is not substantial evidence establishing that China imposed a tax, duty, or fee on *GTC's* exported merchandise that amounted to 8% of the value of that merchandise.

fixed percentage of U.S. price, the Department explained [in the 2012 issuance] that the final step in arriving at a tax-neutral dumping comparison is to reduce the U.S. price downward by this same percentage.” *Final I&D Mem.* 28. Elsewhere, the Issues and Decision Memorandum describes imposition of an 8% irrecoverable VAT tax as a presumption that a respondent can rebut. *Id.* at 29 (explaining that Commerce will “use the difference between the [17%] VAT rate and the [9%] refund rate, consistent with PRC regulations, unless the company can show otherwise for the subject merchandise”).

In summary, Commerce substituted a presumption—whether rebuttable or irrebuttable—for an actual finding. The Department’s decision violated 19 U.S.C. § 1677a(c)(2)(B), which reduces an EP or CEP starting price by the amount of the tax, duty, or other charge that is found to have been imposed by the exporting country in relation to the subject exported merchandise, if included in that price. Any deduction made under § 1677a(c)(2)(B) is specific to the EP or CEP starting price. Generalized conclusions about China’s VAT scheme do not suffice. Commerce may not reduce the starting price by a fixed percentage—no matter how derived—that is not the actual amount of a tax, duty, or other charge that the exporting country is found in fact to have imposed. Because Commerce, based on an impermissible construction of 19 U.S.C. § 1677a(c)(2)(B), did exactly that, the court rejects the arguments of defendant and of Titan and the USW and cannot sustain upon judicial review the VAT deductions Commerce made from the starting prices for GTC’s subject merchandise.

2. *The Department’s Selection of Financial Statements for Calculating Surrogate Financial Ratios Was Supported by Substantial Evidence*

According to section 773(c)(1) of the Tariff Act, 19 U.S.C. § 1677b(c)(1), Commerce, as a general matter, is to determine the normal value of subject merchandise from a nonmarket economy country “on the basis of the value of the factors of production utilized in producing the merchandise,” plus “an amount for general expenses and profit plus the cost of containers, coverings, and other expenses.” 19 U.S.C. § 1677b(c)(1). To implement the statutory directive to add amounts for “general expenses and profit,” Commerce typically calculates surrogate values for factory overhead expenses, for selling, general & administrative (“SG&A”) and interest expenses, and for profit, by calculating and applying “financial ratios” derived from the financial statements of one or more producers of comparable mer-

chandise in the primary surrogate country. *See* 19 C.F.R. § 351.408(c)(4).

In selecting financial statements to calculate the surrogate financial ratios, the Department's policy is to use audited and complete statements, which are contemporaneous with the period of review, from one or more market economy producers of identical merchandise. *See Final I&D Mem.* 36; *Prelim. I&D Mem.* 17–18. In the fifth review, the petitioners placed on the record financial statements for two producers in Indonesia, the Department's chosen surrogate country, of merchandise identical to the subject merchandise: PT Gajah Tunggal Tbk (“Gajah Tunggal”) and PT Goodyear Indonesia Tbk (“Goodyear”). *See Petitioners' 4th Surrogate Value Comments*, Attachments 3, 4 (Sept. 2, 2014), ECF Nos. 89–19, 89–20, 89–21. In the Preliminary Results, Commerce used both of these financial statements to calculate the surrogate financial ratios.¹⁹ *Preliminary Results Surrogate Value Mem.*, A-570–912, ARP 13–14 (Sept. 30, 2014), (Admin.R.Doc. No. 265) ECF No. 108–1 (“*Prelim. Surrogate Value Mem.*”).

In the Final Results, Commerce decided to calculate the surrogate financial ratios using only the statements of Goodyear, concluding that “its audited financial statements are complete, contemporaneous with the POR, and include detailed expense lines for raw materials, manufacturing labor, manufacturing energy, and manufacturing overhead.” *Final I&D Mem.* 36. Commerce decided not to use the Gajah Tunggal statements “because Gajah Tunggal's audited financial statements do not contain a line for manufacturing energy.” *Id.* In the Preliminary Results, Commerce computed a cost of energy for Gajah Tunggal using the company's 2013 annual report, which was also on the record and which provided the company's cost of energy as a percentage of the total cost of production. *Id.* However, in the Final Results, Commerce determined that “there may be some inconsistency between Gajah Tunggal's annual report and its audited financial statements.” *Id.* Accordingly, Commerce decided against using the Gajah Tunggal statements and calculated the surrogate financial ratios “only using Goodyear's complete, audited financial statements which break out all relevant manufacturing costs.” *Id.*

GTC argues that Commerce erred in rejecting the Gajah Tunggal statements. *See* GTC's Br. 26. Specifically, GTC argues that “Commerce has a well-established preference for using multiple financial

¹⁹ From these two financial statements, Commerce calculated separate factory overhead expenses, SG&A and interest, and profit ratios for each company and then averaged those ratios to derive a single set of financial ratios.

statements in its surrogate ratio calculations so that the resulting ratios provide a more accurate representation of the industry as a whole rather than a single company.” *Id.* GTC also argues that there was record evidence that could be used to calculate Gajah Tunggal’s energy costs, namely the company’s 2013 annual report, and the Department’s determination that the annual report was unreliable is unsupported by substantial evidence. *Id.* at 27. Finally, GTC argues that Commerce could have taken notice of Gajah Tunggal’s revised 2013 financial statements, which do contain a line item for energy costs. *Id.* at 28–30. The revised 2013 financial statements were not on the record in this review but were on the record in another antidumping proceeding. *Id.*

The court rejects GTC’s arguments. The Department has a statutory obligation to calculate surrogate values using the best available information, *see* 19 U.S.C. § 1677b(c)(1), but the statute also “accords Commerce wide discretion in the valuation of factors of production.” *Shakeproof Assembly Components v. United States*, 268 F.3d 1376, 1382 (Fed. Cir. 2001) (quoting *Nation Ford Chem. Co. v. United States*, 166 F.3d 1373, 1377 (Fed. Cir. 1999)). The Department exercised its discretion in deciding that the Goodyear financial statements were the best available information on the record for calculating surrogate financial ratios.

Commerce acted within its discretion in deciding against the Gajah Tunggal financial statements because of the lack of a breakdown for energy costs. While Commerce adjusted for this deficiency in the Preliminary Results using information from the company’s annual report, it was under no obligation to do so in the Final Results. Nor was Commerce under an obligation to take steps allowing it to use Gajah Tunggal’s revised 2013 financial statements, which were not on the record in this review, when it had a complete, audited, and contemporaneous set of financial statements from Goodyear on the record. As to the use of only the Goodyear statements, Commerce permissibly balanced the advantage of using financial statements of two companies with the advantage of ensuring consistent reporting of the various costs. Upon judicial review, it is not the role of the court to disturb the valid exercise of an agency’s discretion where it discerns no error in fact or law. Therefore, the court sustains the Department’s determination to reject the Gajah Tunggal statements and calculate the surrogate financial ratios using only the Goodyear financial statements.

3. *The Department's Choice of Surrogate Data for Coal Was Supported by Substantial Evidence*

Commerce applied a surrogate value of \$0.15/kg. for steam coal, which GTC used to manufacture the subject merchandise, which value Commerce calculated from Global Trade Atlas (“GTA”) import data for “Bituminous Coal, Not Agglomerated” from Indonesia, Harmonized System subheading 2701.12. *Prelim. Surrogate Value Mem.* 12. In making this calculation, Commerce excluded imports of coal originating in nonmarket economy countries, unspecified countries, and the countries Commerce considered to maintain non-specific export subsidies, which were India, Indonesia, South Korea, and Thailand. *Id.* GTC claims that the Department’s finding that the Indonesian import data were the best available data on the record for valuing steam coal was not supported by substantial evidence. Based on its review of the record evidence available to support that finding, the court declines to grant relief on this claim.

“Congress has vested Commerce with considerable discretion in selecting the ‘best available information’ for use in valuing factors of production.” *Allied Pacific Food (Dalian) Co. Ltd. v. United States*, 32 CIT 1328, 1342, 587 F. Supp. 2d 1330, 1339 (2008) (citing *Nation Ford Chem. Co. v. United States*, 166 F.3d 1373, 1377 (Fed. Cir. 1999)). Commerce stated for the Final Results that “[w]hen selecting SVs [i.e., surrogate values] for use in an NME proceeding, the Department’s preference is to use, where possible, a range of publicly available, non-export, tax-exclusive, and product-specific prices for the POR, with each of these factors applied non-hierarchically to the case-specific facts and with preference to data from a single surrogate country.” *Final I&D Mem.* 38 (footnote omitted).

Commerce chose Indonesia as the surrogate country for valuation of factors of production, a decision GTC does not contest. The record contained two possible sources of Indonesian data for valuing coal: the Global Trade Atlas import data and the price indices published by Argus Coalindo, a source of information on prices for Indonesian coal. *See Final I&D Mem.* 37–39. Commerce determined the Global Trade Atlas data superior to the Argus Coalindo data, concluding that “the GTA data represent actual prices of coal purchases in Indonesia” whereas the Argus Coalindo data represent prices on the international spot market “and thus do not accurately represent the price of coal bought or sold in Indonesia.” *Id.* at 38. Commerce added that “[b]ecause the Argus Coalindo data is for export prices paid for Indonesian coal, GTA data is a better, more specific, source to value coal inputs and fulfills the Department’s standard SV criteria (non-export, broad-market, etc.)” *Id.*

GTC makes three arguments in claiming that the Department's selection of the Global Trade Atlas import data as the best available information was unlawful. GTC argues, first, that the Department's finding that the Argus Coalindo data reflect only export prices is unsupported by record evidence. GTC's Br. 39. Second, GTC argues that Commerce should have found that the Argus Coalindo data are more specific to the input than are the import data and that Commerce "did not have a valid basis for rejecting the Argus/Coalindo price data" when it found insufficient certain "testing slips" for coal samples that GTC submitted for the record to show the heat values of the coal it used. *Id.* at 42. Finally, GTC argues that Commerce incorrectly rejected the Argus Coalindo data on the ground that GTC did not "corroborate the ash and sulfur levels with those specified in the Argus Coalindo or Platts Coal Pricing Methodologies sources." *Id.* at 43 (citing *Final I&D Mem.* 38–39).

GTC bases its first argument, i.e., that Commerce incorrectly found the Argus Coalindo data to be based solely on export data, on record evidence that the Argus Coalindo data are derived from two separate services, Argus and Coalindo. According to GTC, the Department's conclusion regarding prices for Indonesian coal traded on the international spot market "refers only to the Argus data collection methodology; it has nothing to do with the Coalindo data collection methodology," which GTC describes as having been founded to develop specialist pricing services for the Indonesian coal markets and as deriving prices using panels comprised of Indonesian coal producers, consumers and traders. *Id.* at 39–40. GTC also argues that according to the record information on Argus Coalindo, the prices are for deliveries on an FOB Kalimantan basis, apply as much "to a coal buyer (or trader) located in Indonesia as one located elsewhere," and, therefore, should not be considered prices for export only. *Id.* at 40.

It is possible to interpret the Department's finding that "the Argus Coalindo data is for export prices paid for Indonesian coal," as GTC does, to mean that the data are derived *entirely* from export prices. However, it also is possible to interpret the finding as meaning that the data are derived only partly from export prices. But even if the court were to interpret the statement of the finding as GTC does, the court would not conclude that the choice of the Global Trade Atlas import data was not based on substantial evidence. Regarding export prices, the Department's criterion is that surrogate values be "non-export average values," *Prelim. Surrogate Value Mem.*, i.e., averages that are exclusive of export prices. *See also Final I&D Mem.* 38 ("non-export . . . prices"). Regardless of how the finding is interpreted, the Argus Coalindo data, according to record evidence, did not satisfy

the criterion. Commerce cited the “Argus Coalindo Methodology and Specifications Guide,” which describes the Argus data collection team as consisting of “specialist market reporters/analysts in Singapore, Beijing, Tokyo, Sydney, London, Moscow, Washington, Johannesburg and Bogota, drawing on Argus’ global network of energy correspondents.” *Final I&D Mem.* 38 n.135 (citing *GTC’s Second Surrogate Value Submission*, Exhibit 5 (Sept. 2, 2014), ECF No. 89–29). The guide goes on to state:

The market reporters/analysts ask market participants in the survey whether they have bought or sold any Indonesian coal, whether they have heard of any trade in Indonesian coal, and whether they have received or made any bids or offers for Indonesian coal. The participants are asked where they see the level of prices for Indonesian coal traded on the international spot market.

GTC’s Second Surrogate Value Submission, Exhibit 5 (Sept. 2, 2014), ECF No. 89–29. The record evidence supports a finding that the Argus Coalindo database is at least derived in some way from prices on the international spot market. Commerce validly could conclude on the basis of this evidence that export prices influenced the prices in that database. Commerce also determined that Indonesia maintains non-specific export subsidies, *Prelim. Surrogate Value Mem.* 12, a determination GTC does not contest. Seeking to use price data derived solely from the Indonesian market and avoid data on prices of coal exported from Indonesia to other markets, the Department permissibly concluded that its “non-export” criterion had not been satisfied.

For its second argument, GTC maintains that Commerce should have found that the Argus Coalindo data to be more specific to the input it consumed in producing the subject merchandise. See GTC’s Br. 35–38. Specifically, GTC argues that “Commerce has repeatedly recognized a preference for published sources that provide values specific to the coal input used by respondents (particularly with respect to useful heat values (“UHV”)), and it has repeatedly relied on such sources instead of the less-specific import price data.” *Id.* at 36 (emphasis in original; citations omitted). GTC argues, further, that it “provided the Department with ample evidence of the specific UHV ranges for the coal it uses in the production of subject merchandise, including a summary of characteristics (including UHV) for 48 of GTC’s coal testing reports.” *Id.* at 38. According to GTC, “[u]sing this information in conjunction with the Argus/Coalindo pricing data, Commerce had the ability to assign a surrogate value for coal specific

to the heat value of the actual coal input used by GTC.” *Id.*

The court does not agree with GTC that Commerce was *required* by the record data or its past decisions to choose the Argus Coalindo data based on specificity to the input. Commerce concluded that “there is insufficient record data to establish consistent heat values for GTC’s coal during the POR (*i.e.*, GTC provided only a handful of coal testing slips with heat values that vary quite widely).” *Final I&D Mem.* 38. The finding that the submitted testing results vary widely is supported by the record evidence, which shows, for both the minimum and the maximum heat values in the samples, that the highest value is considerably higher than the lowest value. *See GTC’s Supplemental Section C&D Responses*, Exhibit SD-8 (Conf.) (June 17, 2014), ECF No. 45–3. Referring to a simple average of the minimum and maximum heat values in its coal testing slips, respectively, GTC states that “[u]sing the summary sheet [*i.e.*, for its testing reports] and underlying coal test reports to calculate a simple average, it is evident that the UHV for GTC’s coal is in the 4748–4996 Kcal/Kg range.” GTC’s Br. 41. But the two simple averages do not demonstrate that the heat values consistently were in a narrow range, and according to the record data, they were not.

Further to its argument on useful heat values, GTC argues that Commerce had an obligation under 19 U.S.C. § 1677m(d) to inform GTC that its heat value data were deficient and provide GTC the opportunity to remedy or explain the deficiency. GTC’s Br. 41–42. This argument is unconvincing. Commerce never found the heat value data “deficient” for purposes of § 1677m(d). Had it done so, it would have been required to give GTC the opportunity to remedy or explain before using substitute information, *i.e.*, “facts otherwise available,” or an “adverse inference,” according to 19 U.S.C. § 1677e; here, Commerce did not invoke that authority and simply used other available record evidence to make its determination. Commerce was not obligated by § 1677m(d) to inform GTC that ultimately it would consider the GTC’s submitted heat value data insufficiently probative on the issue for which GTC offered it and, on that ground, disagree with GTC’s argument that the Argus Coalindo data should be preferred to the import data.

GTC’s third argument takes issue with the Department’s statement in the Final Issues and Decision Memorandum that “[t]hough GTC did provide a limited selection of coal testing slips with heat values, GTC made no effort to corroborate its ash and sulfur levels with those specified in the Argus Coalindo or Platts Coal Pricing Methodologies

sources.” *Id.* at 43 (citing *Final I&D Mem.* 38–39). GTC argues that “[t]his reasoning must be rejected” because Commerce, in past cases in which it valued coal, did not raise the same objection as to ash and sulfur levels and in this case “fails to cite a *single instance* in which it rejected coal prices specific by heat value because the record lacked information regarding sulfur or ash content.” *Id.* at 43. GTC adds that “to say that UHV is not a key component for categorizing GTC’s coal runs counter to the Department’s own practice.” *Id.* It also asserts that Platts Coal Pricing Methodologies is another information service unrelated to Argus Coalindo and that the importance of heat values is shown by the Argus Coalindo data because “while Argus/Coalindo does reference sulfur and ash content in its specifications, the pricing data is provided by grade with specific reference to heat value alone.” *Id.* at 44. GTC then reasserts, as to the ash and sulfur issue it raises, its unconvincing argument that “if Commerce believed that there was a deficiency with respect to this information, it had an obligation to notify GTC and provide GTC with an opportunity to provide such information.” *Id.* GTC adds that “[i]t is undisputed that GTA import data fails to provide prices specific to heat values, *or* sulfur and ash content, whereas it is clear that the Argus/Coalindo prices are specific to heat values.” *Id.* (emphasis in original),

The court is unconvinced by GTC’s third argument. Neither the record data on sulfur and ash content, nor the Department’s comments on those data, are sufficient to cause the court to disallow as unsupported by record evidence the finding that the Global Trade Atlas import data were the best available information for valuing GTC’s coal input. Commerce did not conclude that heat value information was unimportant as to the issue of specificity. Nevertheless, given the limitation posed by the significant variation in the heat value test data GTC submitted, Commerce was justified by the record evidence in rejecting GTC’s argument, as made during the review, that the Argus Coalindo must be preferred to the Global Trade Atlas import data because of specificity to the input. GTC summarizes its arguments by asserting that “the record demonstrates that the Argus/Coalindo data satisfy the Department’s surrogate value criteria and are more product specific than any other source available on the record,” *id.* at 45, but this argument ignores that the Argus Coalindo data, according to record data, did not meet the Department’s criterion that the data it uses be based on averages that are exclusive of export prices. Commerce was justified in finding the heat value data GTC submitted insufficiently probative on the question of specificity to the input when weighed against the record data showing

that the Argus Coalindo data were not exclusive of data derived from prices for coal exported from Indonesia.

For the foregoing reasons, the court does not grant relief on GTC's claim challenging the steam coal surrogate value.

4. *The Department's Finding that its Calculations of GTC's Brokerage & Handling and Ocean Freight Costs Were Free of Double-Counting Is Not Supported by Substantial Evidence*

Under section 772(c)(2) of the Tariff Act, 19 U.S.C. § 1677a(c)(2), Commerce is to reduce constructed export price by "the amount, if any, included in such price, attributable to any additional costs, charges, or expenses, and United States import duties, which are incident to bringing the subject merchandise from the original place of shipment in the exporting country to the place of delivery in the United States." 19 U.S.C. § 1677a(c)(2)(A). Among the Department's deductions from the CEP starting prices were surrogate amounts representing the nonmarket economy cost incurred in China for export brokerage and handling ("B&H") and the nonmarket economy cost of trans-Pacific ocean freight from China to the United States. *See Prelim. I&D Mem.* 23. GTC claims that the deductions Commerce made in these two categories were improper because they double-counted certain costs. GTC's Br. 47–51.

Commerce valued the trans-Pacific ocean freight using price quotes submitted by GTC and obtained from a website listing ocean freight costs, <http://rates.descartes.com>. *Prelim. Surrogate Value Mem.* 15. Commerce valued export brokerage and handling using information in a report published in 2013 by the World Bank as *Doing Business 2014: Indonesia*, "Trading Across Borders Indicators." *Id.* at 16. From the World Bank publication, Commerce used prices for what it described as "a price list of export procedures necessary to export a standardized cargo of goods from Indonesia." *Prelim I&D Mem.* 27. Commerce concluded that there was no double-counting between the two data sources, noting that "*Doing Business* states that its trading-across-borders methodology measures the 'cost necessary to complete every official procedure for exporting and importing' a 'standardized cargo of goods by seaport,' but not the 'cost for sea transport' itself." *Final I&D Mem.* 44 (footnotes omitted).²⁰

²⁰ Although *Doing Business* included costs for both exporting out of Indonesia, and importing into Indonesia, a standard fully loaded cargo container, Commerce used only the charges listed therein for exporting.

The price list Commerce assembled from the data in *Doing Business 2014: Indonesia* consisted of the following three costs: “Documents preparation” at “\$165”; “Customs clearance and technical control” at “\$125”; and “Ports and terminal handling” at “\$165.” *Doing Business 2014: Indonesia* 81. Commerce divided the total of the three costs, \$455, by the weight of the “standardized cargo of goods from Indonesia,” which, based on information concerning the Trading Across Borders methodology provided by Titan and the USW, it determined to be 10,000 kilograms, to calculate “a cost of 0.0455 USD per kilogram in brokerage and handling fees for goods exported from Indonesia,” its chosen surrogate country. *Id.* at 16. GTC does not contest the Department’s method of calculation *per se*; its claim, instead, is that several cost elements included in the Descartes ocean freight price quotes are also included in the brokerage and handling costs Commerce derived from the *Doing Business* report.

As double-counted costs, GTC points to the following “Documentation Charges,’ ‘Traffic Mitigation [sic] fee,’ ‘AMS Charge,’ ‘Clean Truck Fee,’ ‘Chassis Usage Charges,’ ‘Shanghai Port Charges,’ ‘International Ship & Port Security charges,’ and ‘ISD Handling Charge.’” GTC’s Br. 49. These items are listed separately in one or more of the Descartes quotes. On each quote, separate from these items, is a cost item for “Ocean Freight.” GTC Mot. Appx. Part 3, Document 7, Exhibit 9, ECF No. 45–3 (“Descartes quotes”).

Commerce stated in the Preliminary Surrogate Value Memorandum that “[w]e did not exclude any ocean freight handling costs” from the Descartes quotes “as they appeared to be necessary for the shipment of freight and did not appear to have been covered by other brokerage and handling calculations.” *Prelim. Surrogate Value Mem.* 15. Commerce also stated in the Final Decision Memorandum that “[t]he surcharges on the Descartes quotes do not appear to overlap with the B&H charge related to exporting, but simply appear to be additional fees imposed by the ocean freight company in order to transport the merchandise from the Chinese port of origin to the U.S. destination port.” *Final I&D Mem.* 44.

Upon examining the record evidence consisting of the *Doing Business 2014: Indonesia* report and the documentation showing the Descartes quotes, the court cannot sustain the Department’s finding that there was no double counting in the Department’s use of the two data sources. The court does not decide that each of the charges identified by GTC necessarily was double counted, but it notes that Commerce stated its finding of no double-counting only generally and not specifically as to each of the charges in the Descartes quotes that GTC identified during the review and to which it now directs the court’s

attention. Commerce, therefore, did not address the specific question of whether certain charges in the Descartes quotes overlap those in the *Doing Business* report. As an example, one of the three cost elements in the Department's calculation of the \$455 brokerage and handling cost from that report is "Documents preparation" at \$165. Commerce did not address the specific question of whether this charge overlapped with the item identified on certain of the Descartes quotes as "Documentation Charges" of \$45 and the item listed on one of the quotes as "Doc. Handling Charges" of \$60. As another example, Commerce also included in the \$455 total a charge for "Ports and terminal handling" at \$165. Commerce does not explain its reasoning for its apparent conclusion that this had no overlap with "Shanghai Port Charges" of \$66, which is listed on one of the Descartes quotes. Because the Department's finding that no double-counting occurred is not supported by substantial evidence, the court must remand the Department's decisions as to deductions from CEP for brokerage and handling, and for ocean freight, for reconsideration. In reconsidering these decisions, Commerce should address specifically each of the charges in the Descartes quotes that GTC identifies as charges that overlap with the charges Commerce obtained from the *Doing Business* report.

5. *The Department's Decision Not to Make a Cost-of-Living Adjustment to the Surrogate Value for Domestic Warehouse Costs Was Unsupported by Substantial Evidence*

GTC challenges the Department's surrogate valuation of domestic (Chinese) warehouse costs. In the Preliminary and Final Results, Commerce calculated a surrogate value for domestic warehouse costs using a publicly available price quote from GIC Logistics Group, an Indonesian warehousing and logistics provider. *Prelim. I&D Mem.* 29; *Final I&D Mem.* 45. Because they are not considered publicly available, Commerce prefers not to use price quotes, but "[w]hen there are no better alternatives, . . . Commerce may use price quotes." *Vinh Quang Fisheries Corp. v. United States*, 33 CIT 1277, 637 F. Supp. 2d 1352, 1358 (2009). In this case, the price quote Commerce used was the only evidence for valuing domestic warehouse costs that was submitted for the record. *See Final I&D Mem.* 45.

GTC is not arguing that Commerce should have refrained from using the price quote, only that Commerce should have adjusted it for inflation so as to make it contemporaneous with the period of review. GTC argues that the date given for the price quote used to value domestic warehouse costs was April 9, 2014 and that because that date was more than seven months after the end of the period of review

on August 31, 2013, Commerce should have deflated it using the Producers Price Index (PPI) to make it contemporaneous with the period of review. See GTC's Br. 51. GTC argues further that "Commerce's view that the cost for warehousing during the POR may have been the same as the cost reflected in the April 2014 price quote is nothing more than unfounded conjecture" and "[i]t is improper for Commerce to base its decisions on such speculation rather than actual record evidence." *Id.* at 53.

Commerce regards contemporaneousness with the POR as important to its ensuring it is valuing factors of production as accurately as possible. See *Jinan Yipin Corp. Ltd. v. United States*, 35 CIT __, 800 F. Supp. 2d 1226, 1292 n.76 (2011). The price quote itself is undated, but the website from which the quote originated was accessed on April 9, 2014. See *Petitioner's Initial Surrogate Value Comments*, Attachment 18 (Apr. 14, 2014), ECF No. 86-43. The date the site was accessed is not itself contemporaneous with the period of review, which began on September 1, 2012 (19 months before the date the site was accessed) and ended on August 31, 2013 (7 months before that date). In the Preliminary Surrogate Value Memorandum, Commerce stated that "[w]e did not inflate [*sic*]" the value calculated for domestic warehouse costs "because it is contemporaneous with the POR." *Prelim. Surrogate Value Mem.* 15. In the Final Results, Commerce justified its decision not to deflate the surrogate value for domestic warehouse costs on the ground that "there is no indication that the quoted price was not in effect during the POR and no party provided a better source of data for the warehouse cost." *Final I&D Mem.* 45.

"[I]t is not sufficient for Commerce to simply rely on the absence of evidence to reach its decision." *Shandong Huarong Machinery Co. v. United States*, 29 CIT 484, 498 (2005). Commerce does not explain whether, or why, its decision not to adjust the surrogate value for inflation should be considered to have produced a more accurate margin. For example, Commerce offers no discussion of evidence on price trends in Indonesia during the period in question as context for its decision, or on whether the record even contained such evidence. Without deciding the question of whether Commerce should have deflated the value according to the date the site was accessed, a date that was of limited probativity on the question of contemporaneity with the POR, the court directs Commerce to reconsider its decision not to make a cost-of-living adjustment and provide a more thorough analysis of the issue that is grounded in whatever relevant evidence exists on the record.

E. The Remaining Claims of Titan and the USW

1. Commerce Did Not Err in Finding that Double Coin Complied with Its Instruction to Revise the Reporting of Freight Distances for Materials

Titan and the USW argue that Double Coin failed to comply with the Department's instruction for submitting corrected reporting of the travel distances for manufacturing inputs, which Commerce used in the calculation of surrogate freight expenses as a component of the determination of the normal value of Double Coin's merchandise. They claim the Department's finding that Double Coin's revised reporting complied with the Department's instruction was not supported by substantial evidence on the record. Titan's Br. 24–25. The court denies relief on this claim.

In calculating normal value for the subject merchandise of GTC and Double Coin, Commerce added surrogate freight costs to the surrogate values for Double Coin's materials inputs so that these prices would represent prices as delivered to the point of tire manufacturing. See *Prelim. I&D Mem.* 25. Commerce calculated these freight expenses by applying to the reported distances an Indonesian surrogate value for the cost of freight. In doing so, Commerce applied what it described as its “*Sigma*” methodology, which involves “assuming the input price is equal between different suppliers and a respondent will select the preferred supplier based upon minimizing freight costs.”²¹ Def.'s Opp'n 47 (citing *Amended Final Results of Redeterm. Pursuant to Court Remand, Sigma Corp. v. United States*, Consol. Court Nos. 91–02–00154, 92–04–00283 (Jan. 30, 1998)). As explained by defendant, the Department's practice of calculating surrogate domestic inland freight costs is to use the shorter of: (1) the distance from the respondent's domestic supplier to the respondent's production facility; or (2) the distance from the nearest ocean port to the respondent's production facility, which Commerce calls the “*Sigma* cap distance.” Def.'s Opp'n 46–47, 77. In explaining its methodology in the fifth review, Commerce stated that “[i]f there are multiple suppliers for one input, the Department caps the distance for each supplier before calculating a weighted-average distance for purchases of that input.” *Prelim. Surrogate Value Mem.* 14.

The issue underlying Titan's and the USW's claim arose because “at verification, the Department observed and Double Coin acknowl-

²¹ In *Sigma Corp. v. United States*, the Court of Appeals for the Federal Circuit employed a presumption that a nonmarket economy producer would seek inputs with lower freight costs when deciding between domestically-produced and imported inputs. 117 F.3d at 1408.

edged that the sub-*Sigma* cap distances reported for certain suppliers corresponded to trading companies from which certain inputs were purchased and not the actual producer/supplier of that input.” *Letter from Dept Commerce to Curtis, Mallet-Prevost, Colt & Mosle LLP re: Request for Revised FOP and U.S. Sales Databases 1* (Sept. 16, 2014) (Admin.R.Doc. No. 253), ECF No. 89–42 (“*Commerce Letter*”). Commerce instructed as follows: “Accordingly, please re-report the supplier distances for all uncapped sub-*Sigma* suppliers to the *Sigma*-capped distance, as appropriate.” *Id.*

In their brief, Titan and the USW state that “[i]n the *Final Results*, Commerce agreed that Double Coin had not shown that it had revised the distances in its database as instructed, but stated that Commerce’s ‘review of the changes. . . demonstrate[d] that the requested changes were properly reported.’” Titan’s Br. 13 (quoting *Final I&D Mem.* 49). Titan’s and the USW’s statement informing the court that “Commerce agreed that Double Coin had not shown that it had revised the distances in its database as instructed” does not accurately characterize the record. The relevant statements in the Final Issues and Decision Memorandum are as follows:

We note that Double Coin certified that it made all requested corrections in its Post-Verification Corrections submission and further confirmed that it capped the underlying line item distances at the distance to the port for the trading companies (rather than the distance to the trading companies), as requested. Though Double Coin’s resubmission did not include the underlying worksheets demonstrating the change for every supplier (nor was such information requested), our review of the changes to the overall distances reported for each input between the most recent factors of production (“FOP”) database and the preceding database demonstrate that the requested changes were properly reported.

Final I&D Mem. 49. The Final Issues and Decision Memorandum does not indicate the Department’s agreement with the notion that Double Coin had not shown it had revised the freight distances as Commerce had instructed. Any reasonable inference that can be drawn is to the contrary.

In the statement of facts in their Rule 56.2 brief, Titan and the USW state that “[p]er Commerce’s instructions, the freight distance for each of Double Coin’s FOPs should have been calculated as the weight-averaged *Sigma* distances.” Titan’s Br. 10. They later repeat this alleged fact in their argument, stating that “[a]s discussed above, Commerce instructed Double Coin to report all its freight distances

using the capped *Sigma* distances once it discovered that Double Coin had misreported the freight distances.” Titan’s Br. 24. The court does not accept this allegation as the uncontested fact Titan and the USW allege it to be. The Department’s instruction was that Double Coin “re-report the supplier distances for all uncapped sub-*Sigma* suppliers to the *Sigma*-capped distance, *as appropriate.*” *Commerce Letter* 1. Although this sentence can be interpreted to mean, as Titan and the USW do, that Commerce wanted Double Coin to re-report all of its freight distances to the *Sigma*-capped distance, i.e., the distance from the nearest port to the tire plant rather than the distance from the material supplier to the tire plant, several considerations caution against acceptance of Titan’s and the USW’s interpretation. The first consideration is the language Commerce used in the instruction. In addition to the words “as appropriate,” the previous sentence suggests a more limited context: “at verification, the Department observed and Double Coin acknowledged that the sub-*Sigma* distances reported for certain suppliers corresponded to trading companies from which certain inputs were purchased and not the actual producer/supplier of that input.” *Id.*

Second, the problem Commerce identified involved distances from trading companies. Therefore, it is not clear to the court why Commerce would have required Double Coin to use the distance between the tire plant and the port in all cases, even if there was a shorter distance from the tire factory to a material supplier that was *not* a trading company. Had Commerce done so, it would have imposed a requirement that would have departed from its established *Sigma*-derived practice of using the shorter of the two distances.

Finally, Commerce itself was in the best position to interpret its instruction (as well as whether Double Coin complied with it), and Commerce did not interpret the instruction as Titan and the USW do. Commerce stated in the Final Issues and Decision Memorandum that Double Coin “confirmed that it capped the underlying line item distances at the distance to the port for the trading companies (rather than the distance to the trading companies), as requested.” *Final I&D Mem.* 49 (“our review of the changes to the overall distances reported for each input between the most recent factors of production (‘FOP’) database and the preceding database demonstrate that the requested changes were properly reported.”).

Titan and the USW include in the fact section of their brief a recalculation of Double Coin’s freight distances in which they attempt to demonstrate that Double Coin did not follow the Department’s instructions and continued to misreport the freight distances. Titan’s Br. 12–13. Their recalculation, however, is based on their own inter-

pretation of the Department's instructions. *Id.* at 10.

In summary, the court finds no error in the Department's determination that Double Coin complied with the instructions Commerce issued to obtain a re-reporting of Double Coin's freight distance data base.

2. *The Court Denies Relief on Titan's and the USW's Claim Contesting the Inventory Carrying Cost Deduction for Sales by CMA*

Because Double Coin's U.S. sales were made to an affiliated entity, CMA, Commerce calculated CEP based on the first sale from CMA to an unaffiliated customer, as provided under 19 U.S.C. § 1677a(b). Commerce adjusted the CEP starting prices for expenses related to commercial activity in the United States, including inventory carrying costs, as provided under 19 U.S.C. § 1677a(d)(1). Titan and the USW claim that Commerce acted contrary to the record evidence in accepting Double Coin's and CMA's method of estimating time in inventory for purposes of calculating the inventory carrying cost deduction. Titan's Br. 3. According to their argument, "[t]he record showed that Double Coin's methodology produced an inaccurate and severe under-counting of time spent in inventory." *Id.*

In the Final Issues and Decision Memorandum, Commerce concluded that "[b]ecause CMA does not track the movement of individual tires into its warehouse, the inventory carrying cost calculation must necessarily rely on an estimate of average days in inventory." *Final I&D Mem.* 55. Commerce explained, further, that CMA "does not track individual tires to a specific shipment into their warehouses, and the accounting for warehouse inventory only tracks the quantity of a given product in and out of inventory." *Id.* at 56 (footnote omitted). Commerce also stated:

Because they do not know when the first shipment of a tire that has gone out for sale came in, Double Coin utilized a last-in-first-out ("LIFO") method to estimate average days in inventory for reporting its inventory carrying costs because company officials know exactly when a tire went out for sale and exactly when the last instance of that type of tire came in to the warehouse.

Id. Commerce found, further, that "[a]s support for this method, CMA provided and Department officials reviewed documentation demonstrating that, for certain models of their larger selling tires, the inventory is moving out of inventory at a quicker pace than it is replaced." *Id.* (footnote omitted).

Commerce stated for the Final Results that “we previously found that the methodology used by Double Coin to determine average days in inventory is acceptable and verified that the relevant information was properly reported.” *Id.* Commerce further stated that “we continue to find Double Coin’s reported inventory carrying costs, based on CMA’s LIFO method of estimating average days in inventory, to be acceptable and appropriate for use in these final results.” *Id.*

During the fifth review, the petitioners, Titan and the USW, argued to Commerce that according to what they termed a “typical” methodology for determining time in inventory, the average time in inventory should have been calculated as 290.6 days. *Id.* at 55. Commerce described the methodology favored as “typical” by Titan and the USW as “computing a ratio of the average inventory value during the POR to the total sales during the POR and then applying that ratio to the number of days in a year.” *Id.* Titan and the USW argued to Commerce that this estimate is supported by record evidence and that the estimate resulting from the LIFO methodology reported by Double Coin, which according to Titan and the USW “results in an average of 13.5 days in inventory for each tire sold,” was not. *Id.* Commerce rejected this position in the Final Results, concluding, *inter alia*, that “Petitioners provide no evidence or argument to support their contention that their calculation is more accurate or otherwise representative of Double Coin’s commercial reality.” *Id.* at 56. Commerce concluded, further, that the calculation offered by Titan and the USW “is based on total sales and inventory values for all products[,] both subject and nonsubject.” *Id.* Titan and the USW make the same argument before the court. Titan’s Br. 25 (“As has been explained, using the commonly accepted method of calculating average time in inventory based on average inventory levels and total sales during the period, the average time Double Coin’s products spent in inventory was 290.6 days, over 21 times the 13.5 day average period submitted by Double Coin.”) (citing *Final I&D Mem.* 55–56).

Because neither the statute, 19 U.S.C. § 1677a(d)(1), nor the regulations specify a method for calculating inventory carrying costs, the court reviews the Department’s decision to accept CMA’s method of estimating average time in inventory according to an abuse of discretion standard. That decision was supported by the finding that CMA’s method was directed to subject merchandise while the suggested alternative considered all CMA merchandise, a finding Titan and the USW do not contest. The decision to choose CMA’s method over the suggested alternative was also supported by the uncontested finding that “CMA provided and Department officials reviewed documenta-

tion demonstrating that, for certain models of their larger selling tires, the inventory is moving out of inventory at a quicker pace than it is replaced.” *Final I&D Mem.* 56 (footnote omitted). Commerce grounded its decision in an explanation of its findings and its reasoning. The court concludes that Commerce acted within its discretion in adopting the CMA method rather than the only alternative Titan and the USW put forth.

3. *The Court Denies Relief on Titan’s and the USW’s Claim that Commerce Miscalculated the Freight Expenses for GTC*

Titan and the USW challenge the Department’s calculation of surrogate freight costs for GTC’s material inputs. They argue that Commerce erred in using as its cap on freight distance the “*Sigma*” distance, i.e., the distance from the tire plant to the nearest port, rather than the distance to a port GTC used in importing its market-economy (“ME”) purchases of materials. Titan’s Br. 27. According to their argument, the Department’s decision was not supported by substantial evidence because “Commerce recognized that the record showed that GTC did not in fact use the nearest port for imports.” *Id.* They argue, further, that Commerce “used the nearest port as the *Sigma* cap distance because it was its practice to make this presumption, which presumption Commerce argues was directed by the Federal Circuit in *Sigma*.” *Id.* They argue that the Court of Appeals “did not direct this particular outcome” in *Sigma*, which in their view did not direct Commerce “to apply a particular method” but “only directed Commerce to consider how a producer would act in sourcing inputs.” *Id.* at 27–28.

In the Preliminary and Final Results, Commerce “used GTC’s reported distance from the factory to the closest commercial port (i.e., the Port of Fengcheng, at 710 km) as the *Sigma* cap distance.” *Final I&D Mem.* 47. Commerce determined that “[t]he record also demonstrates that GTC’s ME input purchases and finished goods exports predominantly transit through a different port (or ports), which is (are) at a greater distance from GTC’s factory.” *Id.*

In support of their claim, Titan and the USW summarize their arguments by asserting that “Commerce’s reliance on its practice as an irrebuttable presumption was not directed by the Federal Circuit, is contrary to substantial evidence on the record, and is otherwise not in accordance with the law.” Titan’s Br. 29. The court disagrees with these three arguments.

For the Final Results, Commerce stated that it considered, and declined to follow, the petitioners' suggestion that Commerce "alter the Department's long established practice of capping import distances to the closest port . . . for its ME imports and export sales." *Final I&D Mem.* 47. Titan's and the USW's argument that the *Sigma* decision did not require the particular methodology Commerce used is unpersuasive because Commerce, in the Final Results, did not state that the holding in *Sigma* compelled it to apply that particular methodology. Instead, in the Final Issues and Decision Memorandum, Commerce described its adherence to its prior practice as follows:

Specifically, the Department added to Indonesian import SVs [surrogate values] a surrogate freight cost using the shorter of the reported distance from the domestic supplier to the factory or the distance from the nearest seaport to the factory where it relied on an import value. This adjustment is in accordance with the decision of the Federal Circuit in *Sigma* . . .

Id. (footnote omitted). Commerce did not describe its decision as based on a conclusion that the holding in *Sigma* would permit no other method. Instead, Commerce grounded its decision in its "long-standing Department practice following the Federal Circuit's holding in *Sigma*." *Id.* (emphasis added).

Nor can the court agree that the Department's decision was not supported by substantial evidence on the record. Titan and the USW do not point to a finding of fact Commerce made that they allege to be unsupported by record evidence; instead, they argue that the decision on the whole was not supported by substantial evidence because "Commerce recognized that the record showed that GTC did not in fact use the nearest port for imports." Titan's Br. 27. Properly construed, their claim is not that Commerce reached an invalid finding of fact but that Commerce should have used a different methodology. As Titan and the USW implicitly acknowledge, Commerce found that GTC used a port other than the nearest port for its *market economy* inputs (as well as export sales). See *Final I&D Mem.* 47. Commerce simply chose not to adopt the petitioners' suggestion that the distance to this farther port be adopted as the *Sigma* cap distance for the nonmarket economy inputs.

Finally, the court rejects Titan's and the USW's vague assertion that the Department's decision not to adopt their suggestion on GTC's freight costs was "otherwise not in accordance with the law." Titan's Br. 29. Because the statute and the regulations are silent on how Commerce is to determine freight distances when calculating surro-

gate freight costs for a respondent's nonmarket economy input purchases, the court considers the Department's decision according to an abuse of discretion standard. The court discerns no violation of law in the Department's decision not to depart from its standard methodology in the circumstance presented.

III. CONCLUSION

For the reasons discussed in the foregoing, the court remands the determination of the International Trade Administration, U.S. Department of Commerce published as *Certain New Pneumatic Off-the-Road Tires from the People's Republic of China: Amended Final Results of Antidumping Duty Administrative Review; 2012–2013*, 80 Fed. Reg. 26,230 (Int'l Trade Admin. May 7, 2015) for reconsideration and redetermination. Therefore, upon consideration of all papers and proceedings in this case, and upon due deliberation, it is hereby

ORDERED that the *Amended Final Results* be, and hereby are, set aside as unlawful and remanded for reconsideration and redetermination in accordance with this Opinion and Order; it is further

ORDERED that Commerce shall issue, within ninety (90) days of the date of this Opinion and Order, a new determination upon remand ("Remand Redetermination") that conforms to this Opinion and Order; specifically, the Remand Redetermination shall assign the individual weighted-average dumping margin to Double Coin as directed in this Opinion and Order and shall redetermine GTC's margin as necessary; it is further

ORDERED that plaintiffs and intervenors may file comments on the Remand Redetermination within thirty (30) days from the date on which the Remand Redetermination is filed with the court; and it is further

ORDERED that defendant may file a response within fifteen (15) days from the date on which the last of any such comments is filed with the court.

Dated: February 6, 2017
New York, New York

/s/ Timothy C. Stanceu

TIMOTHY C. STANCEU
CHIEF JUDGE

Slip Op. 17–13

DYNAENERGETICS U.S. INC., Plaintiff, v. UNITED STATES, Defendant, and
MAVERICK TUBE CORP., Defendant-Intervenor.

Before: Mark A. Barnett,
Judge Court No. 16–00045

[Remanding Commerce’s scope determination for reconsideration in accordance with Defendant’s request for a remand.]

Dated: February 7, 2017

Diana Dimitriuc Quaia, *John M. Gurley*, and *Aman Kakar*, Arent Fox LLP, of Washington, DC, for plaintiff.

Justin R. Miller, Senior Trial Counsel, International Trade Field Office, Commercial Litigation Branch, Civil Division, U.S. Department of Justice, of New York, NY, for defendant. With him on the brief were *Benjamin C. Mizer*, Principal Deputy Assistant Attorney General, *Jeanne E. Davidson*, Director, and *Claudia Burke*, Assistant Director.

Alan H. Price, *Robert E. DeFrancesco, III*, and *Adam M. Teslik*, Wiley Rein LLP, of Washington, DC, for defendant-intervenor.

MEMORANDUM AND ORDER

Barnett, Judge:

This matter is before the court on Plaintiff DynaEnergetics U.S. Inc.’s (“DynaEnergetics”) motion for judgment on the agency record pursuant to U.S. Court of International Trade Rule 56.2. Confidential Pl. DynaEnergetics U.S. Inc.’s Rule 56.2 Mot for J. on the Agency R., ECF No. 32–1; Confidential Pl. DynaEnergetics U.S. Inc.’s Br. in Supp. of its Rule 56.2 Mot. for J. on the Agency R. (“Pl.’s Mot”), ECF No. 32. Plaintiff challenges the final scope ruling by the U.S. Department of Commerce (“Commerce”) that its customized carrier tubing for perforating guns is within the scope of the antidumping (“AD”) and countervailing duty (“CVD”) orders on *Certain Oil Country Tubular Goods* (“OCTG”) from the People’s Republic of China, 75 Fed. Reg. 28,551 (Dep’t Commerce May 21, 2010) (antidumping duty order and amended less than fair value determination) (“AD Order”), 75 Fed. Reg. 3,203 (Dep’t Commerce Jan. 20, 2010) (countervailing duty order and amended final countervailing duty determination) (“CVD Order”) (collectively, “AD & CVD Orders” or “Orders”). *See generally* Pl.’s Mot; *see also* Antidumping and Countervailing Duty Orders on Certain Oil Country Tubular Goods from the People’s Republic of China: Final Scope Ruling on DynaEnergetics U.S. Inc.’s Perforating Gun Carriers (February 12, 2016) (“Final Scope Ruling”), ECF No.

20–1, Public Record (“P.R.”) 20, ECF No. 19.¹ Defendant requests a remand to fully consider the arguments raised by the Plaintiff. Def.’s Resp. to Pl.’s Rule 56.2 Mot. for J. on the Agency R. and App. (“Def.’s Resp.”), ECF No. 39. Defendant-Intervenor Maverick Tube Corporation (“Maverick”) opposes Defendant’s request for remand and asks that the court rule on the merits of Plaintiff’s motion. Confidential Intervenor-Def. Maverick Tube Corp.’s Resp. to Pl. DynaEnergetics U.S., Inc.’s Br. in Supp. of its Rule 56.2 Mot. for J. on the Agency R. (“Def.-Intervenor’s Resp.”), ECF No. 41. For the reasons set forth below, the court grants the Defendant’s request to remand the determination to Commerce for further consideration and explanation.

BACKGROUND

Commerce initiated AD and CVD investigations of certain OCTG from the People’s Republic of China (“PRC”) on May 5, 2009. *Oil Country Tubular Goods from the People’s Republic of China*, 74 Fed. Reg. 20,671 (Dep’t Commerce May 5, 2009) (AD investigation initiation); *Certain Oil Country Tubular Goods from the People’s Republic of China*, 74 Fed. Reg. 20,678 (Dep’t Commerce May 5, 2009) (CVD investigation initiation). AD and CVD orders were issued on May 21, 2010 and Jan 20, 2010, respectively. *See generally* AD & CVD Orders. The scope of the antidumping and countervailing duty orders was defined as:

[C]ertain OCTG, which are hollow steel products of circular cross-section, including oil well casing and tubing, of iron (other than cast iron) or steel (both carbon and alloy), whether seamless or welded, regardless of end finish (*e.g.*, whether or not plain end, threaded, or threaded and coupled) whether or not conforming to American Petroleum Institute (“API”) or non-API specifications, whether finished (including limited service OCTG products) or unfinished (including green tubes and limited service OCTG products), whether or not thread protectors are attached. The scope of the order also covers OCTG coupling stock. Excluded from the scope of the order are: casing or tubing containing 10.5 percent or more by weight of chromium; drill pipe; unattached couplings; and unattached thread protectors.

AD Order, 75 Fed. Reg. at 28,553; *see also* CVD Order, 75 Fed. Reg. at 3,203–04. The notices also included relevant U.S. Harmonized Tariff Schedule (“HTSUS”) subheadings, which Commerce provided for

¹ Defendant filed public and confidential versions of the administrative record as ECF No. 19. All further citations are to the public version, unless otherwise specified. Defendant separately filed Commerce’s instructions to Customs as ECF Nos. 26 and 27.

“convenience and customs purposes only” noting that the “written description of the scope of the order is dispositive.” AD Order, 75 Fed. Reg. at 28,553; CVD Order, 75 Fed. Reg. at 3,204.

On September 25, 2015, DynaEnergetics requested a scope ruling to determine whether its gun carrier tubing falls outside the scope of the AD and CVD orders. Confidential App. to Pl. DynaEnergetics U.S., Inc.’s Br. in Supp. of its Rule 56.2 Mot. for J. on the Agency R. (“Pl.’s Conf. App.”), ECF No. 34, Tab 1 (“Scope Ruling Request”), Confidential Record (“C.R.”) 1–7, P.R. 1–6. In its request, Plaintiff explained that “[t]he carrier tubing, which is the outer shell of the gun, is a seamless mechanical tube,” *id.* at 4, and described it as a “customized product made to exact specifications . . . which combine a very clean steel chemistry, tight dimensional tolerances and enhanced mechanical characteristics . . . dedicated for a single end-use: to be incorporated by DynaEnergetics into a perforating gun used to detonate inside oil wells,” *id.* at 2. Plaintiff further explained that “a perforating gun assembly is a single-use device used to perforate existing oil and gas wells in preparation for production using explosive oil charges,” and that “[p]erforating tools generally consist of a tube called the carrier which holds the charge holder . . .” *Id.* at 4 (citations omitted).

The Petitioner, Maverick, opposed DynaEnergetics’ request, arguing that it is clear from the plain language of the scope that gun carrier tubing is within the scope of the AD & CVD Orders, and that DynaEnergetics’ argument rests upon the false premise that gun carrier tubing is mechanical tubing and therefore is excluded from the Orders. Final Scope Ruling at 6–7. After accepting comments from both parties, Commerce issued its scope ruling pursuant to 19 C.F.R. 351.225(k)(1) without initiating a formal scope inquiry. *See generally id.* In its ruling, Commerce determined that DynaEnergetics’ product was within the scope of the AD & CVD orders. *See* Final Scope Ruling at 10–13.

DynaEnergetics timely commenced this action on March 11, 2016 and filed a motion for judgment on the agency record challenging Commerce’s scope determination. *See generally* Compl.; Pl.’s Mot. In response, Defendant United States requested a remand to “reconsider [Commerce’s] findings in light of DynaEnergetics’ contentions.” Def.’s Resp. at 9. Defendant-Intervenor Maverick opposed Defendant’s remand request and asked the court to address Plaintiff’s arguments on the merits. Def-Intervenor’s Resp. at 31. Plaintiff’s motion is fully briefed and the court held a telephonic hearing on the

request for a remand on February 1, 2017. Docket Entry, ECF No. 48. For the reasons discussed below, the court will grant Defendant's request for a remand.

JURISDICTION AND STANDARD OF REVIEW

The court has jurisdiction pursuant to § 516A(a)(2)(B)(vi) of the Tariff Act of 1930, as amended, 19 U.S.C. § 1516a(a)(2)(B)(vi) (2012),² and 28 U.S.C. § 1581(c).

The court will uphold an agency determination that is supported by substantial evidence and otherwise in accordance with law. 19 U.S.C. § 1516a(b)(1)(B)(i).

"Commerce enjoys substantial freedom in conducting [] scope inquiries," *Eckstrom Indus., Inc. v. United States*, 254 F.3d 1068, 1072 (Fed. Cir. 2001) (citation omitted), and is "entitled to substantial deference with regards to its interpretations of its own antidumping duty orders," *King's Supply Co., LLC v. United States*, 674 F.3d 1343, 1348 (Fed. Cir. 2012). A "scope ruling is a highly fact-intensive and case-specific determination" and "while the plain language of the AD order is paramount, Commerce must also take into account the descriptions of the merchandise contained in the petition, the initial investigation, and the determinations of the Secretary of Commerce (including prior scope determinations) and the Commission." *King's Supply Co.*, 674 F.3d at 1345 (internal quotation marks, citations and alterations omitted); *see also* 19 C.F.R. § 351.225(k)(1). "Since Commerce drafted the antidumping order, the order's meaning and scope are issues particularly within the expertise of that agency. In interpreting its own order, Commerce is performing functions within its special competence." *Sandvik Steel Co. v. United States*, 164 F.3d 596, 600 (Fed. Cir. 1998) (internal quotation marks, citations and alterations omitted). "However, Commerce cannot interpret an antidumping order so as to change the scope of th[e] order, nor can Commerce interpret an order in a manner contrary to its terms." *Eckstrom Indus.*, 254 F.3d at 1072 (internal quotation marks and citation omitted).

DISCUSSION

Plaintiff challenges Commerce's decision that its product is within the scope of the AD & CVD orders as "inconsistent with the evidence on the record describing the product's characteristics and purpose" and Commerce's definition of OCTG as "inconsistent with the scope language and . . . based on non-dispositive subheading descriptions of

² All citations to the Tariff Act of 1930, as amended, are to Title 19 of the U.S. Code and all citations to the U.S. code are to the 2012 edition, unless otherwise specified.

the [HTSUS].” Pl.’s Mot. at 2–3. Plaintiff further argues that Commerce should have initiated a scope inquiry and analyzed the (k)(2) factors because the (k)(1) factors were not dispositive of the scope determination. *Id.* at 3; *see also* 19 C.F.R. § 351.225(k)(1), (k)(2).³ Finally, Plaintiff argues that “Commerce’s instructions to CBP to continue suspension of liquidation, where such instructions have retroactive effect, were contrary to law.” Pl.’s Mot. at 4.

Defendant responds by requesting a remand to fully consider Plaintiff’s arguments. Def.’s Resp. at 9. During the telephonic conference with the court, Defendant acknowledged that the agency’s analysis was cursory and did not fully address DynaEnergetics’ arguments. Defendant asserts this constitutes a substantial and legitimate basis for requesting a remand. *Id.* at 8–9. Defendant-Intervenor opposes Defendant’s request and asks the court to adjudicate Plaintiff’s claim on its merits. Def. Intervenor’s Resp. at 29–31.

When an agency determination is challenged in the courts, the agency may “request a remand (without confessing error) in order to reconsider its previous position” and “the reviewing court has discretion over whether to remand.” *SKF USA Inc. v. United States*, 254 F.3d 1022, 1029 (Fed. Cir. 2001) (citations omitted). Remand is appropriate “if the agency’s concern is substantial and legitimate,” but “may be refused if the agency’s request is frivolous or in bad faith.” *Id.*

Commerce’s concerns are “substantial and legitimate.” Defendant requests a remand so that Commerce may “further consider information from the petition and the determination of the International Trade Commission (ITC) pursuant to 19 C.F.R. § 351.225(k)(1).” Def’s Resp. at 1. Defendant acknowledges that “Commerce’s further consideration of its findings may affect its existing determination not to conduct an analysis under 19 C.F.R. § 351.225(k)(2) and the CBP instructions issued based on its original determination.” *Id.* at 9. Defendant acknowledges that the agency’s reasoning is cursory and that it would be unable to fully respond to Plaintiff’s arguments without resorting to post hoc reasoning. Any such post hoc rationalization would be impermissible. *Burlington Truck Lines, Inc. v. United States*, 371 U.S. 156, 168–69 (1962) (the court may not accept

³ “The determination of whether a particular product is included within the scope of an antidumping order is governed by regulations published at 19 C.F.R. § 351.225 [.]” *Eckstrom Indus.*, 254 F.3d at 1071–72. Pursuant to the regulations, Commerce will first consider “descriptions of the merchandise contained in the petition, and the determinations of the Secretary (including prior scope determinations) and the Commission.” 19 C.F.R. § 351.225(k)(1) (“(k)(1) factors”). When the (k)(1) factors are not dispositive, Commerce will consider “(i) The physical characteristics of the product; (ii) The expectations of the ultimate purchasers; (iii) The ultimate use of the product; (iv) The channels of trade in which the product is sold; and (v) The manner in which the product is advertised and displayed.” 19 C.F.R. § 351.225(k)(2) (“(k)(2) factors”).

“post hoc rationalizations for agency action” and agency action may be “upheld, if at all, on the same basis articulated . . . by the agency itself”) (citations omitted).

Additionally, during the telephonic conference, Defendant asserted that finality would be furthered by an immediate grant of its request for a remand because it believed the court would not be able to sustain the agency’s determination on the insufficient reasoning offered in the original determination. Defendant further acknowledged that the remand determination only would address whether the product in question is within the scope of the orders and issues related to the customs instructions associated with the scope determination, including any retroactivity of those instructions. Plaintiff also asks that any such remand allow Commerce to reconsider the customs instructions associated with the scope determination. Reply Br. of Pl. DynaEnergetics U.S., Inc. (“Pl.’s Reply”) at 1–2, 5, ECF No. 45.

Maverick asserts two reasons for opposing Defendant’s request for a remand, neither of which are availing. First, Maverick argues that all of Plaintiff’s arguments before the court were raised before the agency in the administrative proceeding and, therefore, Commerce had every opportunity to address Plaintiff’s arguments. Def-Intervenor’s Resp. at 30. While DynaEnergetics may well have raised all of the same arguments before the agency, that is not the same as saying that the agency adequately addressed all of those arguments – which is the point made by Defendant. To the extent the agency failed to address these arguments in its determination, counsel cannot make up for the agency’s failings in its briefs to the court as that would constitute impermissible post hoc rationalization. See *Burlington Truck Lines*, 371 U.S. at 168–69. Particularly in light of the fact intensive nature of scope determinations, it is imperative that the agency supply the reasoning to support its determination in the first instance. See *King’s Supply Co.*, 674 F.3d at 1345; *Sandvik Steel Co.* 164 F.3d at 600.

Maverick also argues that concerns for finality should weigh against granting the request for a remand, particularly when Defendant has not indicated what error occurred. Def-Intervenor’s Resp. at 29–30 (citing *Maverick Tube Corp. v. United States*, 39 CIT ___, ___, 107 F. Supp. 3d 1318, 1334–35 (2015), and *Corus Staal BV v. United States*, 27 CIT 388, 391 (2003)). In this case, the error acknowledged by Defendant was the failure to fully address the arguments made by DynaEnergetics to the agency. Unlike the cases cited by Defendant-Intervenor, Defendant does not seek a remand to reconsider or change a statutory interpretation or application of policy. See Def.’s Resp. at 8–9. Instead, it seeks to perform the very function it should

have performed during the original administrative proceeding – providing a reasoned determination taking into account the facts and arguments before it. *Id.* Such a remand request should only be denied if the request is frivolous or in bad faith, *SKF USA Inc.*, 254 F.3d at 1029, and that is not the case here.

For the reasons stated above, the court grants Defendant’s request for a remand to reconsider the scope determination at issue along with, if appropriate, the customs instructions associated with the scope determination.

ORDER

In accordance with the foregoing, it is hereby

ORDERED that Commerce’s Final Scope Ruling is remanded to the agency for further consideration in accordance with the terms of this opinion; and it is further

ORDERED that the agency shall file its redetermination on remand on or before June 7, 2017; and it is further

ORDERED that the agency shall conduct its remand proceeding substantially in accordance with the procedural timeline presented to the court; and it is further

ORDERED that any party seeking to oppose the redetermination on remand shall consult with the other parties and submit a proposed briefing schedule no later than June 21, 2017. Such proposed briefing schedule may include a deadline for requesting oral argument.

Dated: February 7, 2017

New York, New York

/s/ Mark A. Barnett

MARK A. BARNETT, JUDGE

