U.S. Customs and Border Protection

Slip Op. 09–95

BOND STREET, LTD., Plaintiff, V. UNITED STATES, Defendant, and GLEASON INDUSTRIAL PRODUCTS, INC. and PRECISION PRODUCTS, INC., Defendant-Intervenors.

Court No. 08–00049

[Granting Plaintiff's motion for judgment on the agency record, and remanding scope ruling concerning antidumping order on hand trucks from the People's Republic of China]

Dated: September 8, 2009

Fitch, King and Caffentzis (*James Caffentzis*), for Plaintiff.

Tony West, Assistant Attorney General; *Jeanne E. Davidson*, Director, and *Patricia M. McCarthy*, Assistant Director, Commercial Litigation Branch, Civil Division, U.S. Department of Justice (*Stephen C. Tosini* and *Courtney E. Sheehan*); *Irene H. Chen*, Office of the Chief Counsel for Import Administration, U.S. Department of Commerce, Of Counsel; for Defendant.

Crowell & Moring, LLP (*Matthew P. Jaffe*), for Defendant-Intervenors.

OPINION

RIDGWAY, Judge:

I.
Introduction

In this action, Plaintiff Bond Street, Ltd. – a New York importer of business and travel products – contests the U.S. Department of Commerce's determination that Bond Street's Stebco Portable Slide-Flat Cart (style no. 390009 CHR) ("Stebco cart") is within the scope of the antidumping duty order on hand trucks from the People's Republic of China ("PRC"). *See* Hand Trucks and Certain Parts Thereof from the People's Republic of China: Scope Ruling on Stebco Portable Slide-Flat Cart, Inv. No. A–570–891 (May 30, 2007) ("Scope Ruling").

Pending before the Court is Plaintiff's Motion for Judgment on the Agency Record, in which Bond Street urges that Commerce's Scope Ruling be vacated. Bond Street emphasizes that the antidumping order at issue requires that the projecting edge or toe plate of subject

merchandise "slide[] under a load for purposes of lifting and/or moving the load," and asserts that its Stebco cart is not capable of sliding under a load in such a manner. Bond Street contends that Commerce therefore should have reached a negative scope determination. *See generally* Memorandum in Support of Bond Street Ltd.'s Motion for Judgment on the Agency Record ("Pl.'s Brief"); Plaintiff, Bond Street Ltd.'s Reply to Defendant and Defendant-Intervenors' Responses ("Pl.'s Reply Brief").

Bond Street's motion is opposed by the Government and by Gleason Industrial Products, Inc., and Precision Products, Inc. (collectively, "Domestic Manufacturers"), who maintain that Commerce's Scope Ruling is supported by substantial evidence and otherwise in accordance with law, and thus should be sustained. *See generally* Response to Bond Street's Motion for Judgment Upon the Administrative Record ("Def.'s Brief"); Defendant-Intervenors' Memorandum in Opposition to Bond Street's Motion for Judgment Upon the Agency Record ("Def.-Ints.' Brief").

Jurisdiction lies under 28 U.S.C. § 1581(c) (2000).[1] For the reasons set forth below, Bond Street's Motion for Judgment on the Agency Record is granted, and Commerce's Scope Ruling is remanded for reconsideration.

II.
Background

In December 2004, the Department of Commerce published an antidumping duty order on hand trucks and certain parts thereof from the PRC. *See* Notice of Antidumping Duty Order: Hand Trucks and Certain Parts Thereof From the People's Republic of China, 69 Fed. Reg. 70,122 (Dec. 2, 2004) ("Antidumping Order"). The Antidumping Order expressly defines the covered merchandise, both in terms of specific physical characteristics and in terms of functionality:

> A complete or fully assembled hand truck is a hand-propelled barrow consisting of a vertically disposed frame having a handle or more than one handle at or near the upper section of the vertical frame; at least two wheels at or near the lower section of the vertical frame; and a horizontal projecting edge or edges, or toe plate, perpendicular or angled to the vertical frame, at or

[1] The instant action is Bond Street's second challenge to the determination at issue here. Commerce initially issued the Scope Ruling on May 30, 2007, but failed to mail a copy to Bond Street. Bond Street's first action seeking to contest the ruling was therefore deemed premature, and dismissed for lack of jurisdiction without prejudice to refiling. *See Bond Street, Ltd. v. United States*, 31 CIT ____, 521 F. Supp. 2d 1377 (2007).

> near the lower section of the vertical frame. *The projecting edge or edges, or toe plate, slides under a load for purposes of lifting and/or moving the load.*
>
> . . . . That the vertical frame, handling area, wheels, projecting edges or other parts of the hand truck can be collapsed or folded is not a basis for exclusion of the hand truck from the scope of the [order]. . . . Finally, that the hand truck may exhibit physical characteristics in addition to the vertical frame, the handling area, the projecting edges or toe plate, and the two wheels at or near the lower section of the vertical frame, is not a basis for exclusion of the hand truck from the scope of the [order].
>
> Examples of names commonly used to reference hand trucks are hand truck, convertible hand truck, appliance hand truck, cylinder hand truck, bag truck, dolly, or hand trolley. They are typically imported under heading 8716.80.50.10 of the Harmonized Tariff Schedule of the United States ("HTSUS"), although they may also be imported under heading 8716.80.50.90. . . . Although the HTSUS subheadings are provided for convenience and customs purposes, the Department's written description of the scope is dispositive.
>
> Excluded from the scope are small two-wheel or four-wheel utility carts specifically designed for carrying loads like personal bags or luggage in which the frame is made from telescoping tubular material measuring less than 5/8 inch in diameter[.]

Antidumping Order, 69 Fed. Reg. at 70,122 (emphasis added).

After the Antidumping Order issued, Bond Street sought a ruling from Commerce that the Stebco cart is beyond the scope of the Order, and therefore not subject to antidumping duties under that Order. *See* Bond Street Request for Scope Ruling (Dec. 6, 2006) ("Request for Scope Ruling"). Bond Street contends that the Stebco cart is not a "hand truck" within the meaning of the Antidumping Order, but – rather – a "portable luggage cart," designed for "personal uses such as carrying luggage, carrying personal bags, or a salesman storing the cart in his car to carry in many samples[] or sample cases together

at one time to avoid multiple trips." *See id.* at 2, 4.[2] Bond Street's Request for Scope Ruling highlighted certain physical features of the Stebco cart that, according to Bond Street, prevent a user from "slid-[ing] [the] cart under a load for purposes of lifting and/or moving the load," as required by the express terms of the Antidumping Order. *See id.* at 3. Bond Street maintains that, as a practical matter, "items must be *lifted onto* the [toe] plate for purposes of lifting and/or moving [them]." *Id.* at 2 (emphasis added).[3]

Specifically, Bond Street pointed to "the angled design of [the] toe plate combined with the [collapsing] structure of the plate and the lack of a kick plate," asserting that those features "make it virtually impossible to *slide [the Stebco] cart under a load* for purposes of lifting and/or moving a load, a necessary function of any hand truck." *See* Request for Scope Ruling at 3. Bond Street explained that the collapsible toe plate "is specifically designed to enable the [cart's] wheels to fold flat, for the [cart] to have more portability, for easy storage in a car trunk and behind a home/office door, and for use when traveling." *Id.* at 2. But the collapsibility feature also prevents the Stebco cart's toe plate from "slid[ing] under" a load.

In addition to the angled design and collapsibility of the toe plate, as well as the absence of a kick plate, Bond Street also pointed to a hook located on the rear of the cart (approximately 8½ inches from the ground) that is used to secure an elastic bungee cord (the other end of which is attached to the front of the toe plate), after the bungee cord has been pulled over the bags or other items on the cart. *See* Request for Scope Ruling at 2–3 (describing location, use, and purpose of bungee cord and hook); Bond Street Reply Comments (Feb. 12,

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[2] In its Request for Scope Ruling, Bond Street stated that the Stebco cart "is ideal for carrying 3–4 pieces of luggage or sample cases which are between 8 inches and 12 inches deep." *See* Request for Scope Ruling at 3. *See also* Bond Street Reply Comments (Feb. 12, 2007) at 3 (stating that Stebco cart is "designed for personal use, be it for carrying multiple luggage pieces when entering or exiting an airport, or personal bags or items while traveling or in the home," and is not "designed to move heavy equipment").

The Request for Scope Ruling indicated that the Stebco cart, "extended[,] measures approximately 40 inches high by 18.75 inches wide by 19 inches deep." *See* Request for Scope Ruling at 2; *accord*, Domestic Manufacturers Opposition (Jan. 25, 2007) at 5. The Request further stated that the cart "collapses to . . . approximately 30 inches high by 18.75 inches wide, by 2 5/8 inches deep." See Request for Scope Ruling at 2; *accord*, Domestic Manufacturers Opposition at 5.

According to Bond Street, the Stebco cart is properly classified under subheading 8716.80.50.20 of the HTSUS. *See* Request for Scope Ruling at 2.

[3] *See also* Request for Scope Ruling at 4 (stating that items must be "manually lifted" onto the cart); Bond Street Reply Comments at 4 (explaining that cart was "designed with an intent that objects, such as luggage, will be placed on the toe plate by hand"); Bond Street Rebuttal Comments (May 28, 2007) at 2–3 (noting that "all items have to be lifted onto the Stebco cart").

2007) at 2 (explaining that hook "serv[es] as the anchor for securing luggage and personal bags" on cart).[4] Bond Street emphasized that the purpose of placing the hook so low on the back of the cart is to avoid damage to the cart by "prevent[ing] [a user] from pushing the cart forward with his foot to obtain leverage to bring the cart off the floor in order to lift and move a heavy load." Request for Scope Ruling at 3; *see also* Bond Street Reply Comments at 1–2 (explaining that hook's location "serves as a deterrent to the user to push or kick [the cart] under a load"). Bond Street explained that the cart is designed to be pulled, and that the cart "would be damaged if pushed from the rear." Bond Street Reply Comments at 2; *see also id.* at 5 (noting that height of cart, with telescoping handle extended, is intended to allow user to "move the [cart] without having to bend when pulling it").[5]

The Domestic Manufacturers opposed Bond Street's request, asserting that – because the cart has "a hand-propelled barrow with a vertical frame having a handle at the upper section of the vertical frame; two wheels at the lower section of the vertical frame; and a horizontal projecting edge perpendicular to the vertical frame at the lower section of the vertical frame"– the Stebco cart "meets the precise definition of the subject merchandise," and thus falls squarely within the scope of the Antidumping Order. *See* Domestic Manufacturers Opposition (Jan. 25, 2007) at 2, *passim*; Domestic Manufacturers Reply (March 19, 2007) at 1–2; Domestic Manufacturers Con-

[4] In its Request for Scope Ruling, Bond Street stated that "'Hand Trucks' do not normally include bungy cords as they are not required for hand truck use. Heavy large boxes sit securely on a hand truck as a result of their size and/or weight, and [bungy cords] are inconvenient in regular Hand Truck usage due to the time they take to unnecessarily secure a load." *See* Request for Scope Ruling at 3.

[5] Besides detailing the physical features of the Stebco cart and their effect on the cart's ability to "slide[] under" a load, Bond Street's Request for Scope Ruling also addressed the expectations of the ultimate purchaser and the ultimate use of the cart, as well as the manner in which the cart is advertised. *See* Request for Scope Ruling at 3–5.

Bond Street noted, for example, that, as a practical matter, the height of the Stebco cart prevents it from being loaded with more than two standard-size warehouse boxes (assertedly rendering the cart of little or no "industrial or warehouse utility"), and that (due to the design of the toe plate) the cart's "only viable use" is to move relatively light items such as luggage and sample cases, "which can be manually lifted onto the cart." *See* Request for Scope Ruling at 3–4. Bond Street further advised that the cart has a relatively modest load capacity of a maximum of 275 pounds, and that – in any event – the 275-pound maximum can be sustained only for limited periods, while the "ideal load" specified by the cart's manufacturer is 150 pounds. *See* Bond Street Reply Comments at 3–5; Bond Street Rebuttal Comments at 2–3. Bond Street noted that the cart's load-bearing capacity is also limited by the size and composition of its wheels (which are relatively small and made of PVC plastic, in contrast to the larger, shock-absorbent tires typical of hand trucks). *See* Bond Street Reply Comments at 5; Bond Street Rebuttal Comments at 2–3.

Together with its Request for Scope Ruling, Bond Street submitted to Commerce a sample of the Stebco cart, as well as excerpts from catalogs and print-outs of web pages featuring photos and descriptions of various luggage carts and hand trucks. *See* Request for Scope Ruling at 4–6 and Attachments; *see also* Audio Recording of Oral Argument at 51:22–52:19 (confirming that sample Stebco cart is included in the Administrative Record of this action).

tinued Opposition (May 21, 2007) at 1. The Domestic Manufacturers also disputed each of Bond Street's specific claims concerning the physical characteristics of the cart.

The Domestic Manufacturers first targeted Bond Street's emphasis on the Stebco cart's lack of a kick plate. The Domestic Manufacturers argued that the absence of a kick plate "does not remove [the Stebco cart] from the scope of the order," because "it is not necessary for a hand truck to exhibit a kick plate for it to be covered." Domestic Manufacturers Opposition at 2; Domestic Manufacturers Reply at 1–2. The Domestic Manufacturers similarly took aim at Bond Street's statements concerning the location of the bungee cord hook on the rear of the bottom of the cart. Among other things, the Domestic Manufacturers suggested that a user might simply place his foot elsewhere at the bottom of the back of the cart, for leverage to help "position [the toe plate] beneath a load." *See* Domestic Manufacturers Opposition at 3 & n.2.

As to Bond Street's statements that the design of the toe plate prevents the Stebco cart from "slid[ing] under a load," the Domestic Manufacturers relied on dictionary definitions of "slide" and "under" to argue that the Antidumping Order requires only that a toe plate "can be placed in or into a position beneath a load so the load can be slid across the toe plate's surface." *See* Domestic Manufacturers Opposition at 2–3. The Domestic Manufacturers further asserted that "an individual can easily position the toe plate of the [Stebco cart] beneath a load by . . . tipping the load slightly so as to better allow the toe plate to slide under the load." *Id.* at 3. The Domestic Manufacturers accordingly urged Commerce to rule that the Stebco cart is within the scope of the Antidumping Order. *Id.* at 8.[6]

Bond Street has stated that it "does not disagree" with the dictionary definition of "slide" that the Domestic Manufacturers have cited. *See* Bond Street Reply Comments at 2.[7] Indeed, Bond Street repeatedly urged Commerce and the Domestic Manufacturers to test

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[6] The Domestic Manufacturers advanced two additional arguments, not directly relevant here. First, the Domestic Manufacturers argued that the Stebco cart does not fall within the Antidumping Order's express exclusion of "small two-wheel or four-wheel utility carts specifically designed for carrying loads like personal bags or luggage in which the frame is made from telescoping tubular material measuring less than 5/8 inch in diameter." *See* Domestic Manufacturers Opposition at 4–7 (*quoting* Antidumping Order, 69 Fed. Reg. at 70,122); Domestic Manufacturers Reply at 2; Domestic Manufacturers Continued Opposition at 2. And, second, the Domestic Manufacturers asserted that the Stebco cart is similar to two products that Commerce previously determined to be within the scope of the Antidumping Order. *See* Domestic Manufacturers Opposition at 7–8; Domestic Manufacturers Reply at 2; Domestic Manufacturers Continued Opposition at 2–3.

[7] *But see* Pl.'s Brief at 12-13 (asserting that, contrary to the Domestic Manufacturers' claims, "slide under" does not mean "move under, or be positioned under, when lifted," and that the Antidumping Order's functional requirement of a toe plate "cannot be met by a load sliding across or onto it. The toe plate must also be able to slide under a load.").

the sample Stebco cart, to determine whether – in the words of the Domestic Manufacturers' proffered dictionary definition – the cart in fact will "go with a smooth continuous motion" under a load. *See* Bond Street Reply Comments at 2 (quoting dictionary definition of "slide" on which the Domestic Manufacturers rely); *see also id.* at 2–3 (suggesting test of sample Stebco cart provided to Commerce, to "demonstrate[] that the toe plate cannot slide under the load "); Bond Street Rebuttal Comments (May 28, 2007) at 1–2 (detailing suggested test, and noting that Domestic Manufacturers either did not avail themselves of opportunity to test cart when they viewed it at Commerce headquarters, or did not disclose results of testing).[8]

Bond Street asserted, moreover, that "tipping the load slightly" before moving the toe plate under the load (as the Domestic Manufacturers contemplate) would necessarily result in damage to any bag, box, or other object at the bottom of the load, and, over time, would also damage the frame of the cart itself. *See* Bond Street Reply Comments at 2-3. Even more to the point, Bond Street stated that tilting the cart forward in an attempt to slide the toe plate under a load would cause the wheels to collapse and the cart to begin to fold up (as if for storage), precluding the toe plate from "slid[ing] under" the load. *See* Bond Street Reply Comments at 2-3; Bond Street Rebuttal Comments at 2.

Commerce analyzed Bond Street's Request for Scope Ruling under the framework of 19 C.F.R. § 351.225(k)(1) (2006), finding "the descriptions of the merchandise" to be dispositive. *See* Scope Ruling at 8.[9] Commerce determined that the Stebco cart "clearly consists" of four "requisite characteristics" of a hand truck, as established by the scope language of the Antidumping Order – (1) a vertical frame, (2) at least one handle, (3) two or more wheels, and (4) a projecting edge or

[8] Although the Domestic Manufacturers inspected a sample of the Stebco cart, they apparently did not test it. Nor has Commerce done so. *See* Audio Recording of Oral Argument at 55:24–55:33, 1:26:45–1:26:47, 1:36:14–1:36:21, 2:02:22–2:03:10; 2:08:58–2:09:00 (counsel for Government asserts that Commerce did not test the cart, and was not required to do so).

[9] In determining whether merchandise falls within the scope of an antidumping order, Commerce begins by examining the language of the order at issue. The "predicate for the interpretive process is language in the order that is subject to interpretation." *Duferco Steel Inc. v. United States*, 296 F.3d 1087, 1097 (Fed. Cir. 2002). If the terms of the order alone are not dispositive, the interpretive process is governed by 19 C.F.R. § 351.225(d), which directs Commerce to determine whether it can make a ruling based upon the request for a scope ruling and the factors listed in § 351.225(k)(1). *See Sango Int'l, L.P. v. United States*, 484 F.3d 1371 (Fed. Cir. 2007). The three sources to be considered are "[t]he descriptions of the merchandise contained in the petition, the initial investigation, and the determinations of [Commerce] (including prior scope determinations) and the [International Trade] Commission." 19 C.F.R. § 351.225(k)(1).

If the analysis outlined above is not dispositive, Commerce initiates a scope inquiry pursuant to 19 C.F.R. § 351.225(e), and applies the five *Diversified Products* criteria codified in the agency's regulations. *See* 19 C.F.R. § 351.225(k)(2); *Diversified Products Corp. v. United States*, 6 CIT 155, 572 F. Supp. 883 (1983).

toe plate. *Id.* at 8. Indeed, Commerce noted that "Bond Street does not argue that the [Stebco cart] does not contain any of these characteristics." *Id.* Commerce observed that, instead, "Bond Street argues the Department should take into consideration the functions of the [Stebco cart] and the limitations of its toe plate, focusing on the scope language [in the Antidumping Order] that states 'The projecting edge or edges, or toe plate, slides under a load for purposes of lifting and/or moving the load.'" *Id.* (*quoting* Antidumping Order, 69 Fed. Reg. at 70,122). Commerce stated that "Bond Street argues that the design of the collapsing toe plate, the placement of the bungy cord hook, and the lack of a kick plate, make it impossible to slide the [Stebco cart] under a load." *Id.* Although Commerce then briefly addressed the collapsible toe plate, the location of the bungee cord hook, and the absence of a kick plate, *seriatim*, the agency's determination is silent on the ability of the toe plate to "slide[] under a load for purposes of lifting and/or moving the load." *See generally* Scope Ruling, *passim*.

After further finding that the Stebco cart did not fall within the Antidumping Order's express exclusion of "small two-wheel or four-wheel utility carts specifically designed for carrying loads like personal bags or luggage in which the frame is made from telescoping tubular material measuring less than 5/8 inch in diameter,"[10] Commerce concluded that Bond Street's Stebco cart falls within the scope of the Antidumping Order. *See* Scope Ruling at 8–9.

III.
Analysis

Commerce's determination in this case cannot be sustained, because the agency failed to make a finding as to one of the defining characteristics of merchandise within the scope of the Antidumping Order, as established by the terms of that Order – the very characteristic that Bond Street contends the Stebco cart at issue here does not possess. Specifically, Commerce failed to make a determination as to whether the toe plate of the Stebco cart can "slide[] under a load for purposes of lifting and/or moving the load." *See* Antidumping Order, 69 Fed. Reg. at 70,122; *see also* Pl.'s Brief at 7 (noting that Scope Ruling "[g]laringly omitted"any analysis of cart's ability to slide under a load); Pl.'s Reply Brief at 2 (stating that the Scope Ruling's analysis "omits the fifth indispensable and essential element" of a "hand truck"– the ability to slide under a load).

[10] Bond Street concedes that the frame of the Stebco cart includes some telescoping tubing with a diameter greater than 5/8 inch, which Commerce determined prevented the cart from being covered by the express exclusion in the Antidumping Order (quoted above). *See* Request for Scope Ruling at 2; Scope Ruling at 8–9.

The Government and the Domestic Manufacturers contend that the Scope Ruling must be sustained because Commerce expressly addressed each of the physical characteristics of the Stebco cart that Bond Street cites in arguing that the cart's toe plate cannot "slide[] under a load." *See generally* Def.'s Brief at 6–8; Def.-Ints.' Brief at 3–4, 6–7. The Government and the Domestic Manufacturers point out, for example, that the Scope Ruling acknowledged the collapsibility of the toe plate, but that Commerce determined that the collapsibility did not put the cart beyond the scope of the Antidumping Order, because the Order specifically states that the fact "that . . . projecting edges or other parts of the hand truck can be collapsed or folded is not a basis for exclusion of the hand truck from the scope." *See* Def.'s Brief at 6–8; Def.-Ints.' Brief at 3, 6–7.

The Government and the Domestic Manufacturers further emphasize that the Scope Ruling took note of Bond Street's argument that the location of the bungee cord hook prevents a user from pushing the cart forward with his foot to gain leverage in order to lift the front of the cart off the ground, but that Commerce determined (a) that the hook's "primary purpose" is to "secure [items on the cart] for transport," (b) that there was no evidence to indicate that a user could not place his foot "at a position other than the . . . location of the hook (*e.g.*, below the hook or against the wheel)," and (c) that – in any event – the Antidumping Order expressly states that additional "physical characteristics" (such as a bungee cord hook) do not exclude merchandise from the scope of the Order. *See* Def.'s Brief at 6–8; Def.-Ints.' Brief at 3, 6–7.

The Government and the Domestic Manufacturers similarly note that the Scope Ruling considered the fact that the Stebco cart lacks a kick plate, and that Commerce concluded that the absence of such a feature did not remove the cart from the scope of the Antidumping Order because a kick plate "is not a required characteristic as set forth in the language . . . [defining] the scope" of the Order. *See* Def.'s Brief at 6–8; Def.-Ints.' Brief at 3, 6–7.

Contrary to the claims of the Government and the Domestic Manufacturers, however, it is not enough that Commerce analyzed each of the referenced physical characteristics in isolation. Bond Street has never claimed that the existence of those physical characteristics, in and of themselves, places the Stebco cart beyond the scope of the Antidumping Order. To the contrary, the gravamen of Bond Street's argument is that those *physical* characteristics prevent the Stebco cart from having the *functional* or *operational* characteristic set forth in the Antidumping Order – that is, that "[t]he projecting edge or edges, or toe plate, slide[] under a load." *See, e.g.*, Pl.'s Reply Brief at

3–4 (asserting that "[i]t is the nature of the collapse mechanism, not the fact of its presence, that excludes this cart from the scope of the order," and arguing that Commerce erred in focusing on the existence of individual "design features" of the cart "rather than its operation"), 5 (stating that "Commerce's analysis fails to recognize that there is a distinction between physical and operational characteristics of hand trucks," and that agency was obligated to determine whether Stebco cart "possessed those operational features characteristic of the articles covered by the order, in addition to the physical characteristics"); Antidumping Order, 69 Fed. Reg. at 70,122.

But nowhere in its Scope Ruling in this case did Commerce make a determination as to whether the toe plate of the Stebco cart can "slide[] under a load for purposes of lifting and/or moving" that load. Nowhere in the Scope Ruling did Commerce address Bond Street's claim that the collapsible toe plate, the location of the bungee cord hook, and the absence of a kick plate prevent the toe plate of the Stebco cart from "slid[ing] under" a load. Commerce's analysis here thus rendered the Antidumping Order's "slide[] under" language mere surplusage, and verged on the disingenuous.[11]

At oral argument, the Domestic Manufacturers (and, to some extent, the Government) sought to excuse the Scope Ruling as inartfully drafted, asserting that Commerce at least *implicitly* found that the Stebco cart was capable of "slid[ing] under" a load. The Domestic Manufacturers argued, in essence, that "[a] court may 'uphold [an agency's] decision of less than ideal clarity if the agency's path may reasonably be discerned.'" *Ceramica Regiomontana, S.A. v. United States*, 810 F.2d 1137, 1139 (Fed. Cir. 1987) (*quoting Bowman Transp., Inc. v. Arkansas-Best Freight Sys., Inc.*, 419 U.S. 281, 286 (1974); *Colorado Interstate Gas Co. v. Federal Power Comm'n*, 324 U.S. 581, 595 (1945)); *see, e.g.*, Audio Recording of Oral Argument at 1:29:29–1:29:40, 2:15:56–2:16:08, 2:40:10–2:40:49, 2:50:03–2:50:13, 2:56:19–2:57:24; *see also* Def.-Ints.' Brief at 8. But, contrary to the Domestic Manufacturers' assertions, the Scope Ruling here does not

[11] As explained in *Vertex*, another case involving a request for a ruling on the scope of the Antidumping Order at issue here:

> *The Order defines "projecting edge or toe plate" according to its function*. Specifically, it states that "[t]he projecting edge or edges, or toe plate, slides under a load for purposes of lifting and/or moving the load." . . . Although Commerce specified that a hand truck may be "suitable for any use," the "any use" language is limited by this sentence [in the Antidumping Order] which requires that a hand truck's toe plate slide under a load to lift or move it. *Commerce must give effect to this sentence, which states an essential physical characteristic of the articles included within the scope and specifies the purpose for which the horizontal projecting edge or toe plate must be designed.*

Vertex Int'l, Inc. v. United States, 30 CIT 73, 79 (2006) (emphases added).

suffer from a lack of clarity. In fact, the Scope Ruling is crystal clear. It simply ignores the substance of Bond Street's claim.[12]

Because Commerce here failed to make a finding as to whether the Stebco cart's toe plate "slides under a load for purposes of lifting and/or moving the load,"Commerce's Scope Ruling cannot be sustained. This matter therefore must be remanded to the agency for further action.[13]

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[12] Commerce's instructions concerning the suspension of liquidation confirm that the Scope Ruling focused solely on the physical characteristics of the Stebco cart, without regard to the cart's functional or operational ability to "slide[] under" a load. Summarizing the Scope Ruling, those instructions state: "Because the [Stebco cart] consists of a vertical frame, a handle, two wheels, and a projecting edge or toe plate, . . . and because the imported product does not fall within the exclusionary language of the scope, the Commerce Department found this product to be within the scope of the [Antidumping Order]." *See* Instructions re: Suspension of Liquidation (June 14, 2007).

Moreover, the language of the Scope Ruling itself belies any suggestion that Commerce somehow did not grasp the nature of Bond Street's argument. As noted elsewhere above, the Scope Ruling accurately characterized Bond Street's argument as focusing on the functional or operational requirement embodied in the Antidumping Order – the requirement that the toe plate be capable of "slid[ing] under" a load. Commerce wrote:

> Bond Street does not argue that the . . . cart does not contain any of [the physical] characteristics [specified in the Antidumping Order]. Rather, Bond Street argues the Department should take into consideration the functions of the . . . cart and the limitations of its toe plate, focusing on the scope language that states "The projecting edge or edges, or toe plate, slides under a load for purposes of lifting and/or moving the load." Bond Street argues that the design of the collapsing toe plate, the placement of the bungy cord hook, and the lack of a kick plate[] make it impossible to slide the . . . cart under a load.

Scope Ruling at 8.

In any event, even if the Scope Ruling were to be construed as having (implicitly) found that the toe plate of the Stebco cart is capable of "slid[ing] under" a load, any such determination would be vulnerable to attack on the grounds that it is not supported by substantial evidence in the record. There is little or no evidence in the existing record to indicate that the toe plate of the Stebco cart can "slide[] under a load for purposes of lifting and/or moving the load." *See generally, e.g.*, Audio Recording of Oral Argument at 1:34:43–1:35:13, 1:54:36–1:55:00, 2:08:30–2:08:42, 2:40:52–2:47:58.

[13] This result obviates any need to here address the merits of the Domestic Manufacturers' claim that a cart falls within the scope of the Antidumping Order even if the cart's toe plate slides under a load only if that load has been "tilted" or "tipped." *See, e.g.*, Def.-Ints.' Brief at 4, 11–12; *but see* Pl.'s Brief at 11–14; *see also* Audio Recording of Oral Argument at 1:47:47–1:48:00 (acknowledging that Scope Ruling did not consider "tilting" or "tipping" of load).

There is similarly no need to here reach the Domestic Manufacturers' related claim that the scope of the Antidumping Order requires only that it be *possible* to slide a cart's toe plate under a load – that is, that the Order does not require that the toe plate slide under the load with any degree of ease. *See, e.g.*, Def.-Ints.' Brief at 4, 6; *but see* Pl.'s Brief at 9–10 (*discussing Vertex*, 30 CIT at 76, where the Domestic Manufacturers agreed that the projecting plate of the cart there at issue did not "readily 'slide under' a load" and was thus beyond the scope of the Antidumping Order).

IV.
Conclusion

For all the reasons set forth above, Plaintiff's Motion for Judgment on the Agency Record must be granted, and this matter remanded to the Department of Commerce for further action not inconsistent with this opinion.

A separate order will enter accordingly.

Dated: September 8, 2009
New York, New York

/s/ Delissa A. Ridgway
DELISSA A. RIDGWAY
Judge

Slip Op. 09–96

CATFISH FARMERS OF AMERICA, Plaintiffs, v. UNITED STATES, Defendant.

Before: Leo M. Gordon, Judge
Consol. Court No. 08–00111

[Commerce's administrative review results remanded.]

Dated: September 14, 2009

Akin, Gump, Strauss, Hauer & Feld, LLP (*Valerie A. Slater, Christopher D. Priddy, Jaehong D. Park, Jarrod M. Goldfeder, Natalya D. Dobrowolsky*) for Plaintiffs Catfish Farmers of America, America's Catch, Consolidated Catfish Companies, LLC, d/b/a Country Select Fish, Delta Pride Catfish Inc., Harvest Select Catfish Inc., Heartland Catfish Company, Pride of the Pond, Simmons Farm Raised Catfish, Inc., and Southern Pride Catfish Company, LLC.

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Arent Fox LLP (*John M. Gurley, Matthew L. Kanna, Diana Dimitriuc-Quaia*) for Defendant-Intervenors East Seafoods Joint Venture Co., Ltd. and Piazza's Seaford World LLC.

OPINION AND ORDER

Gordon, Judge:

INTRODUCTION

This consolidated action involves an administrative review conducted by the U.S. Department of Commerce ("Commerce") of the antidumping duty order covering certain frozen fish fillets from the

Socialist Republic of Vietnam. *See Certain Frozen Fish Fillets from the Socialist Republic of Vietnam*, 73 Fed. Reg. 15,479 (Dep't of Commerce Mar. 24, 2007) (final results of administrative review), as amended, 73 Fed. Reg. 47,885 (Dep't of Commerce Aug. 15, 2008) ("*Final Results*"); *see also* Issues and Decision Memorandum for Certain Frozen Fish Fillets from the Socialist Republic of Vietnam, A–552–801 (Mar. 17, 2008), *available at http://ia.ita.doc.gov/frn/summary/vietnam/E8-5889-1.pdf* (last visited Sept. 14, 2009) ("Decision Memorandum"). Before the court are motions for judgment on the agency record filed by QVD Food Co. ("QVD"), and Catfish Farmers of America, and individual U.S. catfish processors, America's Catch, Consolidated Catfish Companies, LLC, d/b/a Country Select Fish, Delta Pride Catfish Inc., Harvest Select Catfish Inc., Heartland Catfish Company, Pride of the Pond, Simmons Farm Raised Catfish, Inc., and Southern Pride Catfish Company, LLC (collectively "Catfish Farmers"). The court has jurisdiction pursuant to Section 516A(a)(2)(B)(iii) of the Tariff Act of 1930, as amended, 19 U.S.C. § 1516a(a)(2)(B)(iii) (2006),[1] and 28 U.S.C. § 1581(c) (2006). For the reasons set forth below, the court remands this action to Commerce to reconsider (1) QVD's international freight expense, (2) the valuation of QVD's labels, and (3) the calculation of the surrogate value for fish oil. The court sustains Commerce's determinations regarding all other issues in this action.

STANDARD OF REVIEW

For administrative reviews of antidumping duty orders, the court sustains Commerce's determinations, findings, or conclusions unless they are "unsupported by substantial evidence on the record, or otherwise not in accordance with law." 19 U.S.C. § 1516a(b)(1)(B)(i). More specifically, when reviewing substantial evidence challenges to Commerce's actions, the court assesses whether the agency action is "unreasonable" given the record as a whole. *Nippon Steel Corp. v. United States*, 458 F.3d 1345, 1350-51 (Fed.Cir.2006); *see Dorbest Ltd. v. United States*, 30 CIT 1671, 1675–76, 462 F. Supp. 2d 1262, 1269–70 (2006) (providing comprehensive explanation of standard of review in non-market economy context). Often described as "such relevant evidence as a reasonable mind might accept as adequate to support [the agency's] conclusion," *Consol. Edison Co. v. NLRB*, 305 U.S. 197, 229 (1938), "substantial evidence" is best understood as a word formula connoting reasonableness review. 3 Charles H. Koch, Jr., *Administrative Law and Practice* § 10.3[1] (2d ed. 2008). When addressing a substantial evidence issue raised by a party, the court

[1] Further citations to the Tariff Act of 1930 are to the relevant provisions of Title 19 of the U.S. Code, 2006 edition.

analyzes whether the challenged agency action "was reasonable given the circumstances presented by the whole record." Edward D. Re., Bernard J. Babb, and Susan M. Koplin, 8 *West's Fed. Forms, National Courts* § 13342 (2d ed. 2009).

The administrative record for an antidumping duty administrative review may support two or more reasonable, though inconsistent, determinations on a given issue. Therefore, arguments (like some made in this case) that "substantial record evidence" supports an alternative determination to the one the agency reached are not responsive to the standard of review. The question the court must consider is whether the choice the agency made is reasonable, not whether some alternative may also have constituted a reasonable choice.

DISCUSSION

1. QVD's International Freight Expense

In the *Final Results* Commerce calculated the net price for QVD's U.S. sales by subtracting a gross-weight, international freight expense. *See* Decision Memorandum at 23. Although Commerce stated that its practice was to subtract international freight based on the manner in which it was incurred, after reviewing Catfish Farmers' arguments, Commerce agrees that it must reconsider its calculation of international freight expense and requests a remand to do so, which the court will grant. *SKF USA Inc. v. United States*, 254 F.3d 1022, 1029–30 (Fed. Cir. 2001) ("*SKF*").

2. Valuation of QVD's Labels

In the *Final Results* Commerce used the average of the 2004 UN COMTRAD data covering imports of labels into Bangladesh from all over the world to value QVD's label factor of production. *See* Surrogate Value Mem. at 8; Decision Memorandum at 25. QVD argues that although the UN COMTRAD data is an appropriate basis upon which to derive a surrogate value for labels, there are three data points in the dataset for Japan, Hong Kong, and the Netherlands that should be excluded because they represent aberrationally high prices with low volumes. QVD Br. in Support of Pl.'s Mot. for J. Agency R. 15–19 ("QVD's Br."). Commerce agrees that the issue needs to be further explored and requests a remand to reconsider the application of its aberrational outlier policy to the label surrogate value data, a request the court will grant. *SKF*, 254 F.3d at 1029–30.

3. Valuation of Fish Oil

In the *Final Results* Commerce relied upon World Trade Atlas Indian Import statistics for HTS subheading 1504.20 (Fish Oil, Not Fish Liver) to value the fish oil produced as a by-product of fish

processing. Decision Memorandum at 42. Catfish Farmers argue that Commerce had previously declined to use this data in the investigation and did not explain why it was appropriate to use the data in this administrative review. Catfish Farmers Mem. in Support of Pl.'s Mot. for J. Agency R. 39–40 ("Catfish Farmers Br."). Commerce acknowledges that it did not address this argument in the *Final Results* and requests a remand to reconsider the surrogate value for fish oil and address Catfish Farmers' argument, a request the court will grant. *SKF*, 254 F.3d at 1029–30.

4. Bona Fide Sales of East Sea Seafoods' Subject Merchandise

To derive the United States price for respondent East Sea Seafoods Joint Venture Co. ("ESS"), Commerce used the price between ESS's affiliated company Piazza's Seafood World LLC ("PSW") and unaffiliated United States customers. *See* Decision Memorandum at 39 & n.33, Pub. Doc. 256.[2] After explaining in detail each of the arguments raised by Catfish Farmers that ESS's sales were not bona fide commercial transactions, Commerce concluded:

> We have analyzed all of the information on the record with respect to the question of whether ESS's sales during the POR constitute bona fide sales. Although we have some concerns about certain aspects of the facts on the record, a review of the totality of the circumstances leads us to conclude that sales of ESS's product are bona fide transactions. In determining whether a sale is a bona fide commercial transaction, the Department examines the totality of the circumstances of the sale in question. If the weight of the evidence indicates that a sale is not typical of a company's normal business practices, the sale is not consistent with good business practices, or "the transaction has been so artificially structured as to be commercially unreasonable," the Department finds that it is not a bona fide commercial transaction and must be excluded from review. *See Certain Cut-to-Length Carbon Steel Plate from Romania*: Notice of Rescission of Antidumping Duty Administrative Review, 63 FR 47232, 47234 (September 4, 1998).
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> In particular, in determining whether a U.S. sale, in the context of a review, is a bona fide transaction, the Department considers numerous factors, with no single factor being dispositive, in order to assess the totality of the circumstances surrounding the

[2] Documents in the administrative record are identified as either "Pub. Doc." (for a public document) or "Confid. Doc." (for a confidential document), followed by the document number.

> sale in question. The Department considers such factors as (1) the timing of the sale, (2) the sales price and quantity, (3) the expenses arising from the sales transaction, (4) whether the sale was sold to the customer at a loss, and (5) whether the sales transaction between the exporter and customer was executed at arm's length. *See American Silicon Technologies v. United States*, 110 F. Supp. 2d 992, 996 (CIT 2000) (citation omitted); *see also Tianjin Tiancheng Pharmaceutical Co. Ltd. v. United States*, 366 F. Supp. 2d 1246, 1250 (CIT 2005). An examination of whether a sale is a bona fide transaction may include a variety of these and other factors, depending upon the unique circumstances of each case.
>
> In examining all of the information on the record in this case, we have determined that the concerns raised by the Petitioners do not cause us to reject the commercial reasonableness of ESS's U.S. sale. In the instant case, we have examined the pricing concerns of the Petitioners and find that information on the record, including price lists and average POR prices, indicate that ESS's sale was not priced aberrationally high. We have also analyzed the quantity of the sale, and have determined that it was of a commercial quantity because it was consistent in size with other sales of seafood products that PSW made during the POR. We disagree with the Petitioners that the fact that ESS does not produce a catalog, website or did not actively seek out U.S. customers during the POR, necessitates a conclusion that any U.S. sale it enters into is not legitimate. Also, the tolling arrangement does not, on its face, lead us to conclude that the operation was not a legitimate commercial enterprise because tolling arrangement [sic] are often part of a legitimate business enterprise. We also cannot conclude that the timing of the sale results in a finding that the sales are not bona fide because companies can make a sale at any time during the POR. When viewing the totality of the circumstances, concerning all the facts and arguments placed on the record by parties, we conclude that we cannot determine ESS's sales to be non-bona fide. Therefore, we will continue to calculate a margin for ESS in these final results.

Decision Memorandum at 39.

Catfish Farmers argue that Commerce's "determination regarding [ESS] was not supported by substantial evidence because it failed to provide a reasoned and adequate explanation for its conclusion that ESS's U.S. sales were bona fide." Catfish Farmers Br. 16. Catfish

Farmers argue that Commerce "failed to address the detailed record evidence, argument, and precedent relevant to the bona fides of [ESS] itself, and was unsupported by substantial evidence." Catfish Farmers Br. 13.

Although Commerce's double negative conclusion that it "cannot determine ESS's sales to be non-bona fide" lacks a certain clarity, the court nevertheless does not agree that a remand is necessary for a further explanation about the bona fides of ESS's U.S. sales. During the administrative review, Commerce first explained, and then applied, its totality of the circumstances bona fide sales test. As Commerce explained, Commerce considers numerous factors (with no single factor being dispositive), to assess the totality of the circumstances surrounding the sale in question. Commerce considers such factors as (1) the timing of the sale, (2) the sales price and quantity, (3) the expenses arising from the sales transaction, (4) whether the sale was sold to the customer at a loss, and (5) whether the sales transaction between the exporter and customer was executed at arm's length. *See Am. Silicon Tech. v. United States*, 24 CIT 612, 616, 110 F. Supp. 2d 992, 996 (2000) (citation omitted); *see also Tianjin Tiancheng Pharm. Co.. v. United States*, 29 CIT 256, 260, 366 F. Supp. 2d 1246, 1250 (2005). An examination of whether a sale is a bona fide transaction may include a variety of these and other factors, depending upon the circumstances of each case. If the weight of the evidence indicates that a sale is not typical of a company's normal business practices, the sale is not consistent with good business practices, or the transaction has been so artificially structured as to be commercially unreasonable, Commerce excludes the non-bona fide transaction from review.

In response to Catfish Farmers' arguments that ESS's U.S. sales were not bona fide, Commerce analyzed ESS's U.S. sale and found that the sale was not priced aberrationally high and was made in commercial quantities. Commerce also concluded that ESS's lack of a website, catalog, or U.S. sales solicitations during the period of review did not, in and of themselves, mean that the U.S. sale was unreliable. Commerce likewise found that ESS's tolling arrangement did not, on its face, suggest an illegitimate commercial enterprise because tolling arrangements are often part of legitimate business enterprises. These are all reasonable findings and conclusions supported by the administrative record. When measured against Commerce's totality of the circumstances bona fide sales analysis, Commerce's conclusion regarding the bona fides of ESS's U.S. sale is reasonable.

Turning to Catfish Farmers' arguments about the bona fides of ESS itself, Catfish Farmers argue that Commerce did not directly address that contention in its totality of circumstances bona fide sales determination, and that Commerce therefore "entirely failed to consider

an important aspect of the problem," *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983). Catfish Farmers chose to subsume the bona fides of ESS within the bona fide sales argument, rendering the bona fides of ESS one of many factors for Commerce to consider. *See* Catfish Admin. Case Br. 42–59, Confid. Doc. 89. What Commerce did in resolving the bona fide U.S. *sales* issue was to focus on ESS's affiliated company *sale* and subsequent *sales* to unaffiliated U.S. customers. Commerce followed its usual practice of evaluating the totality of the circumstances with regard to those *sales*. Commerce was persuaded that the *sales* were legitimate, and by implication, that ESS was too. *See Daewoo Elecs. v. Int'l Union*, 6 F.3d 1511, 1520 (Fed. Cir. 1993) ("'The specific determination we make is whether the evidence and reasonable inferences from the record support' Commerce's findings.") (quoting *Matsushita Elec. Indus. Co. v. United States*, 750 F.2d 927, 933 (Fed. Cir. 1984)). The court does not believe Commerce erred by failing to separately and distinctly address the legitimacy of ESS as a respondent when Catfish Farmers did not raise that as a separate, standalone issue. It was argued within the context of Commerce's totality of the circumstances sales test. The court therefore does not share Catfish Farmers' belief that a remand is either necessary or appropriate in this instance. Commerce's bona fide sales determination was reasonable and therefore is sustained.

5. Collapsing Thuan Hung with QVD and QVD Dong Thap

In the *Final Results* Commerce collapsed Thuan Hung with QVD and QVD Dong Thap, as it had in the preceding review. Decision Memorandum at 19. QVD claims that other than a family relationship there is no evidence of financial ties or transactions that would support a determination to collapse Thuan Hung with QVD and QVD Dong Thap. QVD Br. 4. Commerce placed the memorandum from the second administrative review addressing the affiliation and collapsing of the QVD companies on the record of this administrative review. *See* Second Review Collapsing Memorandum, Confid. Doc. 37 ("Collapsing Memorandum"). In its supplemental questionnaire Commerce asked QVD to indicate whether the facts had changed since the preceding review period. Decision Memorandum at 18. In response QVD represented that "there were no changes in the corporate structures of any of the QVD companies or affiliates" and there "were no changes from the 2nd administrative review to the capital structure, scope of operations, affiliations, production capacity, ownership, or management." *Id.* at 19 (internal quotations omitted). Accordingly, relying upon the rationale of the second administrative review, and

"absent any information that would change that determination," Commerce again collapsed Thuan Hung with QVD and QVD Dong Thap. *Id.* at 19.

If parties are affiliated or collapsed, Commerce generally disregards transactions between those parties and looks further downstream for transactions. For example, for export or constructed export price, Commerce looks downstream to find the first sale to an unaffiliated purchaser. 19 U.S.C. § 1677a(a), (b). In the administrative review Commerce found that Thuan Hung was part of the QVD family group, a determination that QVD does not challenge. QVD Br. 10. Rather, QVD asserts that Commerce's collapsing analysis was improper because there was not a significant potential for manipulation by the collapsed entities. QVD Br. 14.

Commerce collapses affiliated parties and treats them as a single entity if (1) "those producers have production facilities for similar or identical products that would not require substantial retooling of either facility in order to restructure manufacturing priorities" and (2) "the Secretary concludes that there is a significant potential for the manipulation of price or production." 19 C.F.R. § 351.401(f)(2) (2006).[3] The regulations further provide a non-exhaustive list of three factors that Commerce may consider in determining whether there is a significant potential for manipulation: (1) the level of common ownership; (2) the extent to which managerial employees or board members of one firm sit on the board of directors of an affiliated firm; and (3) whether operations are intertwined. *Id.*

QVD does not dispute that Thuan Hung has production facilities that can produce and did produce, during the period of review, products similar or identical to the subject merchandise. However, QVD disputes Commerce's determination that there is a significant potential for manipulation of prices and production. QVD Br. 8.

With regard to the first control factor, common ownership, Commerce found, in the second review, that the QVD family members "comprise the only shareholders and the largest share holders as a family in each company" and that, as a result, the QVD family companies have the ability or incentive to coordinate their actions in order to direct the companies to act in concert with each other. Collapsing Memorandum at 15–16. This finding was incorporated into the *Final Results* in this review, along with the other second administrative review findings on this issue. Decision Memorandum at 19.

QVD argues that common family ownership is not sufficient to collapse companies without further indicia of control. QVD Br. 10

[3] Further citations to the C.F.R. are to the 2006 edition.

(citing *Certain Welded Carbon Steel Pipes and Tubes from Thailand*, 63 Fed. Reg. 55,578 (Dep't of Commerce Oct. 16, 1998) (final results of antidumping duty administrative review) ("*Tubes from Thailand*")). QVD is correct that common family ownership alone provides an insufficient basis to collapse entities, but QVD's analysis of *Tubes from Thailand* is incomplete. Rather, *Tubes from Thailand* supports Commerce's determination that, from a family group perspective, the ownership of Thuan Hung is a positive indicator of the significant potential for manipulation. In *Tubes from Thailand* Commerce decided not to collapse one company into the others, finding that the family in question was only a minority owner. *Tubes from Thailand*, 63 Fed. Reg. at 55,583. In the instant case the existence of the family group, and the significant controlling ownership by the family members, reasonably supports Commerce's collapsing decision.

With regard to the second control factor, the extent to which managerial employees or board members of one firm sit on the board of directors of an affiliated firm, Commerce found that, because senior leadership positions of each of the QVD companies were filled with members of the QVD family, and the QVD family members are the largest stakeholders in the company, the evidence "clearly shows that the family has the ability and financial incentive to coordinate their actions to direct . . . [the companies] . . . to act in concert with each other." Collapsing Memorandum at 16; *see* Statement of Administrative Action of the Uruguay Round Agreements Act ("SAA"), H.R. Doc. 103–316 (Vol. I) at 838 ("A company may be in a position to exercise restraint or direction, for example, through corporate or family groupings.").

QVD argues that this control factor requires overlapping boards of directors. QVD Br. 11. QVD is incorrect. There is no applicable precedent that requires overlapping boards of directors to support a collapsing determination. The regulation's list of factors is nonexhaustive and merely suggests three factors for Commerce to examine in establishing potential control. *See* 19 C.F.R. § 351.401(f)(2). Commerce made a family group determination that QVD does not contest. Here, Commerce reasonably applied the control analysis to the family group level because the companies are owned and controlled by family members. Accordingly, although Thuan Hung does not share board members with the other QVD companies, the presence of members of the QVD family group in senior leadership positions in all of the QVD companies supports a finding that there is a significant potential for manipulation.

With regard to the third control factor, intertwined operations, Commerce relied upon several facts. In the second review, Commerce found that Thuan Hung had a past arrangement with QVD and QVD

Dong Thap to process frozen fish fillets for export to the United States. Decision Memorandum at 19; Collapsing Memorandum at 15–16. Commerce acknowledged that the arrangement had ended in 2003, but, in the second review, Commerce continued to find that the past arrangement evidenced the potential for intertwined operations in the future. Collapsing Memorandum at 16. Commerce, however, did not rely upon this fact alone in making its determination. In addition, Commerce found that Thuan Hung processed Vietnamese catfish like the subject merchandise and that Thuan Hung had an import-export registration so that it could export to the United States if it wanted to. *Id.* As a result, Commerce found a potential for intertwined transactions that, when combined with the family group determination, and the level of ownership and direct control by family members of the QVD companies, supported a determination that Thuan Hung should be collapsed with QVD and QVD Dong Thap. *Id.* at 16. After confirming that there were no major changes to the underlying data from the prior review, Commerce concluded that it was appropriate in this review to continue to treat QVD Dong Thap and Thuan Hung as a single entity. Decision Memorandum at 19.

QVD cites to three administrative determinations in which Commerce found that there was insufficient evidence of intertwined operations to support a collapsing determination. QVD Br. 12–13. Two of the determinations do not involve family group findings and, therefore, are inapplicable. The administrative precedent that does address a family group scenario, *Tubes from Thailand*, supports Commerce's collapsing decision in this action, because the evidence that Commerce found missing in *Tubes from Thailand* is present here. In *Tubes from Thailand* Commerce based its decision not to collapse upon the totality of the circumstances, including determinations that the family member on the board of the company in question was only one of nine, and that the family in that case owned a minority share of the company in question. In contrast, here, Commerce found that the QVD family members are the only shareholders, the largest shareholders, and hold senior leadership positions in the companies. Collapsing Memorandum at 15–16.

In addition Commerce found that Thuan Hung processed fish fillets for the QVD companies in the past; that it processed fish identical to the subject merchandise during the period of review; that it has an import-export registration; and that, although it shipped no subject merchandise during the period of review, it could have done so. Further, QVD focuses a great deal upon its contention that the companies did not share customers and customer lists, make production decisions in conjunction with each other, coordinate pricing, borrow or

lend to each other, or engage in similar joint activities. QVD Br. 5–6. The regulation, however, covers not just actual manipulation, but also whether there is a significant *potential for manipulation of price and production in the future*. 19 C.F.R. § 351.401(f)(1).

As with any collapsing determination, Commerce's determination here was dependent upon the totality of the facts and circumstances. Commerce reasonably determined that there existed a significant potential for manipulation of price and production by the collapsed entities. Commerce's collapsing decision is therefore sustained.

6. Affiliation of QVD USA and Beaver Street Fisheries

In the *Final Results* Commerce rejected Catfish Farmers' argument that QVD USA and Beaver Street Fisheries ("BSF") were affiliated because they shared an employee. Catfish Farmers contend that Commerce failed to evaluate whether BSF and QVD USA were affiliated because they both employ Person X, or whether BSF directly or indirectly controlled QVD USA through Person X. Catfish Farmers Br. 21–24. Contrary to Catfish Farmers' assertions, Commerce was aware of their arguments, restated those arguments, and rejected those arguments. Commerce examined the relationship between QVD USA, BSF, and Person X, and determined that the record evidence did not reveal the type of control necessary to warrant a finding that QVD USA and BSF were affiliated. Decision Memorandum at 15–16. The antidumping statute provides that, among other scenarios, an affiliation relationship exists when two or more persons directly or indirectly control, are controlled by, or are under common control with, any person. 19 U.S.C. § 1677(33)(F). The statute defines the "control of another person" as being "legally or operationally in a position to exercise restraint or direction over the other person." 19 U.S.C. § 1677(33).

In the *Final Results* Commerce concluded that "[w]hile Person X acts as QVD USA's agent in the United States and is also employed by BSF, there is no evidence on the record to indicate that QVD USA or BSF are in a legal or operational position to exercise restraint or direction over each other, or that they are under common control of Person X. Decision Memorandum at 15–16. Commerce determined that QVD does not control BSF through Person X, and BSF does not control QVD USA through Person X. Commerce found that although Person X has some influence over the prices of QVD USA, the owner of QVD (not Person X), has the ultimate authority to set QVD USA's prices. QVD USA Verification Report at 5–6, Confid. Doc. 86. With respect to BSF, Commerce found that Person X had no control over the purchasing decisions of BSF. *Id.* Commerce found that BSF employed Person X as one of many advisors about fish market conditions, production facilities, or exporter information. *Id.* Given Person X's role for the respective companies, Commerce found the record

evidence insufficient to support a finding that BSF controlled, or was in a position to control, QVD USA through Person X. These are reasonable findings supported by the administrative record."

Catfish Farmers argue that BSF allegedly "controls" Person X through their employer-employee relationship, and because Person X allegedly was operationally able to exercise restraint and direction over QVD USA, BSF could indirectly exercise control over QVD USA through Person X. Commerce, though, did not agree, finding as a factual matter that Person X simply was not a vehicle through which either company could exercise control over one another. *See Hontex Enter., Inc. v. United States*, 27 CIT 272, 299, 248 F. Supp. 2d 1323, 1345–46 (2003) ("At no point does the evidence demonstrate that [the shared employee] was in control of both Companies or that his activities served to allow one company or any third party to exercise control over the Companies. The evidence merely demonstrates that the Companies shared an employee and nothing more."). Here, Commerce conducted a full control analysis of the relationships between QVD USA, BSF, and their shared employee, Person X, and found that the requisite statutory control was absent, a finding that is reasonable given the role that Person X played in each company.

7. Surrogate Value Selections for Whole Live Fish and Financial Ratios

Catfish Farmers challenge (1) the surrogate value Commerce used to value the primary input, whole live fish, for the subject merchandise, frozen fish fillets, and (2) the surrogate financial statements Commerce used to value the financial ratios for selling, general, and administrative expenses, overhead, and profit. Catfish Farmers Br. 24–35.

In an antidumping proceeding Commerce is required to determine whether subject merchandise is being, or is likely to be, sold at less than fair value in the United States by comparing the export price (the price of the goods sold in the United States) and the normal value of merchandise. 19 U.S.C. § 1675(a)(2)(A). The normal value of merchandise is usually determined by reference to sales of merchandise in the home market, in a third country, or through a constructed value of the merchandise. *See* 19 U.S.C. § 1677b(a)(1), (4).

Under Commerce's non-market economy methodology for determining normal value, Commerce determines a surrogate value for each input used in producing subject merchandise. 19 U.S.C. § 1677b(c)(1). "[T]he factors of production utilized in producing merchandise include, but are not limited to – (A) hours of labor required, (B) quantities of raw materials employed, (C) amounts of energy and other utilities consumed, and (D) representative capital cost, including depreciation." 19 U.S.C. § 1677b(c)(3).

When constructing the value for subject merchandise in a non-market economy, Commerce need not "duplicate the exact production experience of the" non-market economy manufacturers, or undergo an item-by-item accounting when accounting for factory overhead. *Nation Ford Chem. Co. v. United States*, 166 F.3d 1373, 1377 (Fed. Cir. 1999). Rather, Commerce must use the best available information to "acquire an accurate reading of the actual costs of a company operating in a state-controlled-economy." *Technoimportexport and Peer Bearing Co. v. United States*, 15 CIT 250, 254, 766 F. Supp. 1169, 1174 (1991).

A.
Fish Prices from 2006–07 Financial Statement for Gachihata Acquaculture Farms, Ltd.

For the *Final Results* Commerce had a choice of several proposed sources for surrogate value information for the whole live fish used to make the subject merchandise, frozen fish fillets. Commerce obtained a surrogate value for whole live fish from the 2006–07 audited financial statement for Bangladeshi fish grower Gachihata Acquaculture Farms, Ltd. ("Gachihata"). Decision Memorandum at 13–14. Catfish Farmers argue that this financial statement is unreliable and that Commerce should have continued to use the sales data from the 2000–01 Gachihata statement, indexed for inflation. Catfish Farmers Br. 6–13. Although styled as an argument that Commerce failed to consider their arguments and offer a rational connection between the facts found and the choice made, Plaintiffs' argument reads more like a garden variety request to reweigh the evidence, something the substantial evidence standard of review does not allow.

In selecting among competing surrogate value sources, Commerce evaluates potential data for reliability, availability, quality, specificity, and contemporaneity. *See Preliminary Determination of Sales at Less Than Fair Value and Postponement of the Final Determination: Magnesium Metal from the People's Republic of China*, 69 Fed. Reg. 59,187, 59,195 (Dep't of Commerce Oct. 4, 2004) ("*Magnesium Metal from China*").

The sales data from Gachihata's 2006–07 financial statement is publicly available; contemporaneous with the period of review; derived from the primary surrogate country, Bangladesh; concerns the specific type of whole live catfish used to produce the subject merchandise; and is an audited financial statement, and, thus, reliable. *See* QVD Surrogate Value Submission Ex. 6 (Oct. 30, 2007), Pub. Doc. 210. Commerce selected the 2006–07 financial statement over the 2000–01 financial statement because the 2006–07 financial statement data was contemporaneous with the period of review and specific to the input. Decision Memorandum at 13.

Catfish Farmers argue that the 2006–07 Gachihata financial statement allegedly is unreliable because: (1) the underlying data is unreliable; (2) Gachihata did not show a profit for that period; (3) there was an irregularity regarding the valuation of biological assets of the firm; (4) the auditors' report accompanying Gachihata's financial statement was marked private and confidential and, therefore, not publicly available; and (5) the financial statement was missing some pages. Catfish Farmers Br. 6–13. None of these challenges provides a basis for remanding this issue to Commerce for further consideration.

First, Catfish Farmers assert that the data from the 2006–07 Gachihata financial statement is unreliable because it is based upon sales of six metric tons of fish, which Catfish Farmers contend is a "commercially insignificant" quantity. Catfish Farmers Br. 9. Catfish Farmers also claim that Commerce failed to address the commercial quantities issue in its decision. However, Commerce expressly noted that Catfish Farmers had raised that argument. Decision Memorandum at 12. Commerce was simply not persuaded.

Specifically, Catfish Farmers failed to demonstrate on the administrative record that six metric tons is a commercially insignificant quantity. Catfish Farmers claim through bare assertion and a hoped for inference that because Gachihata's 2006–07 sales were significantly less than Gachihata's 2000–01 sales, the 2006–07 quantity must be commercially insignificant. Catfish Farmers Br. 9. It does not follow, however, that because sales during the earlier period were significantly higher than sales during the later period, the later sales were not made in commercial quantities. Catfish Farmers hoped Commerce would infer that the 2006–07 sales were not made in commercial quantities, but Commerce did not oblige. Catfish Farmers now invite the court to draw that inference in the first instance, something the court will not do given the record before the court.

Catfish Farmers also attempt to support its argument by asserting that, according to the 2006–07 financial statement, Gachihata did not produce any subject merchandise in 2005–06. Catfish Farmers Br. 19. This merely demonstrates that commercial quantities were not produced in 2005–06. That fact, however, does not provide any basis for a determination that the six metric tons at issue here was a commercially insignificant quantity.

Second, Catfish Farmers argue that Commerce's reliance upon the 2006–07 Gachihata financial statement was inconsistent with Commerce's policy that financial statements from surrogate companies with no profit will not be used as a source of financial ratios. Catfish Farmers Br. 10 (citing *Certain Frozen Warmwater Shrimp From the Socialist Republic of Vietnam: Final Results of the First Antidumping Duty Administrative Review and First New Shipper Review*, 72 Fed.

Reg. 52,052 (Dep't of Commerce Sept. 12, 2007) ("*Shrimp from Vietnam*") & accompanying Decision Memorandum at 6).

Catfish Farmers misunderstand Commerce's policy. In *Shrimp from Vietnam* Commerce announced a clarification of its practice with regard to obtaining surrogate financial ratios for the selling, general, and administrative ("SG&A") expenses, and overhead for a factors-of-production-normal-value calculation. Decision Memorandum at 9. In that proceeding, Commerce decided that profit was a function of total expenses and, therefore, intrinsically tied to the other financial ratios. *Id.* at 10. As a result, using other financial ratios from a financial statement with no profit renders those other financial ratios unrepresentative of a normal surrogate producer. *Id.* Therefore, Commerce decided that it would not use the financial ratios from a financial statement if the company has no profit. *Id.*

The rationale for not using financial ratios from statements where a company has no profit does not extend to the price the company received for a quantity of fish it sold, which is determined by the market for fish. Whether or not the company made an overall profit, the revenue and quantity of the sales of fish are market prices and quantities reflected in the audited financial statement. These values are not a function of interconnected accounting principles, as are financial ratios. Therefore, while Commerce will understandably reject the use of no-profit statements for purposes of determining surrogate financial ratios, it reasonably may use data from such statement to value individual material inputs that are recorded in the financial statement. Third, Catfish Farmers allege that the 2006–07 Gachihata financial statement indicates that the valuation of the biological assets of the firm, which includes the fish, had not been recognized during the period. Catfish Farmers Br. 11. Catfish Farmers contend that this alleged irregularity provides a basis to reject the use of the fish price data. Catfish Farmers Br. 11.

However, there is no basis upon which to make a negative inference about the prices at which Gachihata sold fish based upon the company's policy regarding the biological asset values for accounting purposes. The auditors' report sets forth a reasonable explanation for not valuing the biological assets of the firm during the period of review. *See* QVD Surrogate Value Submission Ex. 5. There is nothing on the record that indicates that Gachihata's policy was implemented in bad faith, or that it had an impact upon the actual prices and quantities of the fish sold. Commerce acted reasonably when it accepted Gachihata's 2006–07 financial statement.

Fourth, Catfish Farmers argue that because the auditors' report was marked private and confidential, it should be rejected. Catfish Farmers Br. 11–12. Catfish Farmers assert that because the auditors'

report was not "publicly available," Commerce violated its preference for publicly available data. However, Commerce made an appropriate judgment call to accept the auditors' designation of its report as private and confidential.

The relevant fact is that the financial statement, and thus the fish price used, was publicly available. It is only the auditors' report that was kept confidential. However, the parties were able to examine and comment extensively upon the auditors' report because it was placed on the record. Decision Memorandum at 13. After reviewing all of the arguments, Commerce found that nothing in the auditors' report impugned the 2006–07 fish values. *Id.* This is a reasonable finding supported by the record.

Fifth, Catfish Farmers argue Commerce failed to address Catfish Farmers' arguments that the 2006–07 Gachihata financial statement was incomplete and should have rejected it upon that basis. Catfish Farmers Br. 12. However, Commerce specifically addressed that concern:

> As noted above, [Catfish Farmers] also argue that certain pages (cover page, table of contents, page numbers, publication date, etc.) and other sections typically found in the prior review reports are missing from the 2006–2007 financial statement. Although we agree . . . that the 2006–2007 financial statements do not contain certain pages and information found in previous reports, we cannot speculate as to the reason for their omission here. More importantly, we do not find these pages necessary for our analysis, as previously those pages have not contained any relevant information regarding Gachihata's [fish] value.

Decision Memorandum at 14.

In Commerce's view the omissions were not substantial and did not undermine the integrity of the sales price data. Catfish Farmers have not demonstrated that the omissions are significant. They merely argue that pages are missing and that the financial statement is unreliable. Although the information may not have been perfect, Commerce reasonably chose to rely upon it. Where Commerce is faced with the choice of selecting from among imperfect alternatives, it has the discretion to select the best available information for a surrogate value so long as its decision is reasonable. "The Court's role . . . is not to evaluate whether the information Commerce used was the best available, but rather whether a reasonable mind could conclude that Commerce chose the best available information." *Goldlink Indus. Co. v. United States*, 30 CIT 616, 619, 431 F. Supp. 2d 1323, 1327 (2006). Here, Commerce satisfied that test.

B.
Financial Ratios

In the *Final Results* Commerce used the financial statements for Bangladeshi seafood processors Apex Foods Ltd. and Gemini Sea Food Ltd. ("Gemini"), but not Bionic Seafood Exports Ltd. ("Bionic") to derive the fish processing companies' surrogate financial ratios for: (1) SG&A, (2) overhead, and (3) profit. Decision Memorandum at 6–8. Catfish Farmers argue that Commerce should have used Bionic's financial statement because: (1) Commerce's new policy of not using financial statements from companies that have a zero profit is not supported by the evidence; (2) Commerce's rejection of financial statements with no profit contradicts past precedent, including Commerce's use of Bionic's financial statements in all previous administrative reviews; and (3) Commerce did not provide the parties adequate notice or an opportunity for comment upon the new practice. Catfish Farmers Br. 24–32. Catfish Farmers also argue that Commerce should not have used the Gemini financial statement because the financial statement indicates that Gemini received a subsidy. Catfish Farmers Br. 32–35.

Before selecting among competing surrogate value sources for the respondents' factor inputs, Commerce, in accordance with its normal practice, evaluates record data for reliability, availability, quality, specificity, and contemporaneity. *See Magnesium Metal from China*, 69 Fed. Reg. at 59,195. There is no dispute that both the Bionic and Gemini financial statements are publically available, contemporaneous with the period of review, specific to fish processors, and from the primary surrogate country, Bangladesh. Thus, Commerce was required to exercise its judgment in choosing which financial statement to use.

1. Bionic

Commerce reasonably determined not to use Bionic's financial statement because the company did not show a profit. Decision Memorandum at 6. As noted in Section 7A, *supra*, Commerce determined that, for purposes of obtaining financial ratios, it will not rely upon financial statements that have zero profit. Decision Memorandum at 6 (citing *Shrimp from Vietnam*, 72 Fed. Reg. at 52,052 & accompanying Decision Memorandum at 8–10 (Cmt. 2B)). Commerce relied on its determination in *Shrimp from Vietnam* where it explained that the financial ratios are not preferred data, in that they do not reflect the financial situation of a normal surrogate company that operates at a profit and, thus, are not an appropriate benchmark for the calculation of normal value in a non-market economy case, when other financial statements, showing profits, are available. As a

result, Commerce found that "use of the parts of a financial statement for a zero profit company does not account for the interconnectedness of the overhead, SG&A, with the zero profit." *Shrimp from Vietnam* Decision Memorandum at 10. Here, in the *Final Results*, Commerce adopted the rationale from *Shrimp from Vietnam* and disregarded Bionic's financial statements in calculating surrogate financial ratios. Decision Memorandum at 6.

Catfish Farmers argue that Commerce's new policy is unreasonable because it means that Commerce would use a financial statement for a company that made a $1.00 profit but not that for a company which made a $1.00 loss. Catfish Farmers Br. 27. Commerce, however, has not yet faced either factual scenario, so it is speculation upon the part of Catfish Farmers as to what Commerce would do in such a situation. If such circumstances arise, Commerce can address them based upon the record before it at that time.

Catfish Farmers argue that the new policy is inconsistent with past precedent. Catfish Farmers Br. 28–29. In both the *Final Results* here, and *Shrimp from Vietnam*, Commerce explicitly acknowledged that, in the past, Commerce had taken inconsistent positions with regard to financial statements with zero profits. Decision Memorandum at 6; *Shrimp from Vietnam*, 72 Fed. Reg. 52,052 & accompanying Decision Memorandum at 9. However, a past inconsistent practice is not a basis for overturning a new practice designed to eliminate the inconsistency and provide certainty going forward.

Catfish Farmers rely upon *Fuyao Glass Indus. Group Co. v. United States*, 27 CIT 1892 (2003) ("*Fuyao*") and *Rhodia, Inc. v. United States*, 26 CIT 1107, 240 F. Supp. 2d 1247 (2002) ("*Rhodia*"), for the proposition that the Court of International Trade has consistently upheld Commerce decisions to use financial statements of companies with zero profits. Catfish Farmers Br. 28–29. Catfish Farmers though misstate the holdings in those cases. Those cases stand for the proposition that Commerce may exclude zero profit figures from its profit calculations. *Fuyao*, 27 CIT at 1212–13; *Rhodia*, 26 CIT at 115, 240 F. Supp. 2d. at 1255. These cases did not address the issue of whether Commerce should use the selling, general, and administrative expenses, and overhead expenses reflected in financial statements of companies with zero profits. Further, *Fuyao* does not indicate, as Catfish Farmers argue, that the "mere fact that a company is unprofitable does not indicate that the overhead or SG&A expenses are somehow tainted." Catfish Farmers Br. 29.

Catfish Farmers next argue that Commerce changed its practice without giving notice or opportunity to comment. Catfish Farmers Br. 29. Assuming arguendo that prior notice is somehow required for a

change of this type of administrative practice, Catfish Farmers were well aware of the change. Specifically, Commerce announced its new policy of excluding zero profit financial statements in *Shrimp from Vietnam*, 72 Fed. Reg. 52,052 & accompanying Decision Memorandum at 9–10. The effective date of the final results in that case was September 12, 2007. The effective date for the *Preliminary Results* in the underlying review was September 19, 2007. More important, in this administrative review, the parties had the opportunity to comment upon the issue of excluding zero profit financial statements from financial ratio calculations, and took advantage of that opportunity. *See* Catfish Farmers Admin. Case Br. 7–8, Confid. Doc. 89; QVD Admin. Rebuttal Br. 5–8, Confid. Doc. 91. Indeed, *Shrimp from Vietnam* was published more than three months before case briefs were due in this review on December 28, 2007. Thus, Catfish Farmers had sufficient notice of the change in policy, and Commerce's rejection of Bionic's financial statement is a reasonable determination supported by the administrative record.

2. Gemini

In the *Final Results* Commerce included data from the 2005–06 Gemini financial statement in its calculation of the financial ratios for normal value because the data was the best available information. Decision Memorandum at 7–8. Catfish Farmers assert Commerce should not have used the data because there allegedly is a reason to believe or suspect that the company had received a subsidy. Catfish Farmers Br. 32–35. One of the criteria to determine what is the best available information in valuing the factors of production is whether there is a reason to believe or suspect that prices being used may be dumped or subsidized prices. Omnibus Trade and Competitiveness Act of 1988, H.R. Rep. No. 100–576, at 590 (1988) (Conf. Rep.), *as reprinted in* 1988 U.S.C.C.A.N. 1547, 1623. The Conference Report explains that a formal countervailing duty investigation is not required in making the determination, and that Commerce should base its decision upon the available record evidence. *Id.* at 1623–24. Congress provided no further guidance as to what would constitute a reasonable basis to believe or suspect that a price may be subsidized.

Here, Commerce explained that a mere mention, in a financial statement, that a subsidy was received, does not necessarily mean that a countervailable subsidy exists. Decision Memorandum at 7. Commerce carefully reviewed that mention and concluded that there was insufficient record evidence to support a finding that Gemini received a countervailable subsidy. Decision Memorandum at 7–8. Although Catfish Farmers may disagree with Commerce's conclusion,

and may have even reached a different conclusion were they the decision maker, Commerce's conclusion was reasonable and, therefore, must be sustained.

Catfish Farmers argue that the financial statement indicates that Gemini had received from the government of Bangladesh "a 10% [c]ash subsidy as per Bangladesh Bank Circular No. FE–23 dated 12/12/03 against export bill, which was made available to Bangladeshi processing and exporting companies." Catfish Farmers Br. 33. Commerce refused to indulge Catfish Farmers' hoped for inferences and assumptions about this particular quotation. Commerce did not believe it was reasonable to infer that the amount identified as a "subsidy" was from the government of Bangladesh. The financial statement merely reflects information from a Bangladesh Bank circular about a "subsidy." The record does not explain to which bank Gemini's financial statement is referring and contains no evidence that the "subsidy" is from a state bank. Similarly, even if the "subsidy" were identified as being from the Bangladeshi government or other public entity, there is no record evidence that identifies the terms of the alleged program (for example, whether it is only on exports, who is eligible, or whether it is a specific subsidy).

Catfish Farmers also assert that the subsidy is for "processing and exporting companies." Catfish Farmers Br. 33. However, other than the notations in Gemini's financial statement that the alleged "subsidy" was "against export" and "against export bill," there is no indication that the "subsidy" only applies to exports. QVD Surrogate Value Submission Ex. 7 at 19, 21 (May 14, 2007), Pub. Doc. 127. Commerce's refusal to share the inferences drawn by Catfish Farmers is reasonable on this administrative record, which contained a mere mention of a subsidy without additional substantiating evidence of countervailability. As a result, Commerce's determination is sustained.

Conclusion

Commerce's request for a voluntary remand regarding (1) QVD's international freight expense, (2) the valuation of QVD's labels, and (3) the calculation of the surrogate value for fish oil is granted. All other issues raised by Catfish Farmers and QVD in their motions for judgment on the agency record are denied. Accordingly, it is hereby

ORDERED that this action is remanded to the U.S. Department of Commerce to reconsider its calculation of QVD's international freight expense, the valuation of QVD's labels, and the valuation of fish oil; and it is further

ORDERED that the U.S. Department of Commerce is to file its remand results on or before November 10, 2009; and it is further

ORDERED that the parties are to file a proposed scheduling order with page limits for the submission of comments on the remand results, if applicable, not later than 14 days after Commerce files the remand results with the court.

Dated: September 14, 2009
New York, New York

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

Slip Op. 09–97

VINH QUANG FISHERIES CORPORATION, Plaintiff, v. UNITED STATES, Defendant.

Before: Leo M. Gordon, Judge
Court No. 08–00233

[Commerce's new shipper review results sustained; judgment for Defendant.]

Dated: September 14, 2009

Trade Pacific PLLC (*Robert G. Gosselink, Jonathan M. Freed, Ji Hyun Tak*) for Plaintiff Vinh Quang Fisheries Corporation.

Tony West, Assistant Attorney General, *Jeanne E. Davidson*, Director, *Franklin E. White, Jr.*, Assistant Director, Commercial Litigation Branch, Civil Division, U.S. Department of Justice (*Richard P. Schroeder*, Trial Attorney; and Office of the Chief Counsel for Import Administration, U.S. Department of Commerce (*David W. Richardson*), of counsel, for Defendant United States.

Akin Gump Strauss Hauer & Feld LLP (*Valerie A. Slater, J. David Park, Jarrod M. Goldfeder, Christopher D. Priddy, Natalya D. Dobrowolsky*) for Defendant-Intervenors Catfish Farmers of America, America's Catch, Consolidated Catfish Companies, LLC dba Country Select Fish, Delta Pride Catfish Inc., Harvest Select Catfish Inc., Heartland Catfish Company, Pride of the Pond, Simmons Farm Raised Catfish, Inc., and Southern Pride Catfish Company, LLC.

OPINION

Gordon, Judge:

I.
Introduction

This action involves the final results of a new shipper review on the antidumping order on frozen fish fillets from Vietnam. *Certain Frozen Fish Fillets from the Socialist Republic of Vietnam*, 73 Fed. Reg. 36,840 (Dep't of Commerce June 30, 2008) (final results and partial rescission new shipper review) ("*Final Results*"); *see also* Issues and Decision Memorandum for Certain Frozen Fish Fillets from the Socialist Republic of Vietnam, A–552–801 (June 20, 2008), *available at*

http://ia.ita.doc.gov/frn/summary/vietnam/E8-14801-1.pdf ("Decision Memorandum") (last visited Sept. 14, 2009). Before the court is Plaintiff's USCIT Rule 56.2 motion for judgment on the agency record challenging a determination made by the U.S. Department of Commerce ("Commerce") to value unprocessed fish waste using price quotes rather than the processed fish waste values proffered by Vinh Quang Fisheries Corp. ("Vinh Quang"). The court has jurisdiction pursuant to Section 516A(a)(2)(B)(iii) of the Tariff Act of 1930, as amended, 19 U.S.C. § 1516a(a)(2)(B)(iii) (2006),[1] and 28 U.S.C. § 1581(c) (2006). For the reasons set forth below, the court denies Plaintiff's motion and sustains the *Final Results*.

II.
Background

Vietnam is a non-market economy country. During the new shipper review, Vinh Quang reported in its factors of production database fish waste as an offset to production costs. Vinh Quang Section D Questionnaire Response at D–14, Pub. Doc. 35 ("Pl. Sec. D Resp.").[2] Subsequently, Vinh Quang indicated that, during the period of review, fish waste was collected at each stage of production and stored in a designated room. Vinh Quang Supplemental Questionnaire Response at 16 (July 31, 2007), Pub. Doc. 61 ("Pl. July 2007 Supp. Resp."). Vinh Quang represented that "the fish waste is sold without further processing." Pl. July 2007 Supp. Resp. at 16. Vinh Quang also reported that it did not segregate the fish waste into separate by-products, such as fish skin, stomachs, or broken fillets. Vinh Quang Supplemental Response at II–25 (Oct. 10, 2007), Pub. Doc. 97 ("Pl. Oct. 2007 Supp. Resp.").

Vinh Quang proposed that Commerce value fish waste as an average of the UN Comtrade data for Bangladeshi import prices of fish skin under HTS subheading 2301.20, and the World Trade Atlas ("WTA") data for Indonesian import prices for broken meat under HTS subheading 0304.90.90. Decision Memorandum at 6; Vinh Quang Surrogate Value Submission Attach. 2, Pub. Doc. 151 ("Pl. Surr. Val. Subm."). Catfish Farmers, the domestic interested party in the review,[3] submitted surrogate value information for unprocessed fish waste in the form of two price quotes from Indian seafood processing companies. Catfish Farmers Surrogate Value Submission at

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[1] Further citations to the Tariff Act of 1930 are to the relevant provisions of Title 19 of the U.S. Code, 2006 edition.

[2] Documents in the administrative record are identified as "Pub. Doc." (for a public document), followed by the document number.

[3] The defendant-intervenors in this action are Catfish Farmers of America, America's Catch, Consolidated Catfish Companies, LLC dba Country Select Fish, Delta Pride Catfish Inc., Harvest Select Catfish Inc., Heartland Catfish Company, Pride of the Pond, Simmons Farm Raised Catfish, Inc., and Southern Pride Catfish Company, LLC. They are collectively referred to as "Catfish Farmers."

13 & Ex. 16, Pub. Doc. 73 ("Catfish Farmers Surr. Val. Subm."). Catfish Farmers explained that it was unable to obtain public prices for unprocessed fish waste because that item is not widely traded in commercial markets. Catfish Farmers Surr. Val. Subm. at 13 & Ex. 16. For the preliminary results, Commerce valued Vinh Quang's unprocessed fish waste, bone, and head, using the price quotes submitted by Catfish Farmers. *See Certain Frozen Fish Fillets From the Socialist Republic of Vietnam*, 73 Fed. Reg. 6119 (Dep't of Commerce Feb. 1, 2008) (partial rescission and preliminary results) ("*Preliminary Results*"); Analysis for Vinh Quang at 4, Pub. Doc. 146 & Preliminary Results Surr. Val. Mem. at 7, Pub. Doc. 130.

In response to the *Preliminary Results* Vinh Quang argued that Commerce should use the values it submitted for fish skin and broken meat to value fish waste. Vinh Quang Administrative Case Brief at 5, Pub. Doc. 154 ("Pl. Admin. Case Br."). Vinh Quang contended that the Indian price quotes were self-serving, not public, not independently audited, not verifiable, and not representative of industry-wide values. Pl. Admin. Case Br. at 8, 10. Catfish Farmers argued that the Indian price quotes were the best available and only information on the record to value unprocessed fish waste. Catfish Farmers Administrative Rebuttal Brief at 16–17, Pub. Doc. 164 ("Catfish Farmers Admin. Rebuttal Br."). Catfish Farmers asserted that the values proposed by Vinh Quang were inappropriate because they were for processed fish waste and did not match the factor of production at issue. *See* Catfish Farmers Admin. Rebuttal Br. at 16–19.

In the *Final Results* Commerce selected the Indian price quotes for unprocessed fish waste to value the unprocessed fish waste factor of production. Decision Memorandum at 7–8. Vinh Quang challenges that decision in this action.

III.
Standard of Review

For new shipper reviews of antidumping duty orders, the court sustains Commerce's determinations, findings, or conclusions unless they are "unsupported by substantial evidence on the record, or otherwise not in accordance with law." 19 U.S.C. § 1516a(b)(1)(B)(i). More specifically, when reviewing substantial evidence challenges to Commerce's actions, the court assesses whether the agency action is "unreasonable" given the record as a whole. *Nippon Steel Corp. v. United States*, 458 F.3d 1345, 1350-51 (Fed. Cir. 2006); *see also Dorbest Ltd. v. United States*, 30 CIT 1671, 1675–76, 462 F. Supp. 2d 1262, 1269–70 (2006) (providing a comprehensive explanation of the standard of review in the non-market economy context). Often described as "such relevant evidence as a reasonable mind might accept as adequate to support [the agency's] conclusion, " *Consol. Edison Co.*

v. NLRB, 305 U.S. 197, 229 (1938), "substantial evidence" is best understood as a word formula connoting reasonableness review. 3 Charles H. Koch, Jr., *Administrative Law and Practice* § 10.3[1] (2d. ed. 2008). When addressing a substantial evidence issue raised by a party, the court analyzes whether the challenged agency action "was reasonable given the circumstances presented by the whole record." Edward D. Re., Bernard J. Babb, and Susan M. Koplin, 8 *West's Fed. Forms, National Courts* § 13342 (2d ed. 2009).

IV.
Discussion

To value Vinh Quang's unprocessed fish waste as a factor of production, Commerce used the only surrogate values on the record for unprocessed fish waste. Decision Memorandum at 7–8. Vinh Quang argues that the values Commerce selected were unreliable and unrepresentative, and that Commerce cannot use price quotes when there are other values on the record that are publicly available. Mem. in Support of Pl's Mot. J. Agency R. 4 ("Pl. Br."). Vinh Quang also asserts that the information upon which it relies is the "best available." Pl. Br. 4. Vinh Quang further alleges that "Commerce unreasonably departed from both its practice and . . . regulations that require the use of surrogate data that are publicly available." Pl. Br. 9.

In an antidumping proceeding Commerce is required to determine whether subject merchandise is being, or is likely to be, sold at less than fair value in the United States by comparing the export price, that is, the price of the goods sold in the United States, and the normal value of the merchandise. Under Commerce's non-market economy methodology for determining normal value (the price of foreign like merchandise), Commerce determines a surrogate value for each input used in producing subject merchandise. 19 U.S.C. § 1677b(c)(1).

The process of constructing a foreign market value for merchandise produced and/or exported from a non-market economy is necessarily imprecise. *Sigma Corp. v. United States*, 117 F.3d 1401, 1407 (Fed. Cir. 1997). Thus, the statute directs Commerce to use the best available information as a surrogate value. 19 U.S.C. § 1677b(c)(1) ("Except as provided [elsewhere], the valuation of the factors of production shall be based on the best available information regarding the values of such factors in a market economy country or countries considered to be appropriate by the administering authority.").

In evaluating whether a value is the best available information, Commerce, in accordance with its normal practice, evaluates data on the record for reliability, availability, quality, specificity, and contem-

poraneity. *See Magnesium Metal from the People's Republic of China*, 69 Fed. Reg. 59,187, 59,195 (Dep't of Commerce Oct. 4, 2004) (preliminary determination). Commerce also will normally use publically available information when available. 19 C.F.R. § 351.408(c)(1) (2008).

Vinh Quang reported that it sold unprocessed fish waste generated in the production of the subject merchandise. Pl. July 2007 Supp. Resp. at 16. The only unprocessed fish waste surrogate value information on the record is the price quotes submitted by Catfish Farmers. Decision Memorandum at 8. Commerce determined that, in addition to being specific to the factor in question, the Indian price quotes were from one of the potential surrogate countries; were from a producer of comparable merchandise; were publically available; identified the terms of delivery and payment; and identified the offeror and offeree. *Id.* In analyzing Vinh Quang's suggested fish waste surrogate values, Commerce stated:

> Because the reported fish waste is an unprocessed product, [Commerce] finds that it would not be appropriate to value fish waste using an average that includes Bangladeshi import data of HTS 2301.20, "Flours, meals, and pellets, of meal or meal offal of fish", and Indonesian import data of HTS 0304.90.90, "Other fish meat of marine fish." Specifically, in the *2nd Review Results*, [Commerce] found that the Explanatory Notes to the HTS, as published by the World Customs Organization, state that articles classified under HTS 2301.20 are value-added products that go through additional processing, such as "steam-heated and pressed or treated with solvent." *See 2nd Review Final Results*, [73 Fed. Reg. 13,242] at [cmt.] 8A . . . . Because the articles covered by HTS 2301.20 undergo further processing, it would not be appropriate to value [Vinh Quang's] reported fish waste using import data for a higher valued processed product. Additionally, because [Commerce] is valuing broken meat using HTS 0304.90.90, it would not be appropriate to value [Vinh Quang's] reported unprocessed fish waste with a surrogate value that is more specific to a value-added product, such as broken meat.

Id. at 7–8 (additional citations omitted).

Vinh Quang argues that Commerce cannot use a price quote for valuing a factor of production when there are other surrogate values that better fit Commerce's criteria for surrogate values, and asserts that the Indonesian and Bangladeshi prices for broken meat and fish skin were more appropriate surrogate values for fish waste. Pl. Br. 4. The central deficiency with this argument is Vinh Quang's assump-

tion that its proposed processed fish waste values are a satisfactory match for unprocessed fish waste. With that assumption Vinh Quang never comes to terms with Commerce's finding that Vinh Quang's alternative processed fish waste data were an inappropriate match for the *unprocessed* fish waste factor.

The finding that the alternative values were for processed rather than unprocessed fish waste was critical to Commerce's decision. Commerce determined as a factual matter that Vinh Quang's suggested values for fish skin and broken meat did not match the factor reported. Vinh Quang does not challenge that threshold finding. Rather, it assumes, but does not demonstrate, that Commerce erred in concluding that there was no match between Vinh Quang's suggested values and the factor of production at issue. In the absence of a match, Vinh Quang has no basis to claim that Commerce erred in concluding that the values Commerce ultimately selected constituted the best available information on the record.

Vinh Quang also suggests that values derived from data for fish waste imports into Indonesia under HTS subheading 0304.90.100 demonstrate that Commerce's valuation was unreasonable. Pl. Br. 12–13. Vinh Quang failed to raise that argument at the administrative level, and thereby failed to properly exhaust its administrative remedies. When reviewing Commerce's antidumping determinations, the Court of International Trade requires litigants to exhaust administrative remedies "where appropriate." 28 U.S.C. § 2637(d). "This form of non-jurisdictional exhaustion is generally appropriate in the antidumping context because it allows the agency to apply its expertise, rectify administrative mistakes, and compile a record adequate for judicial review—advancing the twin purposes of protecting administrative agency authority and promoting judicial efficiency." *Carpenter Tech. Corp. v. United States*, 30 CIT 1373, 1374–75, 452 F. Supp. 2d 1344, 1346 (2006) (citing *Woodford v. Ngo*, 548 U.S. 81, 89 (2006)). By failing to raise the argument regarding HTS subheading 0304.90.100 at the administrative level, Vinh Quang deprived Commerce of the opportunity to address that subheading and make a "determination, finding, or conclusion." 19 U.S.C. § 1516a(b)(1). As a result, Commerce did not have the opportunity to "apply its expertise," potentially "rectify administrative mistakes," or "compile a record adequate for judicial review." *Carpenter*, 30 CIT at 1374–75, 452 F. Supp. 2d at 1346. Therefore, the court will not consider Vinh Quang's arguments regarding HTS subheading 0304.90.100.

Turning to Vinh Quang's other arguments, the court notes that Vinh Quang correctly states that Commerce prefers to use publicly available, contemporaneous, tax and duty free values that are representative of the market, specific to the factor of production in ques-

tion, and from the approved surrogate country. Pl. Br. 5. The degree to which those standards can be met, however, necessarily varies with each case and with the value for each factor of production.

Vinh Quang argues that a price quote never meets these standards and cannot be used because price quotes are inherently flawed and unreliable privately sourced data. Pl. Br. 5. Defendant freely acknowledges, as it did in the administrative proceeding, that price quotes are not preferred. Decision Memorandum at 8. When there are no better alternatives, however, Commerce may use price quotes. In fact, the same price quotes at issue here were used to value fish waste in the second administrative review. *Certain Frozen Fish Fillets from the Socialist Republic of Vietnam*, 72 Fed. Reg. 13,242 at Cmt. 8A (Dep't of Commerce Mar. 21, 2007) (final results admin. review). Accordingly, price quotes may reasonably be the best available information on the record for surrogate valuation purposes.

Vinh Quang further argues that when a live fish is processed into fillets, two-thirds of the output is fish waste. Pl. Br. 12. The administrative record, however, does not demonstrate that such waste has a high value. The Indian price quotes are the only record information regarding unprocessed fish waste values. No record data indicates that those price quotes are inaccurate. Vinh Quang had the same opportunities to place information on the record as Catfish Farmers, yet chose to submit processed, rather than unprocessed, fish waste values. *See Thai I-Mei Frozen Foods Co.v.United States*, 31 CIT ___, ___, 477 F. Supp. 2d 1332, 1351 (2007) ("[T]he burden of creating an adequate record rests with respondents and not with Commerce.") (quoting *Tianjin Mach. Imp. & Exp. Corp. v. United States*, 16 CIT 931, 936, 806 F. Supp. 1008, 1015 (1992)).

Vinh Quang also argues that the price quotes used by Commerce are unreliable and unrepresentative. Pl. Br. 11–14. It claims that the fish waste value selected by Commerce was only a small fraction of the value of the whole fish, and argues that this "simply is not reasonable." Pl. Br. 12. Again, though, Commerce had to choose among the available data on the record. Here, Vinh Quang assumed that its processed fish waste valuation would be accepted in lieu of unprocessed values. What may have been an unreasonable determination on another administrative record with more data for unprocessed fish waste is nevertheless a reasonable determination on this administrative record.

Similarly, Vinh Quang compares values taken from the databases that it advocates, and argues that those values are significantly different than the values selected by Commerce. But the values advocated by Vinh Quang are not for unprocessed fish waste. Although Vinh Quang assumes that the processed fish waste values are equiva-

lent to unprocessed fish waste values, it does not identify record evidence to support that proposition. Vinh Quang's suggested values are for products that undergo further processing. Decision Memorandum at 8. A product that requires further processing is typically more expensive than the unprocessed product. Other than Vinh Quang's unsupported statement, there is no record evidence to indicate that the value of unprocessed fish waste is anything other than that indicated by the Indian price quotes in the record.

Finally, Vinh Quang's argument that "Commerce unreasonably departed from both its practice and from its regulations that require the use of surrogate data that are publicly available," is not persuasive. Pl. Br. 9. Vinh Quang's contention that Commerce's practice and regulations unconditionally *require* Commerce to use publicly available surrogate data is contradicted by Vinh Quang's own brief, which acknowledges that the regulation at issue provides that Commerce *normally* will use publicly available information. Pl. Br. 4 ("The Secretary normally will use publicly available information to value factors.") (quoting 19 C.F.R. § 351.408(c)(1)). Although Vinh Quang asserts that "there were other sources of 'usable, reliable information' in the form of fish waste import data from Bangladesh and from Indonesia," Pl. Br. 7, that assertion assumes the other data was comparable to, and representative of, unprocessed fish waste. Commerce reasonably found that such data was not comparable to the unprocessed fish waste at issue. In sum, Commerce's selection of the Indian price quotes for unprocessed fish waste as the best available information for valuing Vinh Quang's unprocessed fish waste factor is supported by substantial evidence on the record.

V.
Conclusion

The court denies Plaintiff's motion for judgment on the agency record and will enter judgment in favor of Defendant sustaining Commerce's *Final Results*.

Dated: September 14, 2009
New York, New York

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

Slip Op. 09–98

AD HOC UTILITIES GROUP, Plaintiff, v. UNITED STATES, Defendant, - and - USEC INCORPORATED, et al. Defendant-Intervenors.

Before: Pogue, Judge
Court No. 06–00229

[Plaintiff's motion for rehearing denied.]

September 15, 2009

Pillsbury Winthrop Shaw Pittman LLP (*Nancy A. Fischer* and *Joshua D. Fitzhugh*) for Plaintiff Ad Hoc Utilities Group.

Tony West, Assistant Attorney General; *Jeanne E. Davidson*, Director, *Patricia M. McCarthy*, Assistant Director, Commercial Litigation Branch, Civil Division, U.S. Department of Justice (*Stephen C. Tosini*) for Defendant United States.

Steptoe & Johnson LLP (*Eric C. Emerson, Alexandra E.P. Baj, Sheldon E. Hochberg, Richard O. Cunningham* and *Thomas J. Trendl*) for Defendant-Intervenors USEC Inc. and United States Enrichment Corp.

Akin Gump Strauss Hauer & Feld LLP (*Valerie A. Slater, Margaret C. Marsh, Bernd G. Janzen* and *Lisa W. Ross*) for Defendant-Intervenors Power Resources, Inc. and Crowe Butte Resources, Inc.

OPINION

Pogue, Judge:

I.
INTRODUCTION

Plaintiff in this case, Ad Hoc Utilities Group ("AHUG"), pursuant to USCIT Rule 59,[1] requests rehearing of the court's dismissal of Plaintiff's action for lack of standing. *See Ad Hoc Utils. Group v. United States*, Slip Op. 09–56, 2009 Ct. Intl. Trade LEXIS 60 (CIT June 15, 2009) ("*AHUG*").[2] In *AHUG*, the issue presented was whether "a group of American utility companies that obtain and use

[1] "The court may, on motion, grant a new trial or rehearing on all or some of the issues — and to any party — as follows: . . . (B) after a nonjury trial, for any reason for which a rehearing has heretofore been granted in a suit in equity in federal court." USCIT R. 59(a)(1). Although the Rule references "nonjury trial[s]," subsection (B) has been expansively read by this Court to encompass "rehearing[s] of any matter[s] decided by the court without a jury," *NSK Corp. v. United States*, __ CIT __, __, 593 F. Supp. 2d 1355, 1362 (2008) (citation and internal quotation marks omitted), including this court's grant of Defendants' motion to dismiss for lack of standing. *See id.*; *see also Totes-Isotoner Corp. v. United States*, __ CIT __, __, 580 F. Supp. 2d 1371, 1373–74 (2008), *appeal docketed on other grounds*, No. 2009–1113 (Fed. Cir. Dec. 16, 2008); *Intercargo Ins. Co. v. United States*, 20 CIT 951, 951–52, 936 F. Supp. 1049, 1049–50 (1996), *aff'd*, 129 F.3d 135 (Fed. Cir. 1997) (per curiam) (mem.).

[2] Familiarity with the decision is presumed. The history and context of this case is fully explained therein.

enriched uranium from Russia" had standing "to challenge the Department of Commerce's ('Commerce') decision not to terminate its antidumping duty investigation of that uranium." *Id.* at *1–2. The court dismissed AHUG's action "[b]ecause the utility companies *individually* d[id] not *each* qualify either as producers or importers of the subject uranium," *id.* at *2 (emphasis added), and, in the alternative, because the companies would, even if treated as a group, fail to "qualify as a trade or business association a majority of the members of which are producers or importers." *Id.*

As explained below, as *AHUG* was correctly decided, and no individual utility company with standing is a plaintiff herein, the court denies Plaintiff's motion.

II.
BACKGROUND

A.
The Administrative Proceeding

This dispute arose from AHUG's 2006 challenge to Commerce's second "sunset" review of the suspension of the antidumping duty investigation of uranium from Russia, pursuant to *Uranium from Kazakhstan, Kyrgyzstan, Russia, Tajikistan, Ukraine, and Uzbekistan*, 57 Fed. Reg. 49,220 (Dep't Commerce Oct. 30, 1992) (notice of suspension of investigations and amendment of preliminary determinations). Commerce determined in its sunset review that, in the absence of suspension, Russia would likely continue dumping its enriched uranium in the U.S. market. *See Uranium From the Russian Federation*, 71 Fed. Reg. 32,517 (Dep't Commerce June 6, 2006) (final results of five-year sunset review of suspended antidumping duty investigation) and the accompanying Issues & Decision Memorandum, A–821–802, Sunset Review (May 30, 2006), Admin R. Pub. Doc. 48, *available at* http://ia.ita.doc.gov/frn/summary/RUSSIA/E6-8758-1.pdf (last visited Sept. 9, 2009). AHUG sought court review of Commerce's determination.

Defendants United States and USEC moved the court to dismiss the case for lack of standing, putting in play the issue of whether AHUG could qualify as an "interested party" with a statutory right to judicial review. *See* Section 516 of the Tariff Act of 1930, as amended, 19 U.S.C. § 1516(a)(2)(A).[3] The court, however, consolidated this case with Court No. 06-00228, *Techsnabexport v. United States*, and re-

[3] Further citations to the Act, unless otherwise noted, are to the 2006 version of the U.S. Code.

manded the consolidated case to Commerce. *Techsnabexport v. United States*, __ CIT __, 515 F. Supp. 2d 1363 (2007) ("*Tenex*").[4] To assure consideration of all aspects of the standing issue, the court instructed that, on remand, Commerce review its denial, in the agency's initial proceedings, of "interested party" status to AHUG. __ CIT at __ n.4, 515 F. Supp. 2d at 1364–65 n.4.[5]

Commerce subsequently issued its remand results. *See* Final Results on Redetermination Pursuant to Court Remand *Techsnabexport v. United States* Cons. Court No. 06–00228, Slip Op. 07–143 (Sept. 26, 2007), A–821–802, Suspension Agreement (Dec. 21, 2007), Admin. R. Pub. Doc. [*Techsnabexport v. United States*] 20, *available at* http://ia.ita.doc.gov/remands/07-143.pdf (last visited Sept. 9, 2009) ("Remand Results"). Relevant to this litigation, Commerce, in its volume of future imports analysis, relied on a public report from the International Trade Commission ("ITC"). *See Uranium from Russia*, USITC Pub. 3872, Inv. No. 731–TA–539–C (Second Review) (Aug. 2006), *available at* 2006 ITC LEXIS 537. Commerce noted the ITC report's mention of certain "contingent contracts" that the Russian uranium industry had entered into with American utilities. Remand Results 36–37. Despite the reference to these "contingent contracts," Commerce once again denied AHUG status as an "interested party." *Id.* 49–52. First, Commerce determined that AHUG members were not "producers," given that AHUG members "do not contract directly with the Russian [low-enriched uranium ("LEU")] producer . . . . [,] can only receive Russian LEU[] from USEC itself, which USEC purchased from Tenex[,] . . . . [and] have no control over the Russian producer's production activities." *Id.* 50–51. Furthermore, Commerce noted that "title to the Russian LEU from HEU does transfer from Tenex to USEC, belying AHUG's claim that it is the only entity that owns the LEU as a whole." *Id.* 51. Second, Commerce found that, because "USEC is the only U.S. importer of all Russian LEU downblended from [high-enriched uranium ("HEU")]," AHUG members could not qualify as "importers." *Id.*

B.
The Court's Dismissal of AHUG's Complaint

Reviewing Commerce's remand results, the court considered the standing issue raised by Defendants United States' and USEC's motions, pursuant to USCIT R. 12(b)(1), to dismiss AHUG's complaint

[4] Familiarity with this decision is presumed. The *Tenex* plaintiff's standing to seek review in 06–0028 was uncontested. The two cases were later severed, when, upon the request of the *Tenex* plaintiff, that case was dismissed.

[5] The court deferred ruling on AHUG's standing, finding this to be one of those rare cases in which the questions regarding jurisdiction were intertwined with the merits of the case, and that further information would be necessary.

for lack of subject matter jurisdiction. *See AHUG*, 2009 Ct. Intl. Trade LEXIS 60, at *16–22. Defendants argued that AHUG fails to qualify as an interested party statutorily authorized to challenge Commerce's review decision. In response, AHUG argued that many of its members have "entered into negotiations and signed agreements [*i.e.*, contingent contracts] with Techsnabexport . . . or its agent for the purchase of Russian [enriched uranium product ("EUP")] or enrichment services," and that the contracts confer upon the utility companies entering into them status as importers of the subject merchandise.[6] (Supplemental Br. of the Ad Hoc Utilities Group on the Relevance & Effect of Supreme Ct.'s *Eurodif* Decision ("AHUG Supplemental Br.") 5–6); *see also* 28 U.S.C. § 2631(c); 19 U.S.C. § 1677(9)(A).

The court agreed, in part, with the government and USEC and accordingly dismissed AHUG's complaint for lack of standing. In so doing, the court noted that 28 U.S.C. § 2631(c) and 19 U.S.C. § 1516a(a)(2)(A) require that, in order to obtain judicial review, a party must be "interested" as defined by 19 U.S.C. § 1677(9).[7] *AHUG*, 2009 Ct. Intl. Trade LEXIS 60, at *16–17. After reviewing the record and the filings before it, the court determined that

> under any of the statutory definitions of "importer" — including either as a group of individual companies or, arguably, as a trade or business association — AHUG does not meet the standing requirements stated by section 2631(c).

Id. at *17. The court reasoned that 19 U.S.C. § 1677(9)(A) "precludes standing on the part of a group with a majority of members that are not producers, exporter or importers," *id.* (footnote omitted) (citing *Am. Grape Growers Alliance for Fair Trade v. United States*, 7 CIT 389 (1984)), and, accordingly, the court required AHUG to demonstrate either "that it would be considered a 'trade or business association'" or "that it is a 'multiplied form of a single' importer." *Id.* at

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[6] AHUG abandoned its argument that it had standing as a "producer."

[7] "A civil action contesting a determination listed in section 516A of the Tariff Act of 1930 [19 U.S.C. § 1516a] may be commenced in the Court of International Trade by any interested party who was a party to the proceeding in connection with which the matter arose." 28 U.S.C. § 2631(c). The meaning of the term "interested party," as used in 28 U.S.C. § 2631(c)(2000), is found in 19 U.S.C. § 1677(9). *See* 28 U.S.C. § 2631(k)(1) ("In this section . . . 'interested party' has the meaning given such term in section 771(9) of the Tariff Act of 1930 [19 U.S.C. § 1677(9)]."). 19 U.S.C. § 1677(9) defines "interested party" as, among other definitions not relevant to this proceeding, "a foreign manufacturer, producer, or exporter, or the United States importer, of subject merchandise or a trade or business association a majority of the members of which are producers, exporters, or importers of such merchandise." *Id.* § 1677(9)(A).

*17–18 (quoting *Am. Grape Growers*, 7 CIT at 389).[8] "The former requires only a majority of members, whereas the latter would require all members, to qualify as 'importers' to gain standing, where no member appears individually." *Id.* at *18 (citing *RSI (India) Pvt., Ltd. v. United States*, 12 CIT 84, 86, 678 F. Supp. 304, 306 (1988)("Congress has made an exception [from the requirement that all members satisfy standing requirements] only for importers when they are the majority of the members of a trade or business association.")).

The court recognized that AHUG, in its briefing, identified itself as a group of individual companies, not a trade or business association, that "has no legal existence or status separate from its members." *Id.* at *19 (citation omitted). Thus, AHUG would be required to demonstrate that "*all* of its members share the same qualities that qualify them for standing in the action before the court." *Id.* (emphasis added). However, AHUG only presented evidence that "a number of AHUG members entered into negotiations with Russian uranium suppliers or their agents." *Id.* (citation omitted). Indeed, "AHUG itself concludes that its evidence demonstrates that far fewer than half of its members 'would qualify as United States importers under 19 U.S.C. § 1677(9)(A).'" *Id.* at *20 (citations omitted).[9]

Furthermore, the court went on to note that "even if AHUG were a 'trade or business association,' standing would still be lacking," as "[a] small minority [of interested parties within a group] does not a majority make, and will not give AHUG standing in this case." *Id.* at 20–21.[10]

C.
AHUG's Motion for Rehearing

In moving for reconsideration of the dismissal, AHUG first argues that the court's treatment of it in a "unitary nature is a manifest error of fact." (Mot. of Certain Members of the Ad Hoc Utils. Group for Reh'g Pursuant to USCIT Rule 59 ("AHUG Mot.") 2.) According to AHUG, it is

> not a trade association, business group, or any other organized, unitary entity [but is rather] an ad hoc collection of independent utilities that seek to facilitate their efforts in this proceeding by

[8] A "multiplied form of a single exporter" is identified as "the unified appearance of those[,] who could appear separately[,] [for] administrative and judicial convenience." *Am. Grape Growers*, 7 CIT at 389.

[9] The court took no position on whether individual utility companies that entered into contingent contracts, had they sought review in their own right, would constitute "interested parties" under the statute. *Id.*

[10] Unrelated to this motion, the court additionally held that, in light of *United States v. Eurodif S.A.*, ___U.S.___, 129 S. Ct. 878 (2009), "AHUG'[s] members . . . may n[ot] be considered the owners of the enriched LEU at issue" and thus "AHUG may no longer claim to have standing as a producer." *AHUG*, 2009 U.S. Dist. LEXIS 60, at *16.

> acting under a common name. [AHUG] was intended to facilitate the litigation process and conserve judicial resources, by avoiding the need for separate filings by each utility . . . and providing a convenient short-hand reference for the utilities as a whole. That cooperation did not create a unitary entity capable of replacing the independent participation of AHUG's members.

(*Id.* 2–3.) AHUG asserts that "AHUG's members, including those with standing in this proceeding, *have* appeared as plaintiffs on their own behalf." (*Id.* 3 (emphasis in original).) In support of this statement, AHUG notes that its Summons, Complaint and all other briefs and papers were "filed on behalf of AHUG and its individual members." (*Id.* & 4 n.2.) Moreover, AHUG maintains that "[o]n the Form 13, Disclosure of Corporate Affiliations and Financial Interest, AHUG reported its utility members as individual corporate parties . . . [and] did not report itself as a trade association. . . ." (*Id.* 3.) For these reasons, AHUG contends, those cases cited by the court in its opinion apply only to "the standing of formal groups, not the standing of individual members of ad hoc groups who participate in their individual capacities." (*Id.* 4–5 (citing *Am. Grape Growers*, 7 CIT at 389; *RSI (India) Pvt.*, 12 CIT at 86, 678 F. Supp. at 306).)[11]

III.
STANDARD OF REVIEW

The court will grant a rehearing "only in limited circumstances," such as for "1) an error or irregularity, 2) a serious evidentiary flaw, 3) the discovery of new evidence which even a diligent party could not have discovered in time, or 4) an accident, unpredictable surprise or unavoidable mistake which impaired a party's ability to adequately present its case." *Target Stores v. United States*, __ CIT __, __, 471 F. Supp. 2d 1344, 1347 (2007) (citing *Kerr-McGee Chem. Corp. v. United States*, 14 CIT 582, 583 (1990)). "The court will not grant such a motion merely to give a losing party another chance to re-litigate the case or present arguments it previously raised." *Totes-Isotoner Corp. v. United States*, __ CIT __, __, 580 F. Supp. 2d 1371, 1374 (2008) (citation and quotation marks omitted), *appeal docketed on other grounds*, No. 2009–1113 (Fed. Cir. Dec. 16, 2008). Accordingly, the purpose of rehearing or reconsideration 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*, __ CIT

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[11] Although, at the time of the court's decision, AHUG was composed of at least sixteen members, AHUG's current motion is filed "by [three utility companies which] qualify as interested parties because they entered into one or more 'contingent contracts' with Russian suppliers." (*Id.* 1 n.1.)

at __, 471 F. Supp. 2d at 1349 (quoting *Agro Dutch Indus. Ltd. v. United States*, 29 CIT 250, 254 (2005)); *Former Employees of BMC Software, Inc. v. United States Sec'y of Labor*, Slip Op. 08–102, 2008 Ct. Intl. Trade LEXIS 102, at *4–6 (CIT Sept. 26, 2008).

AHUG's motion, by alleging "error" in the court's July 15 opinion, invokes only the first ground for rehearing. Applying this standard, the court will address each of AHUG's arguments in turn.[12]

IV.
DISCUSSION

I. Change in the Specification of AHUG Members Does Not Provide Grounds for Rehearing

AHUG first seeks rehearing of the court's ruling by moving—rather than on behalf of *all* sixteen of its utility company members—only on behalf of three of the utility companies that allegedly entered into contingent contracts with the Russian uranium industry. (*See* AHUG Mot. 1 n.1.) However, a change in the makeup of AHUG does not provide adequate grounds for rehearing. The court will only grant rehearing in the event of "error" of fact or "discovery of new evidence" that AHUG could not have discovered prior to the court's opinion. *See Target Stores*, __ CIT at __, 471 F. Supp. 2d at 1347. AHUG does not claim that the court committed error as to the number or names of AHUG members at the time of the court's decision, and, indeed, it could not, as the court relied upon the very Form 13 Disclosure Statement that AHUG contends makes AHUG members individual parties to this litigation. *See AHUG*, 2009 Ct. Intl. Trade LEXIS 60, at *20–22 & 20 n.18.

Further, AHUG may not obtain relief through rehearing where it is merely attempting to advance arguments it could have readily asserted before. *See United States v. Matthews*, __ CIT __, __, 580 F. Supp. 2d 1347, 1349 (2008), *aff'd*, No. 2009–1106, 2009 U.S. App. LEXIS 16065 (Fed. Cir. July 22, 2009) (per curiam); *see also Waugh v. Williams Cos. Long Term Disability Plan*, 323 F. App'x 681, 685 (10th Cir. 2009) (motion for rehearing properly denied when movant was not seeking to correct manifest errors of law or present newly discovered evidence, but "instead [was] attempting to advance arguments she could have readily asserted before") (citation and quotation marks omitted); *Carroll v. Nakatani*, 342 F.3d 934, 945 (9th Cir. 2003)

[12] As the court recognized in its prior order, a plaintiff, as the party seeking to invoke the Court's jurisdiction, bears the burden to establish its standing to bring its action. *See DaimlerChrysler Corp. v. Cuno*, 547 U.S. 332, 342 (2006); *Raines v. Byrd*, 521 U.S. 811, 818 (1997). Therefore, AHUG has the burden to demonstrate that its members satisfy the statutory standing requirements. *See* 28 U.S.C. § 2631(c); 19 U.S.C. § 1677(9).

(a motion for rehearing "may not be used to raise arguments or present evidence for the first time when they could reasonably have been raised earlier in the litigation") (citation omitted); 12 James Wm. Moore et al., *Moore's Federal Practice* § 59.13[2][d][vii] (3d ed. 2009) ("Evidence that was available and known during the trial, but that was not submitted to the court, does not constitute sufficient grounds for a Rule 59 motion.") (citation omitted).

II. AHUG Members are not Individually "Plaintiffs" in this Litigation

Second, AHUG alleges that the court erred in categorizing AHUG as a group rather than considering all AHUG members as individual plaintiffs.[13]

The court disagrees. According to the Rules, all parties to a civil action before the court must be properly identified in the caption of the initial pleading(s) in which they are named, i.e., the summons and complaint. USCIT R. 10(a);[14] *see also* Fed. R. Civ. P. 10(a). The summons and complaint in this action named a single plaintiff: AHUG. Although in subsequent pleadings all parties need not be fully named, in the original complaint, the names of all parties must be included. USCIT R. 10(a); *Yousefi v. Lockheed Martin Corp.*, 70 F. Supp. 2d 1061, 1064–65 (C.D. Cal. 1999) (striking 134 putative class members, who moved, together with existing class-action plaintiffs, as self-named "Lockheed Martin Group," to consolidate the actions; the court held that "[a]side from Yousefi, Kane, and Kretchmeyer, the [Lockheed Martin Group's] members are not named plaintiffs in any

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[13] The court notes that AHUG's position on rehearing seems inconsistent with a number of court filings in which it refers to AHUG as "Plaintiff." (*See, e.g.*, AHUG Supplemental Br. 5 (AHUG is "plaintiff in this case"; Compl. 1 (referring to AHUG as "plaintiff" suing "on behalf of its members"; the members were not named as "plaintiffs").)

[14] USCIT R. 10(a) states that "[e]very pleading must have a caption with the court's name, a title[,] a court number, and a Rule 7(a) designation. The caption of the summons and the complaint must name all the parties; the title of other pleadings, after naming the first party on each side, may refer generally to other parties." USCIT Rule 10 corresponds to Federal Rule of Civil Procedure 10.

Congressional intent behind Rule 10, which discounts claims where the complaint fails to sufficiently identify a party, is rooted in concern for providing notice to the parties in an action and protecting the public interest. *See Doe v. Rostker*, 89 F.R.D. 158, 160 (N.D. Cal. 1981)(holding the purpose behind Fed. R. Civ. P. 10 "is not solely one of administrative convenience [but] serves to apprise the parties of their opponents, and it protects the public's legitimate interest in knowing all the facts and events surrounding court proceedings").

Although AHUG claims that three utility companies constitute plaintiffs in this action, AHUG wishes the names of these purported plaintiff companies to remain anonymous. Federal district courts may, under appropriate circumstances, allow Plaintiffs to proceed under anonymous names. *See EW v. N.Y. Blood Ctr.*, 213 F.R.D. 108, 111 (E.D.N.Y. 2003) (listing four factors as which counsel in favor of allowing plaintiff to be designated "John Doe"). However, the court notes that neither AHUG nor any of the three utility companies have asked for "John Doe Corp." designation in this case.

of the suits" and accordingly "the 134 other members of the Lockheed Plaintiffs Group, which are not party to the three suits subject to consolidation, cannot move to consolidate the actions"), *aff'd*, 126 F. App'x 785 (9th Cir. 2005). *See also Mitchell v. Maynard*, 80 F.3d 1433, 1441 (10th Cir. 1996) (affirming refusal to enter judgment against party not named in complaint but referred to in brief); *Zocaras v. Castro*, 465 F.3d 479, 483–85 (11th Cir. 2006) (affirming dismissal a case where the plaintiff prosecuted an action under alias without revealing his true name in the pleadings pursuant to Fed. R. Civ. P. 10).

A plaintiff, as a party who initiates a civil action by filing an initial complaint, *must* identify itself in the caption. 2 Moore et al., *supra*, § 10.02[2][a]–[c]. Plaintiff AHUG drafted its complaint, and thus the court relies on the complaint's caption to discern the plaintiff in the suit. *See Williams v. Bradshaw*, 459 F.3d 846, 849 (8th Cir. 2006)(holding that the caption "is entitled to considerable weight when determining who the plaintiffs to a suit are since plaintiffs draft complaints"). The individual utilities do not individually appear in the Summon's or the Complaint's captions, and said utilities are not individually parties or plaintiffs. *See Yousefi*, 70 F. Supp. 2d at 1064–65.

Nor does the fact that the corporate entities are listed in the Form 13 disclosure statement change the effect of Rule 10. *Cf. Maynard*, 80 F.3d at 1441; *Klingler v. Yamaha Motor Corp.*, 738 F. Supp. 898, 910 (E.D. Pa. 1990) (striking down claims where the defendants were not named in the caption but only referred to in the body of the complaint). A disclosure statement, though a required supplemental filing, is not a complaint or summons. *See* USCIT R. 3(i) ("The disclosure statement must be filed with the entry of appearance (or with the summons if no separate notice of appearance is required)"); *see also* Fed. R. Civ. P. 7.1(b)(1).[15]

As a consequence, the individual AHUG members do not constitute plaintiffs in this action.

III. AHUG Does Not Satisfy Section 1677(9)

Third, AHUG attempts to argue that, given its particular nature as an "ad hoc" group—brought together for efficiency of litigation

[15] Plaintiff argues that "AHUG" is a short hand method of referring to the "plaintiffs," because submitting filings for each corporate entity would be wasteful. (*See* AHUG Mot. 3.) Rules 10(a) does allow for the use of short-form for "other pleadings." USCIT R. 10(a) ("the title of other pleadings after naming the first party on each side may refer generally to other parties."); *see also Adkins v. Safeway, Inc.*, 985 F.2d 1101, 1102 (D.C. Cir. 1993). However, while the use of shorthand may be appropriate for "other pleadings," again, the rule requires all parties to be named in the caption of the complaint. AHUG's claim of conserving resources stands in direct contrast to the intent behind USCIT Rule 10(a).

only—rather than a "formal" group, case law and statutory standing requirements for groups do not apply to it. AHUG provides no support for this proposed special treatment of "ad hoc" groups, and the court can find no support for this distinction. As it noted in its earlier opinion, the court has recognized groups such as AHUG as a "multiplied form of a single" importer that is "identified as 'the unified appearance of those[,] who could appear separately[,] [for] administrative and judicial convenience." *AHUG*, 2009 Ct. Intl. Trade LEXIS 60, at *18 (quoting *Am. Grape Growers*, 7 CIT at 389–90). For such an appearance, as opposed to trade or business associations—which are subject to a statutory exception[16]— *all* members of the group constituting a "multiplied form of a single"importer must "qualify as 'importers' to gain standing, where no member appears [as a plaintiff] individually." *Id.* As was noted by the court, this was clearly not the case here, as only a small minority of AHUG members claimed to have such "importer" status.

AHUG mistakenly argues that the court committed an error of fact by basing its opinion on the assumption that AHUG was a "trade or business association." To the contrary. The court recognized that AHUG repudiated this designation. *See id.* at *19 ("AHUG has identified itself as a group of individual companies, stating that it is not a trade or business association . . . ."). Out of an abundance of caution, and in fairness to AHUG, however, the court noted that, even should AHUG be considered a trade or business association, it did not meet the majority requirement. Contrary to AHUG's assertions, the court did not base its decision on this factual assumption and thus whether or not AHUG qualifies as a trade or business association was not a "material matter of law or fact which [the court] has overlooked in deciding a case, and which, had it been given consideration, would probably have brought about a different result." *Target Stores v. United States*, __ CIT at __, 471 F. Supp. 2d at 1349 (citation and quotation marks omitted).

IV. Amendment of Pleadings

The court will permit a party to amend errors and omissions in the naming of parties "when justice so requires." USCIT R. 15(a)(2). *See Fakhri v. United States*, __ CIT __, __, 507 F. Supp. 2d 1305, 1315–16

[16] In accordance with 19 U.S.C. § 1677(9)(A), a "trade or business association" may qualify as an "interested party" if "a majority of the members [] are producers, exporters, or importers of such merchandise." This requirement has been construed to exclude groups in which only a small minority of members qualify as interested parties. *See AHUG*, 2009 Ct. Intl. Trade LEXIS 60, at *20–21 (citing *Zenith Radio Corp. v. United States*, 5 CIT 155, 156–57 (1983); *Special Commodity Group on Non-Rubber Footwear From Braz., Am. Ass'n of Exps. & Imps. v. United States*, 9 CIT 481, 483–84, 620 F. Supp. 719, 721–22 (1985); *Matsushita Elec. Indus. Co. v. United States*, 2 CIT 254, 256–59, 529 F. Supp. 664, 667–69 (1981)).

(2007).[17] However, such amendments are only allowed "[i]n the absence of any apparent or declared reason — such as undue delay, bad faith or dilatory motive on the part of the movant, repeated failure to cure deficiencies by amendments previously allowed, undue prejudice to the opposing party by virtue of allowance of the amendment, futility of amendment, etc." *Foman v. Davis*, 371 U.S. 178, 182 (1962).

Here AHUG's delay was undue. AHUG, for the first time, asked for leave to amend its complaint in its reply brief on rehearing, well over a year after it first raised its argument for standing as an importer.[18] While mere delay is not a reason to deny leave, where the delay is "'undue'", such delay requires limiting the opportunity to amend. *Datascope Corp. v. SMEC, Inc.*, 962 F.2d 1043, 1045 (Fed. Cir. 1992) (citation omitted); *Tenneco Resins, Inc. v. Reeves Bros., Inc.*, 752 F.2d 630, 634–35 (Fed. Cir. 1985).

Here, the court finds that AHUG's "undue delay" weighs against permitting amendment. First, AHUG was fully on notice that this issue was in play and yet failed, until now, to ask for leave to amend its complaint. This case was filed in 2006, at which point AHUG asserted standing as a "producer" pursuant to this court's holding in *USEC Inc. v. United States*.[19] Furthermore, "importer" standing was at issue almost one month before the U.S. Supreme Court granted

[17] AHUG also argues that USCIT R. 17(a) requires the court to provide it the opportunity to amend its pleadings. Rule 17 is inapplicable to this case, as the court has not dismissed the action on the grounds that AHUG failed to prosecute its case in the name of the "real party in interest." Rather, AHUG, a group of utilities, correctly appeared as the "real party in interest" in this suit even if statutory standing is lacking. *Cf. Mitchell Food Prods. Inc. v. United States*, 43 F. App'x 369, 369–70 (Fed. Cir. 2002) (distinguishing between the concepts of standing and "real party in interest"); *Phibro Energy, Inc. v. Brown*, 19 CIT 663, 669 n.11, 886 F. Supp. 863, 869 n.11 (1995) ("To determine whether a plaintiff is a real party in interest, the Court must determine whether the plaintiff is the entity which under substantive law has the right sought to be enforced.") (citation and quotation marks omitted).

[18] AHUG first referenced its standing as an "importer" in its March 31, 2008 brief to the court:

> a number of AHUG members qualify as importer of record under [the contingent contracts]. . . . Because its members qualify as interested parties under 19 U.S.C. § 1677(9), AHUG respectfully requests that the Court find that AHUG has standing before the Court under 28 U.S.C. § 2631(c).

(Resp. of Ad Hoc Utils. Group to the Court's Req. for Supplemental Info. on Contingent Contracts Relied Upon by Commerce in its Remand Results 8–9.)

[19] In *USEC Inc. v. United States*, 27 CIT 489, 259 F. Supp. 2d 1310 (2003), this Court held that Commerce's decision to treat "SWU contracts" for uranium enrichment as sales of enriched uranium subject to antidumping investigation — rather than as "tolling" or subcontracting arrangements — was unsupported by substantial evidence, as there was no evidence that the enricher ever took ownership of the goods. 27 CIT at 506, 259 F. Supp. 2d at 1326. AHUG relied *USEC* to assert its ownership of the uranium through the enrichment process and thus standing as a "producer" of the uranium. However, as the court previously noted:

> After Commerce's revocation of its tolling regulation and the Supreme Court's [*Eurodif*] decision, it is clear that Commerce may reasonably treat SWU transactions as

certiorari in *Eurodif* and almost three months before the court stayed this matter pending the Supreme Court's decision. *See United States v. Eurodif S.A.*, 128 S. Ct. 2054 (April 21, 2008). Subsequently, importer standing remained at issue for almost five months following *Eurodif*'s issuance and the dissolution of the stay. During this latter time period, the court gave AHUG ample opportunity to explore the "importer" standing issue through repeated briefings to the court as well as specifically-worded questions from the court. *See Te-Moak Bands of W. Shoshone Indians of Nev. v. United States*, 948 F.2d 1258, 1262–63 (Fed. Cir. 1991) ("At some point in the course of litigation, an unjustified delay preceding a motion to amend goes beyond excusable neglect, even when there is no evidence of bad faith or dilatory motive.") (quoting *Daves v. Payless Cashways, Inc.*, 661 F.2d 1022, 1025 (5th Cir. Unit A Nov. 1981)); *id.* at 1261 ("A litigant's failure to assert a claim as soon as he could have is properly a factor to be considered in deciding whether to grant leave to amend.") (quoting *Carson v. Polley*, 689 F.2d 562, 584 (5th Cir. 1982)).

Second, judgment has already issued in this case, and AHUG's motion to amend was not on file previous to the court's dismissal of the case and judgment thereon. *See Summers v. Earth Island Inst.*, __ U.S. __, __, 129 S. Ct. 1142, 1153 (2009); *Datascope*, 962 F.2d at 1044–47. *Compare Pinnacle Pigging Sys. v. Eliminator Pigging Sys. USA, Inc.*, 55 F. App'x 943, 945–46 (Fed. Cir. 2003) (per curiam); *Phonometrics, Inc. v. Resinter N. Am. Corp.*, No. 97–1101, 1997 U.S. App. LEXIS 26574, at *1, 7 (Fed. Cir. Sept. 17, 1997). AHUG has only now, in a footnote to its reply on rehearing, mentioned pleading amendment.

Third, while the court will often grant leave to amend when "mere technical irregularities in the filing of procedural papers" exist, *Zenith Elecs. Corp. v. United States*, 988 F.2d 1573, 1580 (Fed. Cir. 1993) (citations omitted), the court views the omission of the individual companies rather as a "strategic" decision in litigation. *See Trans-Spec Truck Serv. v. Caterpillar Inc.*, 524 F.3d 315, 327 (1st Cir. 2008); *Strub v. Axon Corp.*, Nos. 97–1221 & 97–1222, 1998 U.S. App. LEXIS 20249, at *30 (Fed. Cir. Aug. 17, 1998). The omission of AHUG members as plaintiffs, and indeed, specifically the failure to drop AHUG members who would not quality as importers, was not mere formality in pleading; AHUG itself recognizes that the AHUG members joined together to pool resources to facilitate the litigation in a cost-effective way.

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sales of goods owned by the enricher. As AHUG'[s] members, as opposed to the enricher, may no longer be considered the owners of the enriched LEU at issue, AHUG may no longer claim to have standing as a producer.

AHUG, 2009 Ct. Intl. Trade LEXIS 60, at *16.

Lastly, AHUG provides no compelling reason for its delay. *See Engineered Prods. Co. v. Donaldson Co.*, 147 F. App'x 979, 987 (Fed. Cir. 2005) (applying *Thompson-El v. Jones*, 876 F.2d 66, 67 (8th Cir. 1989)); *Te-Moak Bands*, 948 F.2d at 1263 (collecting cases); *Tenneco Resins*, 752 F.2d at 634; *Zhejiang Mach. Imp. & Exp. Corp. v. United States*, 29 CIT 1266, 1271 (2005) ("a key element of the analysis is the excusability of any delay in raising the new issue") (citation omitted).

Accordingly, the court determines that "justice" does not require amendment here.[20]

V.
CONCLUSION

Accordingly, upon consideration of AHUG's motion, the court does not find any error of law or fact sufficient to support rehearing of this matter.

The court accordingly DENIES AHUG's Motion.

It is SO ORDERED.

Dated: September 15, 2009
New York, New York

/*s*/

DONALD C. POGUE, JUDGE

[20] The court also observes that, pursuant to USCIT R. 21, "[p]arties may be dropped or added by order of the court on motion of any party or on its own initiative at any stage of the action and on such terms as are just." The U.S. Supreme Court has instructed that "it is well settled that Rule 21 invests district courts with authority to allow a dispensable nondiverse party to be dropped at any time, even after judgment has been rendered." *Newman-Green, Inc. v. Alfonzo-Larrain*, 490 U.S. 826, 832 (1989). USCIT R. 21 tracks the language in Fed. R. Civ. P. 21. However, even should *Newman-Green* be extended to allow AHUG to dispose of non-importer members after the court's entry of judgment, "[i]n applying Rule 21, the court is governed by the liberal amendment standards of Rule 15(a)." *Insituform Techs., Inc. v. Cat Contr., Inc.*, 385 F.3d 1360, 1372 (Fed. Cir. 2004) (citation omitted). As explained above, AHUG does not merit Rule 15 amendment.

Slip Op. 09–99

AD HOC UTILITIES GROUP, Plaintiff, v. UNITED STATES, Defendant, - and - USEC INCORPORATED, AND UNITED STATES ENRICHMENT CORPORATION, Defendant-Intervenors.

Before: Pogue, Judge
Court No. 06–00300

[Plaintiff's motion for rehearing denied.]

Dated: September 15, 2009

Pillsbury Winthrop Shaw Pittman LLP (*Nancy A. Fischer, Joshua D. Fitzhugh, Christine J. Sohar, Kemba T. Eneas* and *Stephan E. Becker*) for Plaintiff Ad Hoc Utilities Group.

James M. Lyons, General Counsel, *Neal J. Reynolds*, Assistant General Counsel, Office of the General Council, U.S. International Trade Commission (*Peter L. Sultan*) for Defendant United States.

Steptoe & Johnson LLP (*Eric C. Emerson, Sheldon E. Hochberg, Richard O. Cunningham, Thomas J. Trendl* and *Alexandra E.P. Baj*) for Defendant-Intervenors USEC Inc. and United States Enrichment Corp.

Memorandum and Order

Pogue, Judge:

I.
INTRODUCTION

Plaintiff Ad Hoc Utilites Group ("AHUG"), a group of American utility companies that purchases and uses uranium, has sought review of the International Trade Commission's ("ITC") decision in *Uranium From Russia*, 71 Fed. Reg. 44,707 (ITC Aug. 6, 2006) (concluding that termination of the suspended investigation on uranium from Russia would be likely to lead to continuation or recurrence of material injury to an industry in the United States) and accompanying *Uranium from Russia*, USITC Pub. 3872, Inv. No. 731–TA–539–C (Second Review) (Aug. 2006), *available at* 2006 ITC LEXIS 537.

The Court, on June 16, 2009, in accordance with *Ad Hoc Utils. Group v. United States*, Slip Op. 09–56, 2009 Ct. Intl. Trade LEXIS 60 (CIT June 15, 2009), dismissed this action, pursuant to USCIT Rule 12(b)(1), for lack of subject matter jurisdiction under 28 U.S.C. § 2631(c). *See Ad Hoc Utils. Group v. United States*, Slip Op. 09–57, 2009 Ct. Intl. Trade LEXIS 61 (CIT June 16, 2009). In its decision ordering dismissal, the Court noted that the issues of law and fact before the court are no different than those presented in *Ad Hoc Utilities Group v. United States*, Cause No. 06–229 ("*AHUG*") (AHUG's challenge to Commerce's final determination that termina-

tion of the suspended investigation on uranium from Russia would likely result in continued dumping of enriched uranium), where the court also dismissed AHUG's action for lack of statutory standing and has further denied AHUG's subsequent motion for reconsideration. The parties in *AHUG* and the case at bar are identical, and there is no significant argument raised by Plaintiff here that was not considered by the court in *AHUG*.

AHUG has now moved, pursuant to USCIT R. 59, for reconsideration of the court's dismissal. This motion followed a similar motion in Cause No. 06–229, which motion was denied.

Accordingly, for the reasons stated in *AHUG*, the court DENIES AHUG's motion for reconsideration.

It is SO ORDERED.

Dated: September 15, 2009
New York, New York

/*s*/
DONALD C. POGUE, JUDGE