(Slip Op. 02–37)

USINAS SIDERÚRGICAS DE MINAS GERAIS S/A, COMPANHIA SIDERÚRGICA PAULISTA AND COMPANHIA SIDERÚRGICA NACIONAL, PLAINTIFFS *v.* UNITED STATES, DEFENDANT, AND BETHLEHEM STEEL CORP., U.S. STEEL GROUP, A UNIT OF USX CORP., ISPAT INLAND INC., LTV STEEL CO., INC., AND NATIONAL STEEL CORP., DEFENDANT-INTERVENORS, AND GALLATIN STEEL CO., IPSCO STEEL INC., STEEL DYNAMICS, INC., AND WEIRTON STEEL CORP., DEFENDANT-INTERVENORS

Court No. 99–08–00528

[Exporters' action seeking to challenge continued final affirmative countervailing duty determination without challenging related suspension determination dismissed for want of subject matter jurisdiction.]

(Decided April 19, 2002)

Willkie Farr & Gallagher (William H. Barringer, Christopher S. Stokes, and *Sean M. Thornton),* for Plaintiffs.

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Dewey Ballantine (Alan Wm. Wolff and *Michael H. Stein)* and *Skadden Arps, Slate, Meagher & Flom (Robert E. Lighthizer, John J. Mangan,* and *Worth S. Anderson),* for Defendant-Intervenors Bethlehem Steel Corporation *et al*.

Schagrin Associates (Roger B. Schagrin, Brian E. McGill, and *Roger B. Banks),* for Defendant-Intervenors Gallatin Steel Company *et al*.

OPINION

RIDGWAY, *Judge:* Over the years, legal scholars and jurists have devoted much ink to the meaning in various legal contexts of certain common words—the eternal debate over "shall" vs. "may" being one prime example. *See, e.g.*, Bryan A. Garner, *A Dictionary of Modern Legal Usage* 502 ("shall"), 516–17 ("Statute Drafting") (1987). This is yet another such case.

As discussed more fully below, the disposition of the case at bar turns largely on the meaning of the word "including." The stakes may not be

high in the whimsical world of fairy tales, when the terms in question are "brillig" and "slithy":

> "When *I* use a word," Humpty Dumpty said in rather a scornful tone, "it means just what I choose it to mean—neither more nor less."
>
> "The question is," said Alice, "whether you *can* make words mean so many different things."
>
> "The question is," said Humpty Dumpty, "which is to be master—that's all."

Lewis Carroll, *Through the Looking Glass and What Alice Found There* 124 (William Morrow & Co. 1993) (1872). But the present case does not arise in Humpty Dumpty land, where words mean whatever one wants them to mean; and the stakes here are very high indeed.

This action is one of a trilogy of cases involving antidumping duty and countervailing duty investigations of certain hot-rolled flat-rolled carbon-quality steel products ("hot-rolled steel") from Brazil.[1] In this case, the plaintiff Brazilian steel exporters—Usinas Siderurgicas de Minas Gerais ("USIMINAS"), Companhia Siderurgica Paulista ("COSIPA"), and Companhia Siderurgica Nacional ("CSN") (collectively, "Brazilian Exporters")—seek to challenge the continued final affirmative countervailing duty determination of the U.S. Department of Commerce ("Commerce"). *See* Certain Hot-Rolled Flat-Rolled Carbon-Quality Steel Products From Brazil, 64 Fed. Reg. 38,742 (Dep't Commerce 1999) ("Continued Final Determination"). Commerce made that determination the same day that it executed a suspension agreement with the Government of Brazil ("Brazilian Government")—an agreement which is itself contested in one of the two related actions brought by certain of the U.S. steel producers who are Defendant-Intervenors in this action.[2] *See* Certain Hot-Rolled Flat-Rolled Carbon-Quality Steel Products From Brazil, 64 Fed. Reg. 38,797 (Dep't Commerce 1999) (suspension of countervailing duty investigation and entry of suspension agreement) ("Suspension Determination" or "Suspension Agreement").

The Brazilian Exporters' Complaint in this matter asserts five specific challenges to Commerce's Continued Final Determination. Complaint ¶ 7. However, the Complaint does not seek review of any aspect of Commerce's determination to suspend the countervailing duty investigation or to enter into the Suspension Agreement with the Brazilian Government. Nor does the Complaint allege that any changes made in Commerce's Continued Final Determination rendered the Suspension Determination defective in any way.

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[1] The two companion cases are Court No. 99–08–00524 (challenging an agreement suspending an antidumping investigation of the Brazilian steel producers who are Plaintiffs here), and Court No. 99–08–00525 (challenging Commerce's determination to enter into an agreement suspending the countervailing duty investigation at issue in this proceeding).

The action challenging the suspension agreement in the antidumping duty investigation has now been dismissed. *See Bethlehem Steel Corp. v. United States,* No. 99–08–00524, 2002 Ct. Int'l Trade LEXIS 36 (CIT Apr. 2, 2002).

[2] Defendant-Intervenors did not participate in the briefing on the jurisdictional issue addressed in this opinion.

Pending before the Court is the Motion To Dismiss for Lack of Subject Matter Jurisdiction filed by Defendant, the United States ("the Government"). According to the Government, the sovereign has waived its immunity from suit to permit a party to challenge a continued final countervailing duty determination that changes the size of the net countervailable subsidy (or the underlying reasoning) at the time a suspension agreement is concluded *only if* that challenge is raised as part of a challenge to Commerce's decision to suspend the countervailing duty investigation in question. Defendant's Memorandum in Support of Its Motion To Dismiss For Lack of Subject Matter Jurisdiction ("Defendant's Memo"), *passim*. In other words, according to the Government, the Court lacks jurisdiction because the Brazilian Exporters' Summons and Complaint do not attack *both* Commerce's Continued Final Determination *and* the Suspension Determination and Agreement.

For the reasons discussed below, the Government's motion is granted and this action is dismissed for want of subject matter jurisdiction.

I. BACKGROUND

A. ADMINISTRATIVE PROCEEDINGS

On September 30, 1998, certain U.S. steel producers—including Defendant-Intervenors here[3]—petitioned Commerce and the International Trade Commission ("ITC"), seeking the imposition of countervailing duties on hot-rolled steel from Brazil.[4] The petition was accepted, and the requested investigation was initiated. Certain Hot-Rolled Flat-Rolled Carbon-Quality Steel Products From Brazil, 63 Fed. Reg. 56,624 (Dep't Commerce 1998).

One month later, the ITC notified Commerce of its preliminary affirmative determination on material injury. *See* Certain Hot-Rolled Steel Products From Brazil, Japan, and Russia, 63 Fed. Reg. 65,221 (ITC 1998). Commerce's own preliminary affirmative determination issued on February 12, 1999, tentatively finding net subsidy rates of 9.45% for USIMINAS and COSIPA, 6.62% for CSN, and 7.85% for all others. *See* Certain Hot-Rolled Flat-Rolled Carbon-Quality Steel Products From Brazil, 64 Fed. Reg. 8313, 8321 (Dep't Commerce 1999).

In June 1999, Commerce and the Brazilian Government initialed a proposed agreement to suspend the then-ongoing countervailing duty investigation. *See* Suspension Determination, 64 Fed. Reg. 38,797 (noting June 1999 initialing of proposed suspension agreement). The petitioners filed comments opposing the proposed suspension agreement, but also requested that Commerce continue the investigation in the event that a suspension agreement was executed over their objections. *See* Continued Final Determination, 64 Fed. Reg. 38,742 (Dep't Com-

[3] In addition to Defendant-Intervenors in the case at bar, the petitioners included California Steel Industries, Geneva Steel, Gulf States Steel Inc., the Independent Steelworkers Union, and the United Steelworkers of America. *See* Continued Final Determination, 64 Fed. Reg. 38,742 (Dep't Commerce 1999)

[4] The chronology of the countervailing duty investigation at issue here and the Suspension Agreement entered in that investigation is set forth more fully in *Bethlehem Steel Corp. v. United States,* 25 CIT ____, 159 F. Supp. 2d 730 (2001). The parallel chronology of the related antidumping duty investigation and the suspension agreement in that case is detailed in *Bethlehem Steel Corp. v. United States,* 25 CIT ____, 146 F. Supp. 2d 927 (2001), *dismissed per stipulation*, No. 99–08–00524, 2002 Ct. Int'l Trade LEXIS 36 (CIT Apr. 2, 2002).

merce 1999) (noting petitioners' request for continuation of investigation even if suspension agreement executed).

Commerce and the Brazilian Government signed the Suspension Agreement on July 6, 1999. *See* Suspension Determination, 64 Fed. Reg. 38,797. That same day, Commerce issued its final determination in the underlying countervailing duty investigation, increasing the net subsidy rates slightly to 9.67% for USIMINAS and COSIPA, and decreasing them to 6.35% for CSN and 7.81% for all others. *See* Continued Final Determination, 64 Fed. Reg. at 38,755. The ITC's final determination, issued August 24, 1999, confirmed its preliminary affirmative finding as well. *See* Certain Hot-Rolled Steel Products From Brazil and Russia, 64 Fed. Reg. 46,951 (ITC 1999).

As a result of the Suspension Agreement—which was the subject of *Bethlehem Steel,* 25 CIT ____, 159 F. Supp. 2d 730, and which remains in effect today—no countervailing duty order has been issued covering hot-rolled steel from Brazil.

B. PROCEEDINGS BEFORE THE COURT

The Brazilian Exporters timely filed a Summons with the Court, seeking to invoke the Court's jurisdiction under 28 U.S.C. § 1581(c) to contest "certain aspects of the final determination of the International Trade Administration, Department of Commerce, issued in the countervailing duty investigation of *Certain Hot-Rolled Flat-Rolled Carbon-Quality Steel Products From Brazil,* Inv. No. C–351–829." Summons ¶ 2.

The Complaint, filed one month later, again identified the administrative determination to be reviewed as the "Final Affirmative Countervailing Duty Determination: Certain Hot-Rolled, Flat-Rolled Carbon-Quality Steel Products From Brazil, 64 Fed. Reg. 38,742 (July 19, 1999)." Complaint ¶ 2. The Brazilian Exporters once more invoked the Court's jurisdiction under 28 U.S.C. § 1581(c), and asserted that the action was "commenced under 19 U.S.C. § * * * 1516a(a)(2)(B)(iv)."[5] *Id.* ¶ 3. The Complaint further alleged that Commerce's Continued Final Determination is not supported by substantial evidence on the record and is otherwise not in accordance with law with respect to five specific issues: (1) the methodology for handling pre-privatization subsidies; (2) the treatment of certain equity infusions; (3) the methodology for converting Brazilian *reals* into U.S. dollars; (4) the methodology for calculating repayment in a privatization transaction; and (5) certain aspects of the net countervailable subsidy calculations. *Id.* ¶ 7.

Neither the Summons nor the Complaint challenges any aspect of either Commerce's Suspension Determination or the Suspension Agreement. Nor does either the Summons or the Complaint allege that any changes made in Commerce's Continued Final Determination rendered its Suspension Determination defective in any way. Moreover, the Brazilian Exporters have not challenged the ITC's final determination.

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[5] The Complaint also referenced 19 U.S.C. § 1516a(2)(A)(i)(I). Complaint ¶ 3. That subsection addresses the time period for commencement of an action in the Court of International Trade, and is not at issue here.

Only Commerce's Continued Final Determination is at issue in this case.

II. Standard of Review

It is axiomatic that "'[t]he United States, as sovereign, is immune from suit save as it consents to be sued * * *, and that the terms of its consent to be sued in any court define that court's jurisdiction to entertain the suit.'" *United States v. Mitchell,* 445 U.S. 535, 538 (1980) (*quoting United States v. Sherwood,* 312 U.S. 584, 586 (1941)); *see also Federal Deposit Ins. Corp. v. Meyer,* 510 U.S. 471, 475 (1994) ("[s]overeign immunity is jurisdictional in nature"). A waiver of sovereign immunity "'cannot be implied but must be unequivocally expressed.'" *Mitchell,* 445 U.S. at 538 (*quoting United States v. King,* 395 U.S. 1, 4 (1969)); *see also Lane v. Pena,* 518 U.S. 187, 192 (1996) (waiver of sovereign immunity "must be unequivocally expressed in statutory text" and "will be strictly construed, in terms of its scope, in favor of the sovereign") (citations omitted).

Thus, to the extent that statutory language contains ambiguities concerning the waiver of sovereign immunity, those ambiguities must be construed in favor of immunity. *United States v. Williams,* 514 U.S. 527, 531 (1995) (*citing United States v. Nordic Village, Inc.,* 503 U.S. 30, 33 (1992)); *see also Novacor Chems., Inc. v. United States,* 171 F.3d 1376, 1382 (Fed. Cir. 1999) ("[w]e must strictly construe the statute, for we may not imply a waiver"); *RHI Holdings, Inc. v. United States,* 142 F.3d 1459, 1461 (Fed. Cir. 1998) ("[a]ny statute which creates a waiver of sovereign immunity must be strictly construed in favor of the Government") (*citing Sherwood,* 312 U.S. at 590); *NEC Corp. v. United States,* 806 F.2d 247, 249 (Fed. Cir. 1986) ("[t]he terms of the government's consent to be sued in any particular court define that court's jurisdiction to entertain the suit" (citations omitted)).

III. Discussion

"[S]overeign immunity goes to the issue of the court's power to hear the case, and therefore is antecedent to the merits of the case." *Humane Soc'y of the U.S. v. Clinton,* 236 F.3d 1320, 1326 (Fed. Cir. 2001). To establish jurisdiction here, the Brazilian Exporters must prove that Congress waived the Government's immunity from actions such as this. *McNutt v. Gen. Motors Acceptance Corp.,* 298 U.S. 178, 188–89 (1936); *see also Elkem Metals Co. v. United States,* 23 CIT 170, 175, 44 F. Supp. 2d 288, 292 (1999) (plaintiff bears burden of pleading and proving facts required for jurisdiction). This they cannot do.

A. The Language of The Statute

For purposes of this action, the terms of the United States' consent to suit are reflected in subsection (iv) of 19 U.S.C. § 1516a(a)(2)(B), in-

voked by the Brazilian Exporters' Summons and Complaint and set forth in context below:

> (B) Reviewable determinations
> The determinations which may be contested under subparagraph (A) are as follows:
>
> (i) Final affirmative [antidumping or countervailing duty] determinations * * * including any negative part of such a determination * * *.
> (ii) A final negative [antidumping or countervailing duty] determination * * * *including* * * * any part of a final affirmative determination which specifically excludes any company or product.
> (iii) * * *
> (iv) A determination by the administering authority, under section 1671c or 1673c of this title, to suspend an antidumping duty or a countervailing duty investigation, *including* any final determination resulting from a continued investigation which changes the size of the dumping margin or net countervailable subsidy calculated, or the reasoning underlying such calculations, at the time the suspension agreement was concluded.
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> * * * * * * *

19 U.S.C. § 1516a(a)(2)(B) (1994) (emphases supplied.)

The "subparagraph (A)" referenced in 19 U.S.C. § 1561a(a)(2)(B) sets forth the procedure for challenging an administrative determination reviewable under subparagraph (B). Specifically, subparagraph (A) requires the filing of a summons within thirty days of publication of the determination, followed by a complaint thirty days thereafter. As the U.S. Court of Appeals for the Federal Circuit has explained, that procedure delimits the subject matter jurisdiction of the Court of International Trade. *See Georgetown Steel Corp. v. United States,* 801 F.2d 1308, 1312 (Fed. Cir. 1986) (*citing Lehman v. Nakshian,* 453 U.S. 156, 161 (1981)).

In *Georgetown Steel,* the Court of Appeals held that, since subparagraph (A) "specifies the terms and conditions upon which the United States has waived its sovereign immunity in consenting to be sued in the Court of International Trade, those limitations must be strictly observed and are not subject to implied exceptions. If a litigant fails to comply with the terms upon which the United States has consented to be sued, the court has no 'jurisdiction to entertain the suit.'" *Georgetown Steel,* 801 F.2d at 1312 (*citing United States v. Mitchell,* 445 U.S. 535, 538 (1980)). In that case, Georgetown Steel's initial mailing of its complaint was returned for insufficient postage. The Court of Appeals held that the plaintiff's failure to comply with the statutory thirty day deadline for the filing of its complaint deprived the Court of International Trade of subject matter jurisdiction.

The instant case turns on the interpretation of the jurisdictional provision immediately following that at issue in *Georgetown Steel,* which

similarly "specifies the terms and conditions upon which the United States has waived its sovereign immunity." As with subparagraph (A) in *Georgetown Steel,* subparagraph (B) here can be interpreted to waive sovereign immunity only if such a waiver has been unequivocally expressed in the statute.

B. Dictionary Definitions of "Including"

The Brazilian Exporters' claim to jurisdiction turns largely on the word "including" as it is used in 19 U.S.C. § 1516a(a)(2)(B)(iv). However, the statute at issue does not define the term. Accordingly, it is to be construed using its established meaning. *See*, *e.g.*, *NLRB v. Amax Coal Co.,* 453 U.S. 322, 329 (1981) ("[w]here Congress uses terms that have accumulated settled meaning under either equity or the common law, a court must infer, unless the statute otherwise dictates, that Congress means to incorporate the established meaning of these terms"); *see also NSK Ltd. v. United States,* 115 F.3d 965, 974 (Fed. Cir. 1997) (to the same effect).

To establish the plain meaning of "including," both the Government and the Brazilian Exporters point to dictionary definitions—but with very different results. While the Government maintains that the term as used in the statute is "illustrative," the Brazilian Exporters read the term as "conjunctive" or "expansive."

Specifically, the Government relies on *Merriam-Webster's Collegiate Dictionary* to argue that Congress' use of "including" reflects its intent that a challenge to a continued final determination occur only "as a constituent, component, or subordinate part of a larger whole"—in other words, as part of a challenge to a suspension determination. Defendant's Memo at 15 (*quoting Merriam-Webster's Collegiate Dictionary* 588 (10th ed. 1999) (definition of "include"), *and citing Webster's Third New International Dictionary* 1143 (1963) ("include" means "to place, list, or rate as a part or component of a whole or of a larger group, class, or aggregate <*included* a sum for tips in his estimate of expenses>")). The Government contends that, had Congress intended to permit parties to challenge a continued final determination without challenging the suspension determination, the statute would have authorized challenges to suspension determinations "or" continued final determinations. Instead, according to the Government, Congress chose the word "including," to require that any challenge to a continued final determination be made as a subordinate part of a greater challenge—a challenge to a suspension determination. Defendant's Memo at 15–16.

Relying on *Amax Coal, supra*, and touting *Black's Law Dictionary* as "[t]he authoritative American legal dictionary," the Brazilian Exporters argue that—for purposes of statutory construction—the "legal" definition of "including" should take precedence over the "non-legal" definitions on which the Government relies. Plaintiffs' Opposition To Defendant's Motion To Dismiss For Lack of Subject Matter Jurisdiction ("Plaintiffs' Opposition") at 6–7. The Brazilian Exporters emphasize

that *Black's* definition of "including" recognizes the "expansive" meaning of the term:

> To confine within, hold as in an enclosure, take in, attain, shut up, contain, enclose, comprise, comprehend, embrace, involve. Term may, according to context, express an enlargement and have the meaning of *and* or *in addition to*, or merely specify a particular thing already included within general words theretofore used. "Including" within a statute is interpreted as a word of enlargement or of illustrative application as well as a word of limitation.

Black's Law Dictionary 763 (6th ed. 1990) (emphasis in original). The Brazilian Exporters therefore conclude that "'including' can be a word of enlargement, synonymous with 'as well as,'" and that—so read—19 U.S.C. § 1516a(a)(2)(B)(iv) permits a party to challenge the final determination resulting from a continued investigation, *as well as*—or *in addition to*—the decision to suspend the investigation. Plaintiffs' Opposition at 7.

The Brazilian Exporters misread *Amax Coal.* That case does not hold that "legal" definitions (such as those in *Black's)* trump "non-legal" definitions. Indeed, in *NSK Ltd. v. United States,* the Court of Appeals quoted the very language from *Amax Coal* on which the Brazilian Exporters rely, and then placed equal reliance on *Webster's Third New International Dictionary* and *Black's. NSK Ltd. v. United States,* 115 F.3d 965, 974 (Fed. Cir. 1997).[6]

Moreover, in interpreting statutes, the U.S. Supreme Court often relies on non-legal dictionaries. *See*, *e.g., Deal v. United States,* 508 U.S. 129, 131–32 (1993) *and Hartford Fire Ins. Co. v. California,* 509 U.S. 764, 781, 801 (1993) (*citing Webster's New International Dictionary and Oxford English Dictionary, respectively*); *see also* Note, *Looking it up: Dictionaries and Statutory Interpretation,* 107 Harv. L. Rev. 1437, 1447–48 (1994). In fact, the Supreme Court recently characterized one of the sources which the Government cites—*Webster's Third New International Dictionary*—as one of the "most authoritative" dictionaries. *Johnson v. United States,* 529 U.S. 694, 706 n.9 (2000).[7]

More to the point, the Brazilian Exporters do not (and cannot) dispute the Government's claim that "including" can be used in a merely "illustrative" sense. *See* Plaintiffs' Opposition at 6 (asserting that the term "is not *always* used in the 'illustrative' sense * * *," and that the Government "fails to acknowledge that the word 'include' can *also* mean * * *") (emphases supplied). Rather, the gravamen of the Brazilian Exporters' argument is that the term "including" sometimes has an "expansive" or "conjunctive" meaning instead. *Id*. (asserting that "The

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[6] In any event, as the Government observes, the definition in *Black's* is similar to the definitions in the sources cited by the Government, in that *Black's* notes that the word "include" derives from the Latin *Inclaudere*, which means "to shut in, keep within." Defendant's Reply to Plaintiffs' Opposition to Defendant's Motion to Dismiss for Lack of Subject Matter Jurisdiction ("Defendant's Reply") at 8 (*citing Black's Law Dictionary* 763 (6th ed. 1990)). Indeed, even the Brazilian Exporters concede that *Black's* recognizes the use of "including" in an "illustrative" sensse.

[7] The Supreme Court also cited with approval the *Oxford English Dictionary,* which defines "including" as something "[t]hat includes, shuts in, encloses, or comprises." VII *Oxford English Dictionary* 801 (2d ed. 1989). *See Johnson,* 529 U.S. at 706 n.9.

Plain Meaning of 'Including' Is Broader Than Defendant's Selective Dictionary Definitions"). But that is not enough to carry the day.

As discussed in section II above, any ambiguity in the language of the statute must be construed in favor of sovereign immunity. Accordingly, the fact that the term "including" can be used in a merely "illustrative" sense—a fact that the Brazilian Exporters concede—renders any other potential definition irrelevant.

C. The Language of § 1516a(a)(2)(B)(iv) As A Whole

The language of 19 U.S.C. § 1516a(a)(2)(B)(iv) as a whole supports the conclusion that challenges to continued final determinations are not permitted in isolation. *See generally* Defendant's Memo at 16–18.

As the Government observes, Congress limited the types of continued final determinations that may be challenged under § 1516a(a)(2)(B)(iv) by "close reference" to the underlying suspension agreement. *See* Defendant's Memo at 18. By the terms of the statute, the only such determination that may be challenged is one "resulting from a continued investigation" that "changes the size of the dumping margin or net countervailable subsidy calculated, or the reasoning underlying such calculations, at the time the suspension agreement was concluded." 19 U.S.C. § 1516a(a)(2)(B)(iv) (1994).

The focus of § 1516a(a)(2)(B)(iv) is thus on Commerce's determination to suspend the investigation. Judicial review of continued final determinations under § 1516a(a)(2)(B)(iv) is effectively limited to those cases where it is alleged that the assumptions underlying the suspension determination—*i.e.*, Commerce's findings in the preliminary determination—have changed so as to (arguably) render some aspect of the suspension determination defective. As the Government puts it, "it would be absurd and illogical for Congress to limit the types of final determinations that may be challenged by close reference to the underlying suspension agreement and then permit challenges to those same final determinations in isolation, without regard to either the suspension agreement or [the suspension] determination."[8] *See* Defendant's Memo at 18.

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[8] In advancing this argument in its opening brief, the Government noted that a challenge to a final determination which resulted from a continued investigation that changed the size of the net countervailable subsidy would permit a party to demonstrate error in a suspension determination based upon acceptance of an agreement under 19 U.S.C. § 1671c(c)—*i.e.*, an agreement offsetting at least 85% of the net countervailable subsidy. Defendant's Memo at 17. While the 85% requirement may be fulfilled at the time the suspension agreement is signed, the continuation of the investigation and the resulting final determination may establish that the 85% requirement is no longer met—for example, because the agency's continued final determination finds a higher net subsidy rate.

The Brazilian Exporters seize upon the Government's example and argue that it does not support the Government's position here because the plaintiff in the hypothetical "would be using the continued final determination as evidence that the determination to suspend the investigation was contrary to law," rather than challenging the legality of the continued final determination. Plaintiffs' Opposition at 14. True enough, a plaintiff could seek to use the continued final determination's higher net subsidy rates to attack the suspension determination. But a plaintiff might also consider the continued final determination's rates themselves erroneous. Thus, the Government postulates, suppose that Commerce preliminarily found a net subsidy rate of 10% and accepted a suspension agreement based upon that 10% rate; but, then, after continuation of the investigation, Commerce's continued final determination found a net subsidy rate of 20%. Defendant's Reply at 11–12. In challenging Commerce's suspension determination, a party could argue that the *increase* in the continued final determination demonstrates the invalidity of Commerce's initial conclusions concerning the amount of the subsidy to be offset by the suspension agreement. But a party could also argue that the 20% rate found in Commerce's continued final determination was too low. Such a plaintiff would be challenging the continued final determination as part of its overall challenge to the suspension determination. *Id*. at 12.

D. THE USE OF "INCLUDING" IN OTHER PARTS OF § 1516a(a)(2)(B)

The use of the term "including" elsewhere in 19 U.S.C. § 1516a(a)(2)(B) further reinforces the Government's position.

There is a "natural presumption that identical words used in different parts of the same act are intended to have the same meaning." *Atlantic Cleaners & Dyers, Inc. v. United States,* 286 U.S. 427, 433 (1932) (citation omitted). *See also Helvering v. Stockholms Enskilda Bank,* 293 U.S. 84, 87 (1934); *Sorenson v. Sec. of the Treasury,* 475 U.S. 851, 860 (1986); *Sullivan v. Stroop,* 496 U.S. 478, 484 (1990); *Libbey Glass v. United States,* 921 F.2d 1263, 1265 (Fed. Cir. 1990). *See generally* 2A Norman J. Singer, *Statutes and Statutory Construction* § 46:06 (6th ed. 2000) (noting existence of "presumption that the same words used twice in the same act have the same meaning"). Applying that maxim of statutory construction, the word "including" in § 1516a(a)(2)(B)(iv) should be read in parallel with its use in §§ 1516a(a)(2)(B)(i) and (ii).[9]

As the Brazilian Exporters concede, there is a substantial but subordinate relationship between the agency determination listed *after* "including" and the agency determination listed *before* "including" in both §§ 1516a(a)(2)(B)(i) and (ii); that is, in both of those subsections, "including" is used in an "illustrative" sense, and the determinations listed after "including" must be challenged in conjunction with the respective determinations that precede the term. *See* Plaintiffs' Opposition at 7–11.

The structure of § 1516a(a)(2)(B)(iv) is substantially the same. In that subsection—as in §§ 1516a(a)(2)(B)(i) and (ii)—the determination after the word "including" is subsidiary to the determination that precedes "including."[10] Thus, under § 1516a(a)(2)(B)(iv), any challenge to a final determination resulting from a continued investigation that changes the size of the net countervailable subsidy must be made in conjunction with a challenge to a suspension determination. A final determination resulting from a continued investigation cannot be challenged in isolation.

E. THE LEGISLATIVE HISTORY OF § 1516a(a)(2)(B)(iv)

The Brazilian Exporters contend that the legislative history of 19 U.S.C. § 1516a(a)(2)(B)(iv) supports their claim of jurisdiction. Specifically, they argue that the purpose of adding the "including" clause to that subsection was to preclude appeals to the Court before a final agency determination, thus eliminating piecemeal litigation. Plaintiffs' Opposition at 11–13; *see also* Defendant's Memo at 13 *and* Defendant's Reply at 14–15, including authorities cited there. Asserting that this case does not raise any issues related to interlocutory appeals, the Bra-

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[9] Logically, the maxim has even greater force here, where the term at issue is used not merely within the same statute, but within the same section.

[10] The Brazilian Exporters attempt to distinguish § 1516a(a)(2)(B)(iv) by arguing that, in §§ 1516a(a)(2)(B)(i) and (ii), the determination that follows the word "including" is itself a component part of the determination that precedes that word. To the contrary, a final antidumping determination by Commerce excluding certain companies cannot be said to be a part of a subsequent negative injury determination by the ITC. *See* 19 U.S.C. § 1516a(a)(2)(B)(ii) (1994).

zilian Exporters suggest that the action does not contravene Congressional intent.

But the Brazilian Exporters paint with too broad a brush. A continued final affirmative determination has no practical effect, unless and until the related suspension agreement is dissolved—at the wish of the foreign party, or because the agreement is successfully attacked under § 1516a(a)(2)(B)(iv), or because Commerce determines that a signatory has violated it under 19 U.S.C. § 1671c(i). Thus, many of the same jurisprudential concerns that militate against piecemeal litigation also weigh against litigation of a challenge such as that advanced by the Brazilian Exporters here—a challenge which is not yet (and may never be) ripe.

In any event, as the Government notes, it is immaterial whether or not this action implicates the concerns over interlocutory appeals reflected in the legislative history of the statute. *See* Defendant's Reply at 15–16. The language of the statute is paramount, and this action conflicts with the limited waiver of sovereign immunity found in the statute itself.

F. 19 U.S.C. § 1671c(f)(3)

The Brazilian Exporters also point to "the architecture of the suspension agreement statute"—particularly 19 U.S.C. § 1671c(f)(3)—as evidence that Congress intended to allow challenges to continued final determinations in isolation from related suspension determinations. According to the Brazilian Exporters, the Government's reading of § 1516a(a)(2)(B)(iv) would render § 1671c(f)(3) "meaningless." Plaintiff's Opposition at 14–15.

Invoking § 1671c(f)(3)(A), the Brazilian Exporters emphasize that the viability of a suspension agreement depends upon a legally valid affirmative determination. *Id*. at 14–16. That subsection provides that, if the results of a continued final determination are negative, "the suspension agreement shall have no force or effect and the investigation shall be terminated." According to the Brazilian Exporters, that provision is rendered meaningless unless the legal validity of a continued final affirmative determination can be challenged in court. *Id*. at 15.

But the Brazilian Exporters' reliance on § 1671c(f)(3)(A) is misplaced. Contrary to their claim, it does not follow that a continued final affirmative determination is subject to judicial review pursuant to § 1516a(a)(2)(B)(iv) independently of a challenge to the related suspension agreement. A party that takes the position that a suspension agreement should have no force and effect because Commerce should have made a final negative determination need only seek judicial review under § 1516a(a)(2)(B)(iv). In other words, the party need only challenge the suspension determination and the continued final determination at the same time.

The Brazilian Exporters' reliance on 19 U.S.C. § 1671c(f)(3)(B) is similarly unavailing. Under that section, no countervailing duty order issues—notwithstanding a continued final affirmative determination—

provided that the suspension agreement continues to remain in force and to meet all relevant requirements, and provided that the parties comply with the terms of the agreement. The Brazilian Exporters apparently contend that Congress intended that parties be able to seek judicial review of a continued final determination without challenging the suspension determination in order to ensure that the agreement continues to meet the requirements of the statute. Plaintiffs' Opposition at 16–17.

However, the statute provides elsewhere for annual administrative reviews to "review the current status of, and compliance with" suspension agreements and to "review the amount of any net countervailable subsidy * * * involved in the agreement[s]." 19 U.S.C. § 1675(a)(1)(C) (1994); *see generally Elkem Metals Co. v. United States,* 23 CIT 170, 44 F. Supp. 2d 288 (1999) (noting availability of Commerce review of compliance with suspension agreement, with results subject to judicial review under 19 U.S.C. § 1516a(a)(2)(B)(iii)). There is thus no need to read into § 1516a(a)(2)(B)(iv) some right to independently challenge a continued final determination in order to ensure that a suspension agreement continues to meet statutory requirements.

G. The Brazilian Exporters' Asserted "Perpetual Choice"

The Brazilian Exporters' final argument is predicated on their claim that the suspension agreement statute was designed to accord responding governments a "perpetual choice" between a suspension agreement and a continued final determination. Plaintiffs' Opposition at 17–21. Characterizing a suspension agreement as "a voluntary alternative to an order," the Brazilian Exporters assert that "the purpose of the suspension agreement is to allow * * * the responding government[ ] to have the option of deciding, at any given moment, whether to pursue the suspension agreement or abandon the suspension agreement and have an order based on a final determination." *Id*. at 18.[11] The Brazilian Exporters maintain that a right to immediate judicial review of the validity of a continued final determination is necessary to ensure that, in weighing its options in the exercise of its "perpetual choice," a responding government can make an informed decision based on full knowledge of the precise consequences of a decision to abandon the suspension agreement. *Id*. at 19.

However, the fundamental premise of this argument is faulty. Nothing in either the language of the statute or its legislative history evinces any concern on the part of Congress with ensuring such a "perpetual choice." Indeed, the legislative history indicates that the suspension agreement statute was drafted not for the benefit of respondent govern-

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[11] The Brazilian Exporters actually contend that a suspension agreement "may be terminated at any time by either *the U.S. government* or the Respondent government." Plaintiffs' Opposition at 17–18 (emphasis supplied). *See also id*. at 18 ("the purpose of the suspension agreement is to allow *the U.S. government*, as well as the responding government, to have the option of deciding, at any given moment, whether to pursue the suspension agreement or abandon the suspension agreement") (emphasis supplied). But the Brazilian Exporters appear to be mistaken. While Section XI of the Suspension Agreement provides that the Government of Brazil may terminate the agreement at any time, nothing in the agreement gives the U.S. Government the same right. *See* Suspension Determination, 64 Fed. Reg. 38,797.

ment signatories, but rather to serve "the interest of the public and the domestic industry affected." S. Rep. No. 96–249 at 71, *reprinted in* 1979 U.S.C.C.A.N. 381, 457.

Nor is there any merit to the concern that denying the right to immediately challenge a continued final determination in isolation will effectively insulate that determination from judicial review. *See* Plaintiffs' Opposition at 18, 20–21. A signatory's withdrawal from a suspension agreement would trigger 19 U.S.C. § 1671c(i). Under that provision of the statute, where—as here—the investigation had already been completed, Commerce would issue a countervailing duty order. Within thirty days after *Federal Register* publication of the order, any interested party who was a party to the proceeding could contest Commerce's final affirmative determination. 19 U.S.C. § 1516a(a)(2) (1994).

In short, contrary to the implication of the Brazilian Exporters' argument, the statute does indeed provide for meaningful judicial review of continued final determinations—albeit not immediately and not "in the manner * * * most convenient to signatories." *See* Defendant's Reply at 19.

IV. CONCLUSION

The Brazilian Exporters have failed to meet their burden of establishing the jurisdiction of the Court. They essentially concede that the precise statutory language at issue *can* be read to preclude their challenge of the continued final determination unless they also challenge the underlying suspension agreement. It is axiomatic that any ambiguities concerning a waiver of sovereign immunity must be construed in favor of immunity.

For all the reasons set forth above, the Court lacks subject matter jurisdiction over this action. Accordingly, it must be dismissed.

(Slip Op. 02–38)

TIMKEN CO., PLAINTIFF *v.* UNITED STATES, DEFENDANT, AND PEER BEARING CO., DEFENDANT-INTERVENOR

Court No. 98–12–03235

Plaintiff, The Timken Company ("Timken"), moves pursuant to USCIT R. 56.2 for judgment upon the agency record challenging the Department of Commerce, International Trade Administration's ("Commerce") final determination, entitled *Final Results of 1996–1997 Antidumping Duty Administrative Review and New Shipper Review and Determination Not To Revoke Order in Part of Tapered Roller Bearings and Parts Thereof, Finished and Unfinished, From the People's Republic of China ("Final Results"),* 63 Fed. Reg. 63,842 (Nov. 17, 1998), as amended, *Amended Final Results of 1996–1997 Antidumping Duty Administrative Review of Tapered Roller Bearings and Parts Thereof, Finished and Unfinished, From the People's Republic of China ("Amended Final Results"),* 63 Fed. Reg. 71,447 (Dec. 28, 1998).

Specifically, Timken contends that Commerce erred in: (1) selecting, for valuing the hot-rolled steel bar used to manufacture tapered roller bearings ("TRBs") cups and cones, export data from Japan to Indonesia, rather than the annual report data from eight Indian bearing producers or Indian import statistics or export statistics from Japan to India; (2) valuing material costs for steel inputs by using the prices paid by a People's Republic of China ("PRC") bearing producer and a PRC trading company to market-economy suppliers; (3) valuing scrap generated from the production of cups, cones and rollers using unadjusted Indonesian import statistics; and (4) failing to adjust overhead, selling, general and administrative expenses ("SG&A") and profit rates to account for differences in material and labor values of other surrogate sources used in determining normal value ("NV").

Held: Timken's 56.2 motion is granted in part and denied in part. This case is remanded to Commerce to: (1) provide the Court with an explanation as to why export statistics from Japan to India are not the "best available information" for the purpose of choosing a surrogate to value hot-rolled steel bar used to produce TRB cups and cones; and (2) explain whether or not the American Metal Market prices can serve as an alternative surrogate to value scrap and, if Commerce concludes that the American Metal Market prices present the "best available information" for the purpose of such surrogate evaluation, to recalculate Commerce's determination accordingly.

[Timken's 56.2 motion is granted in part and denied in part. Case remanded.]

(Dated April 22, 2002)

Stewart and Stewart (Terence P. Stewart, James R. Cannon, Jr. and *Amy S. Dwyer)* for Timken.

Robert D. McCallum, Jr., Assistant Attorney General; *David M. Cohen,* Director, Commercial Litigation Branch, Civil Division, United States Department of Justice *(Lucius B. Lau);* of counsel: *Rina Goldenberg,* Office of the Chief Counsel for Import Administration, United States Department of Commerce, for the United States.

Arent Fox Kintner Plotkin & Kahn, PLLC (John M. Gurley and *Matthew J. McConkey)* for Peer Bearing.[1]

OPINION

TSOUCALAS, *Senior Judge:* Plaintiff, The Timken Company ("Timken"), moves pursuant to USCIT R. 56.2 for judgment upon the agency record challenging the Department of Commerce, International Trade Administration's ("Commerce") final determination, entitled *Final Results of 1996–1997 Antidumping Duty Administrative Review and New*

[1] Peer Bearing Company has intervened in this action but has not filed a motion for judgment upon the agency record.

Shipper Review and Determination Not To Revoke Order in Part of Tapered Roller Bearings and Parts Thereof, Finished and Unfinished, From the People's Republic of China ("Final Results"), 63 Fed. Reg. 63,842 (Nov. 17, 1998), as amended, *Amended Final Results of 1996–1997 Antidumping Duty Administrative Review of Tapered Roller Bearings and Parts Thereof, Finished and Unfinished, From the People's Republic of China ("Amended Final Results"),* 63 Fed. Reg. 71,447 (Dec. 28, 1998).

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BACKGROUND

This case concerns the 1987 antidumping duty order on TRBs from the PRC for the period of review ("POR") covering June 1, 1996, through May 31, 1997.[2] *See Antidumping Duty Order; Tapered Roller Bearings and Parts Thereof, Finished or Unfinished, From the People's Republic of China ("Antidumping Duty Order"),* 52 Fed. Reg. 22,667 (June 15, 1987). On July 10, 1998, Commerce published the preliminary results of the subject review. *See Preliminary Results of 1996–1997 Antidumping Duty Administrative Review and New Shipper Review of Tapered Roller Bearings and Parts Thereof, Finished and Unfinished, From the People's Republic of China ("Preliminary Results"),* 63 Fed. Reg. 37,339. Commerce published the *Final Results* on November 17, 1998. *See* 63 Fed. Reg. at 63,842.

JURISDICTION

The Court has jurisdiction over this matter pursuant to 19 U.S.C. § 1516a(a) (1994) and 28 U.S.C. § 1581(c) (1994).

STANDARD OF REVIEW

In reviewing a challenge to Commerce's final determination in an antidumping administrative review, the Court will uphold Commerce's determination unless it is "unsupported by substantial evidence on the

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[2] Since the administrative review at issue was initiated after December 31, 1994, the applicable law is the antidumping statute as amended by the Uruguay Round Agreements Act ("URAA"), Pub. L. No. 103–465, 108 Stat. 4809 (1994) (effective January 1, 1995). *See Torrington Co. v. United States,* 68 F.3d 1347, 1352 (Fed. Cir. 1995) (citing URAA § 291(a)(2), (b) (noting effective date of URAA amendments)).

record, or otherwise not in accordance with law * * *." 19 U.S.C. § 1516a(b)(1)(B)(i) (1994).

I. Substantial Evidence Test

Substantial evidence is "more than a mere scintilla. It means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Universal Camera Corp. v. NLRB ("Universal Camera"),* 340 U.S. 474, 477 (1951) (quoting *Consolidated Edison Co. v. NLRB,* 305 U.S. 197, 229 (1938)). Substantial evidence "is something less than the weight of the evidence, and the possibility of drawing two inconsistent conclusions from the evidence does not prevent an administrative agency's finding from being supported by substantial evidence." *Consolo v. Federal Maritime Comm'n,* 383 U.S. 607, 620 (1966) (citations omitted). Moreover, "[t]he court may not substitute its judgment for that of the [agency] when the choice is 'between two fairly conflicting views, even though the court would justifiably have made a different choice had the matter been before it *de novo.*'" *American Spring Wire Corp. v. United States ("American Spring Wire"),* 8 CIT 20, 22, 590 F. Supp. 1273, 1276 (1984) (quoting *Penntech Papers, Inc. v. NLRB ("Penntech Papers"),* 706 F.2d 18, 22–23 (1st Cir. 1983) (quoting, in turn, *Universal Camera,* 340 U.S. at 488)).

II. Chevron Two-Step Analysis

To determine whether Commerce's interpretation and application of the antidumping statute is "in accordance with law," the Court must undertake the two-step analysis prescribed by *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc. ("Chevron"),* 467 U.S. 837 (1984). Under the first step, the Court reviews Commerce's construction of a statutory provision to determine whether "Congress has directly spoken to the precise question at issue." *Id.* at 842. "To ascertain whether Congress had an intention on the precise question at issue, [the Court] employ[s] the 'traditional tools of statutory construction.'" *Timex V.I., Inc. v. United States,* 157 F.3d 879, 882 (Fed. Cir. 1998) (citing *Chevron,* 467 U.S. at 843 n.9). "The first and foremost 'tool' to be used is the statute's text, giving it its plain meaning. Because a statute's text is Congress's final expression of its intent, if the text answers the question, that is the end of the matter." *Id.* (citations omitted). Beyond the statute's text, the tools of statutory construction "include the statute's structure, canons of statutory construction, and legislative history." *Id.* (citations omitted); *but see Floral Trade Council v. United States,* 23 CIT 20, 22 n.6, 41 F. Supp. 2d 319, 323 n.6 (1999) (noting that "[n]ot all rules of statutory construction rise to the level of a canon, however") (citation omitted).

If, after employing the first prong of *Chevron,* the Court determines that the statute is silent or ambiguous with respect to the specific issue, the question for the Court becomes whether Commerce's construction of the statute is permissible. *See Chevron,* 467 U.S. at 843. Essentially, this is an inquiry into the reasonableness of Commerce's interpretation. *See Fujitsu Gen. Ltd. v. United States,* 88 F.3d 1034, 1038 (Fed. Cir.

1996). Provided Commerce has acted rationally, the Court may not substitute its judgment for the agency's. *See Koyo Seiko Co. v. United States,* 36 F.3d 1565, 1570 (Fed. Cir. 1994) (holding that "a court must defer to an agency's reasonable interpretation of a statute even if the court might have preferred another"); *see also IPSCO, Inc. v. United States,* 965 F.2d 1056, 1061 (Fed. Cir. 1992). The "[C]ourt will sustain the determination if it is reasonable and supported by the record as a whole, including whatever fairly detracts from the substantiality of the evidence." *Negev Phosphates, Ltd. v. United States,* 12 CIT 1074, 1077, 699 F. Supp. 938, 942 (1988) (citations omitted). In determining whether Commerce's interpretation is reasonable, the Court considers the following non-exclusive list of factors: the express terms of the provisions at issue, the objectives of those provisions and the objectives of the antidumping scheme as a whole. *See Mitsubishi Heavy Indus. v. United States,* 22 CIT 541, 545, 15 F. Supp. 2d 807, 813 (1998).

DISCUSSION

I. Commerce's Selection of Export Data From Japan to Indonesia as a Surrogate Value for Bearing Quality Steel Bar Used by PRC Producers to Manufacture TRB Cups and Cones

A. Background

Antidumping margins are the difference between NV and United States price of the merchandise. When the merchandise is produced in a non-market economy country ("NME") such as the PRC, Commerce constructs NV pursuant to section 1677b(c), which provides that

> 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 [Commerce].*

19 U.S.C. § 1677b(c)(1) (1994) (emphasis supplied).

The statute does not define the phrase "best available information," it only provides that

> [Commerce], in valuing factors of production * * *, shall utilize, to the extent possible, the prices or costs of factors of production in *one or more market economy countries* that are[:]
>
> (A) at a level of economic development comparable to that of the nonmarket economy country, and
>
> (B) significant producers of comparable merchandise.

19 U.S.C. § 1677b(c)(4) (1994) (emphasis supplied).

Thus, the statute grants to Commerce broad discretion to determine the "best available information" in a reasonable manner on a case-by-case basis. *See Lasko Metal Prods., Inc. v. United States ("Lasko"),* 43 F.3d 1442, 1446 (Fed. Cir. 1994) (noting that the statute "simply does not say—anywhere—that the factors of production must be ascertained in a single fashion.") Consequently, Commerce values as many factors of production ("FOPs") as possible using information obtained from the "primary" surrogate country, that is, the country that Commerce con-

siders to be most comparable in economic terms to the NME country being investigated, and that also produces merchandise comparable to the subject merchandise. *See, e.g., Tianjin Mach. Import & Export Corp. v. United States ("Tianjin"),* 16 CIT 931, 940–41, 806 F. Supp. 1008, 1018 (1992); *Timken Co. v. United States,* 16 CIT 142, 145–46, 788 F. Supp. 1216, 1218 (1992). Additionally, if Commerce determines that suitable values cannot be obtained from the data of the primary surrogate country, Commerce resorts to the data from the second, and sometimes the third, surrogate. *See, e.g., Timken Co. v. United States ("Timken 2001"),* 25 CIT ____, ____, 166 F. Supp. 2d 608, 621–23 (2001); *Notice of Final Determination of Sales at Less Than Eair Value: Certain Cased Pencils From the People's Republic of China,* 59 Fed. Reg. 55,625, 55,629 (Nov. 8, 1994); *Final Determination of Sales at Less Than Fair Value: Certain Helical Spring Lock Washers From the People's Republic of China,* 58 Fed. Reg. 48,833, 48,835 (Sept. 20, 1993).

During this review, Commerce initially chose India as the primary surrogate country to value all FOPs except steel inputs and scrap, which were valued using the data from the secondary surrogate country, Indonesia. *See Preliminary Results,* 63 Fed. Reg. at 37,342–43. Commerce explained that in order to value the steel inputs used by PRC producers to manufacture TRB cups and cones, Commerce "reviewed several data sources, including: U.S., Indian, and Indonesian import statistics, and [export data from Japan] * * * to determine the most accurate value for steel inputs." *Final Results,* 63 Fed. Reg. at 63,845. Commerce reasoned that it decided to use secondary surrogate data (that is, Indonesian import statistics) over import data from India because Commerce determined that steel values contained in the Indian import data were not reliable for two reasons: (1) Commerce was unable to isolate Indian import value for bearing quality steel used to manufacture the merchandise at issue, *see* Def.'s Mem. Opp. Pl.'s Mot. J. Agency R. ("Def.'s Mem."), App. Ex. 8 at 3; and (2) "when compared with the U.S. import statistics for the HTS category which only includes bearing quality steel bars and rods, the Indian values are unreliably high." *Final Results,* 63 Fed. Reg. at 63,845. Commerce, however, re-examined the matter after considering comments that questioned the use of Indonesian import statistics to value bearing quality steel bar used by Chinese manufacturers in the production of cups and cones. *See id.*

Upon examining the Indonesian import statistics, Commerce found that Indonesian tariff category 7228.30 "include[d] several types of hot-rolled bars and rods of alloy steel, in addition to the bearing quality steel bars and rods used in cup and cone production." *Id.* at 63,845. Although the Indonesian import statistics were consistent with the United States benchmark, Commerce was persuaded by "Timken's arguments that the volume of steel imported into Indonesia exceeded the volume of bearing quality steel that could actually be consumed in that country." Def.'s Mem. at 14. Commerce, therefore, decided to further examine the Indonesian import values. *See Final Results,* 63 Fed. Reg. at 63,845.

Examining the data further, Commerce observed that the export data from Japan to Indonesia "provid[ed] a breakdown of the broad six-digit 7228.30 category into several more narrowly defined * * * categories." *Id.* In particular, during the period of review, 2,974 metric tons ("MTs") of the merchandise were exported to Indonesia under Japanese HS Code 7228.30.900 (that is, a category that most likely includes the bearing quality steel bar used to produce the merchandise at issue). *See id.* at 63,846. Consequently, Commerce concluded that export data from Japan to Indonesia under category 7228.30.900 would constitute the best information available to value steel used to produce the merchandise at issue. *See id.* Commerce stated that

> [b]ecause this Japanese tariff category is the narrowest category which could contain bearing quality steel and because it is consistent with [the United States] benchmark, [Commerce] believe[s] it is the best alternative for valuing steel used in the production of cups and cones. Moreover, [Commerce] view[s] the data on [exports from Japan] to Indonesia as an Indonesian value, *i.e.,* it is a value from a country comparable to the PRC. Although the data are from Japanese statistics, [Commerce] ha[s] used those statistics to "refine" the Indonesian data in an attempt to make the import category conform better to the input used by the PRC TRB producers.

Id.

Moreover, Commerce examined and rejected the annual report data of eight Indian bearing manufacturers suggested by Timken as an alternative for valuing the bearing quality steel used in the production of the subject merchandise at issue. *See* 63 Fed. Reg. at 63,843–44. Commerce found that the annual report data of the eight Indian bearing manufacturers were unsuitable to value the steel inputs because "only three [of these manufacturers] break out steel costs according to the type of steel used in the production of bearings." *Id.* at 63,843. Commerce further pointed out that

> [f]or the three companies that do break out their steel costs by broad types of steel, only Asian Bearing separately identifie[d] "steel bars," the steel input used by the Chinese respondents to produce certain TRB components (cups, cones, & rollers). However, because Asian Bearing provides an average cost for steel bar and does not provide specific costs according to the type of bar used *(i.e.,* hot-rolled versus cold-rolled), [Commerce] is unable to accurately value the two types of steel bar used in the production of cups and cones versus that used in the production of rollers. Furthermore, the annual report does not specify whether the steel bar is only used by Asian Bearing in the production of tapered roller bearings or whether it is used to produce other products manufactured by the company. To the extent that Asian Bearing uses hot-rolled and cold-rolled steel bars in different proportions than the PRC TRB producers, Asian Bearing's average cost of steel bars is not an accurate value to apply to the PRC producers' factors.

Id.

Commerce also stated that it was rejecting Asian Bearing's data because of Commerce's "longstanding practice of relying, to the extent possible, on public statistics on surrogate countries to value any factors for which such information is available over company-specific data." *Id.* at 63,844.

Finally, Commerce in its brief explained the basis for its rejection of the export statistics from Japan to India as an alternative for valuing the bearing quality steel used in the production of the subject merchandise at issue. *See* Def.'s Mem. at 31–33. Commerce reasoned that:

> Because (1) Commerce found that the Indian import data were significantly higher than the U.S. benchmark; and (2) Timken supplied the [export data from Japan] to India in support of its argument that the Indian import data were reasonable, it is apparent that Commerce rejected the [export data from Japan] to India for the same reasons that it rejected the Indian import data *(i.e.,* both sources of data were unreliable when compared to the U.S. benchmark).

Id. at 32.

B. Contentions of the Parties

1. Timken's Contentions

Timken contends that Commerce abused its discretion when it used export data from Japan to Indonesia to value "the hot-rolled steel bar used to produce tapered roller bearing cups and cones over: (1) the annual report data from eight Indian producers; (2) Indian import statistics; or (3) [export statistics from Japan] to India." Timken's Mem. P. & A. Supp. Mot. J. Agency R. ("Timken's Mem.") at 24.

With regards to the annual report data from eight Indian producers, Timken asserts that the average material costs of the eight Indian producers was a superior surrogate source to value hot-rolled steel bar used to produce TRB cups and cones than Commerce's use of the export data from Japan to Indonesia.[3] *See id.* at 25–32. In particular, Timken maintains that: (1) "the eight annual reports for the Indian bearing producers are publicly available average data from the primary surrogate country," *id.* at 28; (2) "unlike Japanese export statistics, the average steel costs contained in the eight annual reports reflect non-export

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[3] Timken notes that Commerce's practice of selecting "best available information" to determine the surrogate value pursuant to 19 U.S.C. § 1677b(c)(1)

> "is to select, where possible, publicly available information, which is (1) an average non-export value; (2) representative of a range of prices within the POR if submitted by an interested party, or most contemporaneous within the POR; (3) product-specific; and (4) tax-exclusive. * * * [Commerce] has also articulated a preference for a surrogate country's domestic prices over import values."

Timken's Mem. at 27 (quoting *Ferrovanadium and Nitrided Vanadium From the Russian Federation: Notice of Final Results of Antidumping Duty Administrative Review,* 62 Fed. Reg. 65,656, 65,661 (Dec. 15, 1997)).

Timken also maintains that based on the aforementioned practice of selecting the "best available information," Commerce has previously used the annual reports or actual price lists of producers in the surrogate country rather than import statistics. *See* Timken's Mem. at 27 (citing *Coalition for the Preservation of American Brake Drum and Rotor Aftermarket Mfrs. v. United States,* 23 CIT 88, 115–17, 44 F. Supp. 2d 229, 255–57 (1999); *Notice of Final Determination of Sales at Less Than Fair Value: Certain Preserved Mushrooms from the People's Republic of China,* 63 Fed. Reg. 72,255, 72,263–64 (Dec. 31, 1998); *Notice of Final Determination of Sales at Less Than Fair Value: Circular Welded Non-Alloy Steel Pipe From Romania,* 61 Fed. Reg. 24,274, 24,279 (May 14, 1996); and *Notice of Preliminary Determinations of Sales at Less Than Fair Value and Postponement of Final Determinations: Brake Drums and Brake Rotors From The People's Republic of China,* 61 Fed. Reg. 53,190, 53,195 (Oct. 10, 1996).

prices," *id.;* (3) "the eight annual reports for the 1996–97 fiscal year are representative of a range of material prices contemporaneous with the period of review," *id.;* (4) unlike "the Japanese export statistics which also cover non-bearing quality steel, seven of the eight annual reports primarily reflect material costs for bearing quality steel in India," *id.* at 28–29; and (5) "unlike the Japanese export statistics, the material costs included in the annual reports also reflect domestic prices." *Id.* at 29. Moreover, Timken points out that Commerce departed from its own "strong preference [to] calculate[] normal value in NME cases based on factor values from a single, primary surrogate source" by rejecting the annual report data from eight Indian producers. Timken's Mem. at 26–27 (citing *Peer Bearing Co. v. United States ("Peer Bearing 1998"),* 22 CIT 472, 481, 12 F. Supp. 2d 445, 455 (1998); *Tianjin,* 16 CIT at 940, 806 F. Supp. at 1017–18; *Industrial Nitrocellulose From the People's Republic of China: Final Results of Antidumping Duty Administrative Review,* 62 Fed. Reg. 65,667, 65,668 (Dec. 15, 1997); *Notice of Final Determination of Sales at Less Than Fair Value: Certain Cut-to-Length Carbon Steel Plate From Ukraine,* 62 Fed. Reg. 61,754, 61,762 (Nov. 19, 1997); and *Final Determination of Sales at Less Than Fair Value: Certain Carbon Steel Butt-Weld Pipe Fittings From the People's Republic of China,* 57 Fed. Reg. 21,058, 21,062 (May 18, 1992)).

Additionally, Timken argues that Commerce "failed to compare the merits of [Indian annual report data] with * * * export statistics [from Japan] to Indonesia." Timken's Mem. at 30; *see also* Timken's Reply Br. ("Timken's Reply") at 4–5. In particular, Timken asserts that: (1) the export data from Japan to Indonesia does not "separately identify material costs for hot-rolled bar for the production of cups and cones," Timken's Mem. at 30; (2) the export data from Japan to Indonesia "include[s] non-bearing quality steel," *id.,* and; (3) "Japanese exports of steel to Indonesia were not likely to have been used for the production [of the] subject merchandise." *Id.* Timken also asserts that the annual reports of the eight Indian producers were publicly available and were used by Commerce to value overhead, SG&A and profit. Timken's Mem. at 31. Finally, Timken maintains that the "fact that the average material[] costs" of the eight Indian producers were on average "higher than Japanese export prices to Indonesia * * * is insufficient to support use of * * * [Japanese exports to Indonesia] as the 'best available information' to value material costs [at issue]." *Id.* at 32. Timken, therefore, argues that Commerce's decision to use export data from Japan to Indonesia to value the subject merchandise at issue is arbitrary and unsupported by substantial evidence. *See* Timken's Reply at 5.

As an alternative to the prior argument, Timken suggests that Commerce should have used Indian import statistics to value the steel inputs

at issue.[4] *Id*. In particular, Timken argues that: (1) Commerce's use of United States import data as a benchmark for assessing the reliability of the Indian import data was unreliable and unreasonable, *see* Timken's Reply at 6–7; Timken's Mem. at 24 n.3; (2) "import[] statistics from the primary surrogate country are superior to * * * export statistics [from Japan] to the secondary surrogate," Timken's Mem. at 24–25 n.3; and (3) Commerce arbitrarily selected export statistics from Japan to Indonesia as a surrogate to value the subject merchandise at issue despite the fact that Indonesia is not a "'significant' bearing producer" and "Indian import statistics were remarkably consistent with the raw material costs reported in the annual reports of eight Indian bearing[] producers." *Id.* at 25 n.3; *see also,* Timken's Reply at 7.

Finally, Timken alternatively argues that Commerce failed to explain Commerce's rejection of export data from Japan to India as a surrogate value. *See* Timken's Mem. at 32–35; Timken's Reply at 8–9. Timken asserts that "[w]ithout an articulation of reasons as to why [Commerce] considered * * * export statistics [from Japan] to India inadequate, the Court cannot determine whether [Commerce's] decision was arbitrary, capricious, or otherwise not in accordance with law."[5] Timken's Mem. at 35 (citing *SEC v. Chenery Corp.,* 332 U.S. 194, 196 (1947)). Moreover, Timken contends that Commerce should have used the export data from Japan to India over export data from Japan to Indonesia as a surrogate to value the subject merchandise at issue because (1) if Commerce was persuaded by the fact that the export statistics from Japan to Indonesia provide more product-specific data for bearing quality steel bar to value TRB cups and cones, then the very same fact with regards to export statistics for Japanese exports to India should be equally considered by Commerce, *see* Timken's Mem. at 33; (2) "Japanese steel exported to Indonesia was less likely to be used in the production of identical or comparable merchandise than Japanese exports to India," *id.* at 34; (3) Commerce's reliance on United States import data as a benchmark was unreasonable, *see id.;* and (4) "[i]f Japanese export statistics under HTS 7228.30.90 contained more product-specific information than Indian or Indonesian import statistics, then [Commerce] should have used * * * export statistics [from Japan] to India." *Id.*

2. Commerce's Contentions

Commerce responds that its decision to value steel inputs used by PRC producers to manufacture TRB cups and cones by using export data from Japan to Indonesia rather than either the annual report data for eight Indian producers, or export statistics from Japan to India, or

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[4] In its brief, Timken directs the Court to review the arguments Timken made regarding the use of Indian import statistics as a surrogate value in *Peer Bearing Co. v. United States ("Peer Bearing 2001"),* 25 CIT ___, 182 F. Supp. 2d 1285 (2001); *Timken 2001,* 25 CIT ___, 166 F. Supp. 2d 608; *Timken Co. v. United States ("Timken 1999"),* 23 CIT 509, 59 F. Supp. 2d 1371 (1999); *Peer Bearing 1998,* 22 CIT at 479–82, 12 F. Supp. 2d at 453–56. *See* Timken's Mem. at 24. The Court, however, does not entertain arguments "incorporated by reference," that is, those arguments in Timken's prior briefs, and shall only address the arguments currently before the Court.

[5] Timken also argues that Commerce's failure to consider export data from Japan to India as a surrogate to value the subject merchandise and Commerce's post-hoc explanation that Commerce "rejected the * * * export statistics [from Japan] to India because they were higher than the U.S. import values * * * requires a remand so that [Commerce] may explain its decision on the record." Timken's Reply at 8; *see also id.* at 9.

Indian import statistics was reasonable and in accord with the mandate of 19 U.S.C. § 1677b(c). *See* Def.'s Mem. at 23–33. Specifically, Commerce points out that, contrary to Timken's argument, "'[t]he court's role is not to determine whether the information chosen by Commerce is the "best" actually available, but whether the choice is supported by substantial evidence and is in accordance with law.'" *Id.* at 25 (quoting *Novachem, Inc. v. United States,* 16 CIT 782, 786, 797 F. Supp. 1033, 1037 (1992)). Commerce, therefore, maintains that its selection of the export data from Japan to Indonesia as the "best available" surrogate value should be sustained because that data "represented 'the narrowest category most likely containing bearing quality steel bar'; and * * * 'it is consistent with [the United States] benchmark.'" Def.'s Mem. at 25 (quoting *Final Results,* 63 Fed. Reg. at 63,846).

Commerce argues that its decision to reject the annual report data of eight Indian bearing manufacturers as an alternative for valuing the bearing quality steel used in the production of the subject merchandise at issue was supported by substantial evidence. *See* Def.'s Mem. at 26–29. Commerce asserts that it examined the annual report data of the eight Indian producers and found that only three of the eight reports "identified steel costs by the type of steel used in the production of bearings." *Id.* at 27. Moreover, Commerce points out that

> "[f]or the three companies that do break out their steel costs by broad types of steel, only Asian Bearing separately identifie[d] 'steel bars,' the steel input used by the Chinese respondents to produce certain TRB components (cups, cones, & rollers)."

Id. (quoting *Final Results,* 63 Fed. Reg. at 63,843).

Commerce further reasoned that it rejected the Asian Bearing annual report for three reasons:

> (1) "Asian Bearing provides an average cost for steel bar and does not provide specific costs according to the type of bar used *(i.e.,* hot-rolled versus cold-rolled)"; (2) "the annual report does not specify whether the steel bar is only used by Asian Bearing in the production of tapered roller bearings or whether it is used to produce other products manufactured by the company"; and (3) "public statistics provide a more representative value for these material inputs than a single company's information."

Def.'s Mem. at 27 (quoting *Final Results,* 63 Fed. Reg. at 63,843– 44).

Additionally, Commerce maintains that "[n]either the Indian annual reports nor the Japanese export data * * * satisfied all of Commerce's preferences." Def.'s Mem. at 29. Commerce, therefore, selected the "policy preference *(i.e.,* non-export value or product-specificity) [that] would lead to a more accurate dumping margin." *Id.*

Commerce also argues that its decision to reject Indian import statistics as an alternative for valuing the bearing quality steel used in the

production of the subject merchandise at issue was supported by substantial evidence. *Id.* at 29–31. Commerce points out that

> "[i]n comparing [Indian import statistics] data to other market values, including U.S. imports from category 7228.30.20 (the only import category on the record which explicitly contains only bearing quality steel), [Commerce] found the Indian values to be unreliable because the values for these imports were significantly higher."

Id. at 30 (quoting App. Ex. 8).

Additionally, Commerce was unable to isolate Indian import value for bearing quality steel used to manufacture the subject merchandise at issue. *See* Def.'s Mem., App. Ex. 8 at 3. Commerce also points out that the United States benchmark used by Commerce in assessing the reliability of the Indian import data was reasonable and reliable. *See* Def.'s Mem. at 31; *see also Final Results,* 63 Fed. Reg. at 63,844–45.

Finally, Commerce contends that its decision to reject export data from Japan to India as an alternative for valuing the bearing quality steel used in the production of the subject merchandise at issue was supported by substantial evidence. *See* Def.'s Mem. at 31–33. Commerce agrees with Timken that Commerce "did not formally explain the basis for its rejection of * * * export statistics [from Japan] to India as a surrogate value." *Id.* at 31. Nevertheless, Commerce maintains that the Court may discern Commerce's rejection of export data from Japan to India as a surrogate value because Commerce's reasoning "is apparent from the administrative record." *Id.* In particular, Commerce reasoned that

> [b]ecause [:] (1) Commerce found that the Indian import data were significantly higher than the U.S. benchmark; and (2) Timken supplied the * * * export data [from Japan] to India in support of its argument that the Indian import data were reasonable, it is apparent that Commerce rejected the * * * export data [from Japan] to India for the same reasons that it rejected the Indian import data *(i.e.,* both sources of data were unreliable when compared to the U.S. benchmark).

Id. at 32.

C. Analysis

1. Commerce's Changes of Policy or Methodology

Agency statements provide guidance to regulated industries. While "'an agency does not act rationally when it chooses and implements one policy and decides to consider the merits of a potentially inconsistent policy in the very near future,'" *Transcom, Inc. v. United States,* 24 CIT ____, ____, 123 F. Supp. 2d 1372, 1381 (2000) (quoting *ITT World Communications, Inc. v. FCC,* 725 F.2d 732, 754 (D.C. Cir. 1984)), Commerce, in view of the rapidly-changing world of global trade and Commerce's limited resources, should be able to rely on its "unique expertise and policy-making prerogatives." *Southern Cal. Edison Co. v. United States,* 226 F.3d 1349, 1357 (Fed. Cir. 2000). "'The power of an administrative agency to administer a congressionally created * * * program necessari-

ly requires the formulation of policy * * *.'" *Chevron,* 467 U.S. at 843 (quoting *Morton v. Ruiz,* 415 U.S. 199, 231 (1974)).

An agency decision involving the meaning or reach of a statute that reconciles conflicting policies "'represents a reasonable accommodation of conflicting policies that were committed to the agency's care by the statute, [and a reviewing court] should not disturb [the agency decision] unless it appears from the statute or its legislative history that the accommodation is not one that Congress would have sanctioned.'" *Chevron,* 467 U.S. at 845 (quoting *United States v. Shimer,* 367 U.S. 374, 382–83 (1961)). Furthermore, an agency must be allowed to assess the wisdom of its policy on a continuing basis. Under the *Chevron* regime, agency discretion to reconsider policies is inalienable. *See Chevron,* 467 U.S. at 843. Any assumption that Congress intended to freeze an administrative interpretation of a statute would be entirely contrary to the concept of *Chevron* which assumes and approves the ability of administrative agencies to change their interpretations. *See, e.g., Maier, P.E. v. United States EPA,* 114 F.3d 1032, 1043 (10th Cir. 1997), *J.L. v. Social Sec. Admin.,* 971 F.2d 260, 265 (9th Cir. 1992), *Saco Defense Sys. Div., Maremont Corp. v. Weinberger,* 606 F. Supp. 446, 450–51 (D. Me. 1985). In sum, underlying agency interpretative policies "are given controlling weight unless they are arbitrary, capricious, or manifestly contrary to the statute." *Chevron,* 467 U.S. at 844.

Moreover, "'[a]n [agency] announcement stating a change in the method * * * is not a general statement of policy.'" *American Trucking Ass'ns, Inc. v. ICC,* 659 F.2d 452, 464 n.49 (5th Cir. 1981) (quoting *Brown Express, Inc. v. United States,* 607 F.2d 695, 701 (5th Cir. 1979) (internal quotations omitted)). While a policy "denotes * * * [the] general purpose * * * [of the statute] considered as directed to the welfare or prosperity of the state," BLACK'S LAW DICTIONARY 1157 (6th ed. 1990), methodology refers only to the "performing [of] several operations[] in the most convenient order," *id.* at 991; *accord Avoyelles Sportsmen's League, Inc. v. Marsh,* 715 F.2d 897 (5th Cir. 1983); *Interstate Natural Gas Ass'n of Am. v. Federal Energy Regulatory Comm'n,* 716 F.2d 1 (D.C. Cir. 1983); *Hooker Chems. & Plastics Corp. v. Train,* 537 F.2d 620 (2d Cir. 1976). Consequently, the courts are even less in the position to question an agency action if the action at issue is a choice of methodology, rather than policy. *See, e.g., Maier, P.E.*, 114 F.3d at 1043 (citing *Professional Drivers Council v. Bureau of Motor Carrier Safety,* 706 F.2d 1216, 1221 (D.C. Cir. 1983)). Similarly, an agency decision to change its methodology, that is, to take an act of statutory implementation while pursuing the same policy, should be examined under the *Chevron* test and sustained if the new methodology is reasonable. *See, e.g., Koyo Seiko Co., v. United States*, 24 CIT ____, ____, 110 F. Supp. 2d 934, 942 (2000) (stating that "'the use of different methods [of] calculati[on] * * * does not [mean there is a] conflict with the statute,'") (quoting *Torrington Co. v. United States,* 44 F.3d 1572, 1578 (Fed. Cir. 1995)).

Therefore, Commerce's decision to reject the annual report data of eight Indian producers and Commerce's consequential use of alternative data as a surrogate value for bearing quality steel bar used by PRC producers to manufacture TRB cups and cones was a justifiable change of methodology as long as such change in position was reasonably supported by the record.

2. Commerce's Decision to Use Export Data from Japan to Indonesia

As a preliminary matter, the Court rejects Timken's assertion that Commerce erred in using United States data as benchmarks to test the reliability of the Indian import data and export data from Japan to India. A comparison of surrogate data to that of market economy in order to determine the reliability of such surrogate data is within "'Commerce's statutory authority and consistent with past practice.'" *Peer Bearing 1998,* 22 CIT at 481, 12 F. Supp. 2d at 455 (quoting *Writing Instrument Mfrs. Ass'n v. United States ("Writing Instrument"),* 21 CIT 1185, 1195, 984 F. Supp. 629, 639 (1997)) (upholding use of United States benchmark as a point of comparison for two possible surrogate values and quoting, in turn, *Olympia Indus., Inc. v. United States ("Olympia 1997"),* 21 CIT 364, 369 (1997) (approving Commerce's use of data from other market economies to test the reliability of surrogate country data)). Commerce, therefore, acted within its statutory authority by utilizing United States data to aid in its FOPs valuation. *See* 19 U.S.C. §§ 1677b(c)(1) and (4); *Peer Bearing 1998,* 22 CIT at 481, 12 F. Supp. 2d at 455.

Next, with respect to Timken's challenge to Commerce's decision to use export data from Japan to Indonesia to value the hot-rolled steel bar used by PRC producers to manufacture TRB cups and cones, the Court finds that Commerce's decision was unreasonable.

In this case, during the review at issue, Commerce examined the Indonesian import statistics and found that: (1) Indonesian import statistics were consistent with the United States benchmark; and (2) "the volume of steel imported into Indonesia exceeded the volume of bearing quality steel that could actually be consumed in that country." Def.'s Mem. at 14. Upon further examination of Indonesian import statistics, Commerce observed that export data from Japan to Indonesia under category 7228.30.900 would constitute the best information available to value steel used to produce the merchandise at issue. Commerce reasoned that because

> this Japanese tariff category is the narrowest category which could contain bearing quality steel and * * * it is consistent with [the United States] benchmark.

Final Results, 63 Fed. Reg. at 63,846.

Commerce went on to state that

> [Commerce] view[s] the data on Japanese exports to Indonesia as an Indonesian value, *i.e.,* it is a value from a country comparable to the PRC. Although the data are from Japanese statistics, [Commerce] ha[s] used those statistics to "refine" the Indonesian data in

> an attempt to make the import category conform better to the input used by the PRC TRB producers.

Id.

With respect to export statistics from Japan to India, Commerce, however, admittedly failed to explain its rejection of the export statistics from Japan to India as a surrogate value. *See* Def.'s Mem. at 31. While Commerce maintains that the Court may discern Commerce's reasoning for rejecting the export data from Japan to India from the record, the Court finds that Commerce's reasoning for rejecting the export data from Japan to India as a surrogate value was not sufficiently explained. To the contrary, on the basis of the explanation supplied by Commerce one may conclude that it was illogical for Commerce to utilize export data from Japan to Indonesia in order to "refine" the Indonesian data and then to subsequently reject analogously structured export data from Japan to India.

Accordingly, the Court remands this issue to Commerce with instructions to provide the Court with an explanation as to why export statistics from Japan to India are not the "best available information" for the purpose of choosing a surrogate to value hot-rolled steel bar used to produce TRB cups and cones.

II. Commerce's Use of Luoyang Bearing Factory's and China National Machinery Import and Export Corporation's Market Economy Import Data

A. Background

During the POR, Luoyang Bearing Factory ("Luoyang"), China National Machinery Import and Export Corporation ("CMC"), Zhejiang Changshan Bearing (Group) Co., Ltd. ("ZX"), and Zhejiang Machinery Import and Export Corporation ("Zhejiang") "submitted [to Commerce] market economy input prices for steel they imported, directly or indirectly, and used in the production of" TRBs. Def.'s Mem., App. Ex. 6 at 1. In the *Preliminary Results,* Commerce stated that

> [Luoyang and CMC] * * * purchased steel from market economy suppliers and paid for the steel with market economy currencies. In these instances [Commerce] valued the steel input using the actual prices reported for imported inputs from a market economy * * *. Where * * * [ZX and Zhejiang] purchased the steel from a PRC trading company [CMC] and paid for the steel in * * * [non-market economy currency], [Commerce] did not use the market economy price to the trading company and instead used surrogate data [to value the steel input].

63 Fed. Reg. at 37,343 (citing Def.'s Mem., App. Ex. 6).

However, in the *Final Results,* Commerce partially departed from the conclusion reached in its *Preliminary Results* and "us[ed] * * * [CMC's] import steel price as surrogate data for those companies that actually used the imported steel [that is, ZX and Zhejiang]." *Final Results,* 63 Fed. Reg. at 63,854; *accord* Def.'s Mem. at 33 n.35. For the purpose of assessing the alternative surrogate data, Commerce determined the

reliability of CMC's import prices by examining the following: "(1) the value and volume of steel imports, (2) the type and quality of the imported steel, and (3) consumption of imported steel by the NME producer." *Final Results,* 63 Fed. Reg. at 63,854; *see also, Olympia Indus., Inc. v. United States ("Olympia 1999"),* 23 CIT 80, 82, 36 F. Supp. 2d 414, 416 (1999). Upon examining these factors, Commerce concluded that:

> [t]he record evidence demonstrates that * * * [CMC] purchased steel from a market-economy country, in a convertible currency. This company used a portion of the steel in its own production of TRBs but also sold a portion of the steel to an unrelated manufacturer. Based on the invoices for the imported steel, and the specifications of the steel sourced by the factories domestically, [Commerce] conclude[d] that the imported steel is of the same grade and has the same range of sizes as steel that the NME manufacturers used to produce the subject merchandise.
>
> Regarding the value of the steel imported by * * * [CMC], [Commerce] found that the price paid by the trading company is within the range of prices created by the actual steel prices paid by PRC producers and [Commerce's] surrogate value. Consequently, the price paid by * * * [CMC] is not aberrational. With respect to volume and consumption of steel by the NME producer, [Commerce] note[s] that the amount of steel imported by the trading company was significant and that the NME producer in question consumed a significant amount of imported steel to produce the subject merchandise.

Final Results, 63 Fed. Reg. at 63,854.

B. Contentions of the Parties

1. Timken's Contentions

Timken contends that Commerce's decision to value material costs for certain steel inputs by using the prices paid by CMC to market-economy suppliers was not supported by substantial evidence and contrary to law. *See* Timken's Mem. at 36–38. In particular, Timken argues that Commerce's reliance on CMC's import prices as an alternative surrogate value violates "[t]he plain language of the statute and regulations [which] require, * * * 'to the extent possible,' that [Commerce] value factors of production based on prices or costs 'in' another market economy country at a comparable level of development." *Id.* at 36 (quoting 19 U.S.C. § 1677b(c)(4) and 19 C.F.R. § 353.52(c)(1997)); *see also* Timken's Reply at 9. Relying on *Olympia 1999,* 23 CIT 80, 36 F. Supp. 2d 414, Timken maintains that "trading company import prices are not actual prices but surrogate values subject to the requirements of 19 U.S.C.

§ 1677b(c)(4)."[6] Timken's Reply at 10; *see also* Timken's Mem. at 37. Based on the foregoing, Timken further maintains that "[n]owhere in its final determination does [Commerce] explain that it was not 'possible' to use Indian or other surrogate values according to the expressed statutory requirements."[7] Timken's Mem. at 38; *see* Timken's Reply at 13. Timken, therefore, asserts that a remand is necessary so that Commerce can explain its interpretation of 19 U.S.C. § 1677b(c)(4) as it "applie[s] to the facts of this case." Timken's Reply at 13.

Additionally, Timken argues that Commerce's three-pronged test only examines whether trading company import prices are aberrational or insignificant and does not "determine whether [trading company import] prices reflect market forces and are more reliable than surrogate values from a comparable market economy." Timken's Mem. at 42–43; Timken's Reply at 15–16. Timken contends that in order for Commerce to assess the reliability of trading company import prices pursuant to § 1677b(c)(1), Commerce should have considered: (1) "whether the trading company importer sufficiently covered its costs in reselling the imported materials;" (2) "any countertrade arrangements between the trading company and its market-economy supplier;" (3) "any commissions or other consideration paid by the purchaser or supplier to the trading company, or lack thereof;" and (4) "any affiliation between the trading company, the market-economy supplier and/or the Chinese manufacturer." Timken's Mem. at 43. Moreover, Timken maintains that contrary to Commerce's assertion that *Olympia 1999,* 23 CIT 80, 36 F. Supp. 2d 414, approved Commerce's three-pronged test, "[t]he issue [in *Olympia 1999]* was not whether [Commerce] could rely on the test to support acceptance of trading company import prices." Timken's Reply at 16.

Next, Timken argues that Commerce's determination that a PRC bearing producer's (that is, Luoyang's) import prices constituted the "best available information" under § 1677b(c)(1) to value material costs for certain steel inputs was contrary to § 1677b(c)(1) and unsupported by substantial evidence because Commerce failed to determine whether the prices paid by the PRC bearing producer to the market-economy suppliers were "market-driven." *See* Timken's Mem. at 39–41. In par-

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[6] Timken, in its Reply Brief states that:

> Although the Court in *Olympia [1999]* did address the use of trading company import prices, the Court reviewed [Commerce's] reliance on traditional surrogate values over trading company prices in that case. Therefore, the Court in *Olympia [1999]* did not reach the issue of whether § 1677b(c)(4) requires [Commerce] to value factors of production 'to the extent possible' based on values in one or more market economy countries that are at a level of economic development comparable to that of the nonmarket economy country, and significant producers of the subject merchandise before resort to 'alternative surrogate' trading company import prices.

Timken's Reply at 13.

Moreover, contrary to Commerce's argument that the Court of Appeals for the Federal Circuit ("CAFC") in *Lasko,* 43 F.3d 1442, supports Commerce's treatment of trading company import prices, Timken argues that *Lasko* "addressed the issue of whether or not [Commerce] could mix-and-match surrogate market values and market-based values to value factors of production." Timken's Reply at 10. Timken, therefore, maintains that *Lasko* did not address "the issue of the proper interpretation of 19 U.S.C. § 1677b(c)(4) or the use of Chinese trading company purchases as surrogates." *Id.* Additionally, contrary to Commerce's contention that "*Lasko* rejected the argument that [§ 1677b(c)(4)] set forth a hierarchy requiring [Commerce] to base foreign market value solely on surrogate factors of production[,]" Timken argues that "*Lasko* did not involve the selection between competing surrogate values pursuant to § 1677b(c)(4)." *Id.* at 12–13.

[7] For instance, Timken asserts that Commerce could have used the eight annual reports of Indian bearing producers as a possible surrogate to value the steel inputs at issue. *See* Timken's Mem. at 38.

ticular, Timken maintains that "[i]mports from a market-economy country are not necessarily priced at market-economy rates when sold in a non-market economy country." Timken's Mem. at 40. Timken states:

> [i]ndeed, with the increasing number of countries applying anti-dumping rules, it can be expected that exports to China could be dumped with impunity or sold at price levels that are atypical of prices in the country of exportation. * * * Producers in highly-developed countries, concerned with unused capacity might export to China at below-market prices in order to better spread their fixed costs. Or, the domestic Chinese competition may require potential exporters to price at levels not found 'in' their own market economies in order to establish channels of distribution and market share. In either case, dumped import prices would not reflect prices in the exporting country, whether or not it was at a comparable level of development.

Id.[8]

Moreover, relying on *Final Determinations of Sales at Less Than Fair Value: Oscillating Fans and Ceiling Fans From the People's Republic of China ("Oscillating Fans"),* 56 Fed. Reg. 55,271, 55,275 (Oct. 25, 1991), Timken maintains that "as [Commerce] evaluates market-economy prices to determine whether they are reliable in a market-economy case, [Commerce] should evaluate those prices to determine whether they are reliable in [an] NME case."[9] Timken's Mem. at 41.

Timken also contends that Commerce "should have considered the volume and frequency of" Luoyang's market-economy purchases[10] and "should have rejected all prices that were not at arm's length, that did not reflect commercial quantities, or that otherwise did not reasonably reflect the actual cost of production in a comparable market economy." *Id.* at 41–42; *see* Timken's Reply at 15.

2. Commerce's Contentions

Commerce responds that its determination to value material costs for steel inputs using the prices paid by: (1) a PRC bearing producer (Luoyang) and (2) a PRC trading company (CMC) to market-economy suppli-

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[8] In support of its assertions, Timken aruges that "legislative history is instructive" and provides

> [i]n valuing * * * factors {of production}, Commerce shall avoid using any prices which it has reason to believe or suspect may be dumped or subsidized prices. However, the conferees [do] not intend for Commerce to conduct a formal investigation to ensure such prices are not dumped or subsidized, but rather intend that Commerce base its decision on information generally available to it at that time.

Timken's Mem. at 40 (quoting 1988 U.S.C.C.A.N. 1547, 1623).

[9] Timken contends that contrary to Commerce's argument that *Lasko Metal Prods., Inc. v. United States ("Lasko Metal"),* 16 CIT 1079, 1081, 810 F. Supp. 314, 317 (1992), *aff'd, Lasko,* 43 F.3d 1442, allows Commerce to "presume that the prices paid by PRC producers are 'market driven' and otherwise reliable[,] * * * this Court did not address the issue presented in this case of whether [Commerce] had an obligation to determine whether the prices were, in fact, 'market driven' or otherwise reliable as required in an non-NME case pursuant to 19 U.S.C. §§ 1677b(a), (b)." Timken's Reply at 14–15.

[10] Timken refers to 19 C.F.R. § 351.408(c)(1)(1998) and the comments of this regulation to support its argument that Commerce "has recognized that use of prices paid by an NME producer to a market-economy supplier must be assessed for reliability." Timken's Mem. at 41 n.6. As Timken and Commerce correctly note, 19 C.F.R. § 351.408(c)(1) does not apply to the subject review. *See id.;* Def.'s Mem. at 35 n.36. Nevertheless, "[f]or segments of proceedings initiated on the basis of petitions filed or requests made after January 1, 1995, but before part 351 applies, part 351 * * * serve[s] as a restatement of [Commerce's] interpretation of the requirements of the Act as amended by the URAA." 19 C.F.R. § 351.701 (1998).

ers was supported by substantial evidence and in accordance with law. *See* Def.'s Mem. at 33–39.

First, with respect to Commerce's decision to value material costs for certain steel inputs by using the prices paid by a PRC trading company to market-economy suppliers, Commerce, relying on *Lasko* argues that the Court "reject[ed] [the] argument that [§ 1677b(c)(4)] set forth a hierarchy that requires Commerce to 'determine [NV] in a[n] NME solely on the basis of surrogate factors of production.'" Def.'s Mem. at 35 (quoting *Lasko,* 43 F. 3d at 1445). Commerce further argues that since § 1677b(c)(4)

> does not distinguish between producers and trading companies for purposes of determining NV in a case involving an NME country, it is apparent that Commerce's authority to use the actual market-economy prices paid for by producers also extends to actual market-economy prices paid for by trading companies.

Def.'s Mem. at 35.

Moreover, Commerce contends that its three-pronged test is presumptively correct and has been approved by *Olympia Indus. Inc. v. United States,* 36 F.3d 414 (CIT 1999) [sic].[11] *Id.* at 38. Commerce further maintains that § 1677b(c)(1) is silent as to the methodology Commerce is to use in "determin[ing] whether to use the market prices paid by trading companies as an alternative surrogate value." Def.'s Mem. at 38–39. Commerce, therefore, argues that since the statute is silent "'the Supreme Court * * * ha[s] held that our duty is not to weigh the wisdom of, or to resolve any struggle between, competing views of the public interest, but rather to respect legitimate policy choices made by the agency interpreting and applying the statute.'" *Id.* at 39 (quoting *Lasko,* 43 F.3d at 1446 and *Suramerica de Aleaciones Laminadas, C.A. v. United States ("Suramerica"),* 966 F.2d 660, 665 (Fed. Cir. 1992), and citing *Timken 1999,* 23 CIT at 516, 59 F. Supp. 2d at 1377)).

Second, with respect to Commerce's determination to value material costs for certain steel inputs by using the prices paid by a PRC bearing producer to market-economy suppliers, Commerce argues that this practice was sustained by the CAFC in *Lasko. See* Def.'s Mem. at 33. In particular, Commerce points out that § 1677b(c)(1) "requires Commerce to value factors of production using the 'best available information'" and that *Lasko* found that "'the best available information on what the supplies used by the Chinese manufactures would cost in a market economy country was the price charged by those supplies on the international market.'" *Id.* at 33–34 (quoting *Lasko,* 43 F.3d at 1446). Commerce also points out that contrary to Timken's argument, the prices paid by the PRC bearing producer constituted the best available information because the PRC bearing producer had a contract priced in United States dollars between itself and a market-economy supplier and "'[t]he cost for raw materials from a market economy supplier, paid in

[11] The Court assumes that the correct citation is *Olympia 1999,* 23 CIT 80, 36 F. Supp. 2d 414.

convertible currencies, provides Commerce with the closest approximation of the cost of producing the goods in a market economy country.'" Def.'s Mem. at 35–36 (quoting *Lasko Metal,* 16 CIT at 1081, 810 F. Supp. at 317).

Additionally, Commerce asserts that since Timken's argument (that is, the prices paid by the PRC bearing producer, Luoyang, might not reflect market-economy prices) is based on hypothetical assertions, Commerce's decision to accept the PRC producer's prices are not in conflict with legislative history. *See* Def.'s Mem. at 36 (citing to 1988 U.S.C.C.A.N. 1547, 1623–24). Commerce also asserts that Timken's argument (that is, Commerce should have considered the volume and frequency of Luoyang's market-economy purchases) is unpersuasive because "[t]he authorities relied upon by Timken reveal that it is [Commerce's] practice to consider the volume of market-economy purchases for purposes of determining whether to value domestically-purchased inputs based upon the value of imports from a market-economy country." *Id.* at 37 (citing *Final Results of Antidumping Duty Administrative Review of Certain Helical Spring Lock Washers From the People's Republic of China ("Certain Helical Spring Lock Washers"),* 62 Fed. Reg. 61,794, 61,796 (Nov. 19, 1997). Commerce, therefore, points out that "[w]here Commerce uses the prices of a respondent's market-economy purchases to value those purchases, it does not consider the volume or frequency of those purchases." *Id.* at 38 (citing *Lasko,* 43 F.3d at 1446).

C. Analysis

The applicable statute provides that, when dealing with imports from an NME country such as the PRC, Commerce shall determine the NV of the subject merchandise based on FOPs utilized in producing the merchandise. *See* 19 U.S.C. § 1677b(c)(1). The statute further provides that Commerce shall value the reported FOPs based on the best available information regarding the values of FOPs in an appropriate market economy. *See id.* While conducting NME investigations, Commerce "shall utilize, to the extent possible, the prices or costs of [FOPs] in one or more market economy countries that are[:] (A) at a level of economic development comparable to that of the nonmarket economy country, and (B) significant producers of comparable merchandise." *See* 19 U.S.C. § 1677b(c)(4).

The CAFC, however, reasoned that "the purpose of the statutory provisions [that is, §§ 1677b(c)(1) and (4)] is to determine antidumping margins 'as accurately as possible.'" *Shakeproof Assembly Components, Div. of Illinois Tool Works, Inc. v. United States ("Shakeproof"),* 268 F.3d 1376, 1382 (Fed. Cir. 2001) (quoting *Lasko,* 43 F.3d at 1446); *see also Olympia Indus., Inc. v. United States ("Olympia 1998"),* 22 CIT 387, 390, 7 F. Supp. 2d 997, 1000–01 (1998) (noting that "accuracy is the touchstone of the antidumping statute" and citing *Rhone Poulenc, Inc. v United States ("Rhone Poulenc"),* 899 F.2d 1185, 1191 (Fed. Cir. 1990)). Additionally, Commerce's "task in [an NME] investigation is to calculate what * * * [the] costs or prices would be [in the NME] if such prices

or costs were determined by market forces." *Tianjin,* 16 CIT at 940, 806 F. Supp. at 1018.

1. Commerce's Decision to Value Material Costs for Certain Steel Inputs by Using the Prices Paid by a PRC Trading Company

The Court disagrees with Timken that Commerce is required to value FOPs pursuant to § 1677b(c)(4) prior to resorting to a PRC trading company's import prices paid to a market-economy supplier to value material costs for certain steel inputs. Specifically, the Court disagrees with Timken's narrow reading of *Lasko,* 43 F.3d 1442. The Court in *Lasko Metal,* 16 CIT at 1081, 810 F. Supp. at 317, reasoned that "[t]he cost for raw materials from a market economy supplier, paid in convertible currencies, provides Commerce with the closest approximation of the cost of producing the goods in a market economy country." Additionally, the CAFC observed

> "[w]here we can determine that a [non-market economy] producer's input prices are market determined, accuracy, fairness, and predictability are enhanced by using those prices. Therefore, using surrogate values when market-based values are available would, in fact, *be contrary to the intent of the law."*

Shakeproof, 268 F.3d at 1382 (emphasis in original) (quoting *Lasko,* 43 F.3d at 1446); accord *Oscillating Fans,* 56 Fed. Reg. at 55,275; *see also Olympia 1998,* 22 CIT at 392, 7 F. Supp. 2d at 1002 (stating that "[t]he same holds true here with respect to the trading company data").

Moreover, the relevant regulation provides:

> [Commerce] normally will use publicly available information to value factors. However, where a factor is purchased from a market economy supplier and paid for in a market economy currency, [Commerce] normally will use the price paid to the market economy supplier. In those instances where a portion of the factor is purchased from a market economy supplier and the remainder from a nonmarket economy supplier, [Commerce] normally will value the factor using the price paid to the market economy supplier.

19 C.F.R. § 351.408(c)(1).

In the case at bar, "[t]he record evidence demonstrates that the Chinese trading company [that is, CMC,] purchased steel from a market-economy country, in a convertible currency." *Final Results,* 63 Fed. Reg. at 63,854. Moreover, "[t]his company used a portion of the steel in its own production of TRBs but also sold a portion of the steel" to ZX and Zhejiang, the PRC producers that purchased the steel from the trading company and paid for the steel in non-market economy currency. *Id.; see also Preliminary Results,* 63 Fed. Reg. at 37,343; *see also* Def.'s Mem., App. Ex. 6. Based on the foregoing, the Court finds that Commerce's decision to use the PRC trading company's import steel price as surrogate data for ZX and Zhejiang is reasonable, is in accordance with law and is in accord with the purpose of the statutory provisions to determine antidumping margins as accurately as possible.

Next, observing that § 1677b(c)(1) does not specify what constitutes "best available information," the Court concludes that "'[t]he statute [,therefore, does not] * * * require Commerce to follow any single approach in evaluating data.'" *Timken 1999,* 23 CIT at 515, 59 F. Supp. 2d at 1376 (quoting *Olympia 1997,* 21 CIT at 368, and citing *Lasko,* 43 F.3d at 1446); *see also Shakeproof Assembly Components, Div. of Illinois Tool Works, Inc. v. United States,* 23 CIT 479, 481, 59 F. Supp. 2d 1354, 1357 (1999), *aff'd, Shakeproof,* 268 F.3d 1376 (stating that "[t]he statute requires Commerce to use the best available information, but does not define that term" and pointing out that "'[t]he relevant statute does not clearly delineate how Commerce should determine what constitute the [best available information,]'" (quoting *Olympia 1998,* 22 CIT at 389, 7 F. Supp. 2d at 1000)).

During the POR, Commerce utilized a three-pronged test in assessing the reliability of the PRC trading company's import prices. *See Final Results,* 63 Fed. Reg. at 63,854. Specifically, Commerce examined: "(1) the value and volume of steel imports, (2) the type and quality of the imported steel, and (3) consumption of imported steel by the NME producer." *Id.* Applying the three-pronged test to the case at bar, Commerce stated:

> Based on the invoices for the imported steel, and the specifications of the steel sourced by the factories domestically, [Commerce] conclude[d] that the imported steel is of the same grade and has the same range of sizes as steel that the NME manufacturers used to produce the subject merchandise.
>
> Regarding the value of the steel imported by the trading company, [Commerce] found that the price paid by the trading company is within the range of prices created by the actual steel prices paid by [the] PRC producers and [Commerce's] surrogate value. Consequently, the price paid by the PRC trading company is not aberrational. With respect to volume and consumption of steel by the NME producer, [Commerce] note[s] that the amount of steel imported by the trading company was significant and that the NME producer in question consumed a significant amount of imported steel to produce the subject merchandise.

Id.

While it is possible that Timken's proposed factors could indeed have better assessed the reliability of trading company import prices, the Court's "duty is not to weigh the wisdom of, or to resolve any struggle between, competing views of the public interest, but rather to respect legitimate policy choices made by the agency in interpreting and applying the statute." *Suramerica,* 966 F.2d at 665. The Court, therefore, affirms Commerce's use of its three-pronged test in assessing the reliability of trading company import prices as reasonable and in accordance with law.

2. Commerce's Decision to Value Material Costs for Certain Steel Inputs by Using the Prices Paid by a PRC Bearing Producer

The Court disagrees with Timken's argument that since Commerce did not use the mode of examination offered by Timken on the issue, that is, whether prices paid by a PRC bearing manufacturer, Luoyang, to market-economy suppliers were market driven, Commerce's determination to value certain steel inputs by using the prices paid by Luoyang was contrary to § 1677b(c)(1) and unsupported by substantial evidence.

The Court is not persuaded by Timken's argument that "as [Commerce] evaluates market-economy prices to determine whether they are reliable in a market-economy case, [Commerce] should [use the same mode to] evaluate those prices to determine whether they are reliable in [an] NME case."[12] Timken's Mem. at 41. As *Lasko Metal* stated, "[t]he cost for raw materials from a market economy supplier, paid in convertible currencies, provides Commerce with the closest approximation of the *cost of producing the goods in a market economy country."* 16 CIT at 1081, 810 F. Supp. at 317 (emphasis supplied); *see also Shakeproof,* 268 F.3d at 1382,

> "[w]here we can determine that a [non-market economy] producer's input prices are market determined, accuracy, fairness, and predictability are enhanced by using those prices. Therefore, using surrogate values when market-based values are available would, in fact, *be contrary to the intent of the law."*

(emphasis in original) (quoting *Lasko*, 43 F.3d at 1446); accord *Oscillating Fans,* 56 Fed. Reg. at 55,275. Therefore, the cost for raw materials from a market-economy supplier, paid in convertible currency, constitutes an alternative market-driven price for the purpose of valuation.

During the POR, Commerce determined that the import prices paid in hard currency by Luoyang (that is, a PRC bearing producer) to a market-economy supplier represented the "best available information" to value material costs for certain steel inputs. Commerce indicates that Luoyang's "November 12, 1997, submission included a contract between Luoyang and a market economy supplier for the purchase of steel used in the production of bearing cages. The contract showed a price in U.S. dollars." Def.'s Mem., App. Ex. 6 at 1; *see also* Def.'s Proprietary Ex. 1 (providing a copy of the November 12, 1997 contract). Based on the foregoing, the Court finds that Commerce's determination to value certain steel inputs by using the prices paid by Luoyang to market-economy suppliers is reasonable, is in accordance with § 1677b(c)(1) and is supported by substantial evidence. *See Peer Bearing 2001,* 25 CIT at ____, 182 F. Supp. 2d at 1305 ("'[i]n the absence of a statutory mandate to the

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[12] Market-economy cases and non-market economy cases are distinct. *See, e.g., Shakeproof,* 268 F.3d at 1379 n.1. ("The [NV] of goods in 'market economy' cases is generally the price at which the foreign product is first sold in the exporting country. * * * [T]he normal value of goods in [NME] may be instead determined by looking at the 'factors of production' used to manufacture the goods," citations omitted); *see also Lasko,* 43 F.3d at 1445 ("[I]f [Commerce] cannot determine [NV] pursuant to the general provisions of § 1677b(a), then [Commerce] must use the [FOP] methodology to *estimate* [NV] for the merchandise in question") (emphasis in original).

contrary, Commerce's actions must be upheld as long as they are reasonable'" (quoting *Timken 1999,* 23 CIT at 516, 59 F. Supp. 2d at 1377); *see also Chevron,* 467 U.S. at 844–45.

Similarly, the Court is not persuaded by Timken's argument that Commerce was obligated to examine the volume and frequency of Luoyang's market-economy purchases. As Commerce correctly notes, "[t]he authorities relied upon by Timken reveal [conversely,] that it is [Commerce's] practice to consider the volume of market-economy purchases for purposes of determining whether to value domestically-purchased inputs based upon the value of imports from a market-economy country." Def.'s Mem. at 37 (citing *Certain Helical Spring Lock Washers,* 62 Fed. Reg. at 61,796, and *Antidumping Duties; Countervailing Duties,* 62 Fed. Reg. 27,296, 27,366 (May 19, 1997)).

Accordingly, the Court affirms Commerce's decision to value material costs for steel inputs by using the prices paid by a PRC producer and a PRC trading company to market-economy suppliers.

III. Commerce's Valuation of Scrap Generated From the Production of Cups, Cones and Rollers

A. Background

During the period of review, Commerce

> valued scrap recovered from the production of cups and cones using Indonesian import statistics from HTS category 7204.2900. Scrap recovered from the production of rollers and cages was valued using import data from the Indian tariff subheading 7204.29 and 7204.4100 respectively.

Preliminary Results, 63 Fed. Reg. at 37,343.

In the *Final Results,* Commerce did "not adjust[] the values for scrap from the *Preliminary Results,* with the exception of the change * * * relating to roller scrap." *Final Results,* 63 Fed. Reg. at 63,847. Specifically, Commerce explained that

> category 7204.29.09 best captures the type of scrap generated from the production of rollers and [Commerce] ha[s] recalculated the surrogate value for this scrap excluding data from subcategory 7204.29.01. However, [Commerce] notes that [Commerce] continue[s] to use the broad category 7204.29 to value scrap from the production of cups and cones because the Indonesian import data do not provide a further breakdown of this category into subheadings. Therefore, for scrap generated from cups and cone production, [Commerce] used data under Indonesian import category 7204.29, "other waste and scrap of alloy steel."

Id. at 63,846.

B. Contentions of the Parties

1. Timken's Contentions

Timken argues that Commerce "erred in selecting scrap values that reflected the prices of high quality scrap in the face of record evidence that the scrap of Chinese bearing producers consisted of low quality

turnings, shavings, and low-grade scrap." Timken's Mem. at 44. In particular, Timken maintains that "[t]he surrogate values * * * were significantly higher in value than the benchmark U.S. imports of high and low quality scrap under HTS No. 7204.29.00, 7204.41.00.20, 7204.41.00.60 or American Metal Market prices for shop turnings." *Id.* (citing Timken's Mem. at 19, Table 2).[13] Moreover, Timken maintains that Commerce failed to explain why the American Metal Market prices could not serve as an alternative surrogate to value scrap. *See* Timken's Mem. at 46; Timken's Reply at 20–21. Timken further maintains that Commerce's approach was inconsistent because "Indian domestic, import or export steel values were not 'reliable' by [Commerce's] standard because they were higher than U.S. import values, yet scrap values [chosen by Commerce that were] higher than U.S. import values were [deemed by Commerce] somehow reliable."[14] Timken's Reply at 17.

2. Commerce's Contentions

Commerce maintains that its valuation of scrap generated from the production of cups, cones and rollers is supported by substantial evidence and is in accordance with law. *See* Def.'s Mem. at 40.

Commerce argues that it "recognized that, notwithstanding the fact that the PRC production process might result in lower quality scrap, 'it remains bearing quality scrap.'" *Id.* (quoting *Final Results,* 63 Fed. Reg. at 63,847). Additionally, Commerce maintains that "'[s]ince steel used in the production of cups and cones is bearing quality steel, the scrap resulting from the production thereof must be of a corresponding grade.'" *Id.* Commerce further maintains that it acted within its discretion in not adjusting the surrogate values of scrap to account "for the potentially low quality of the PRC scrap." Def.'s Mem. at 40 (quoting *Shieldalloy Metallurgical Corp. v. United States ("Shieldalloy"),* 20 CIT 1362, 1368, 947 F. Supp. 525, 532 (1996), pointing out that "'[t]he statute does not specify what constitutes best available information, nor does it prescribe a specific method for adjusting raw material prices to account for differences in grade or quality'" and *Peer Bearing 1998,* 22 CIT at 481,

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[13] Besides these four benchmarks supplied by Timken to support its argument that Commerce's surrogate values are higher in value than Timken's benchmarks, Timken mentions Russian scrap prices as a fifth possible benchmark. *See* Timken's Reply at 17 (citing Timken's Mem. at 19, Table 2). Nevertheless, with respect to the Russian scrap price, Timken maintains "[Commerce] was unlikely to rely on another NME country's prices." Timken's Reply at 20 (citing 19 U.S.C. § 1677b(c)(2) and 19 C.F.R. § 353.52(b)(1997)).

[14] Timken also contends that Commerce departed from its previous methodology of "valuing scrap using the same surrogate source as the raw materials." Timken's Mem. at 46 (citing *Final Results and Partial Termination of Antidumping Duty Administrative Review of Tapered Roller Bearings and Parts Thereof, Finished and Unfinished, From the People's Republic of China,* 62 Fed. Reg. 6173, 6180 (Feb. 11, 1997), and *Final Results of Antidumping Duty Administrative Review and Revocation in Part of Antidumping Duty Order of Tapered Roller Bearings and Parts Thereof, Finished and Unfinished, From the People's Republic of China,* 62 Fed. Reg. 6189, 6196 (Feb. 11, 1997)); *see also* Timken's Reply at 21–22. Specifically, Timken points out that Commerce, in this review, "valued raw materials for cups and cones based on Japanese export statistics but valued scrap from the production of cups and cones based on Indonesian import statistics." Timken's Mem. at 46; *accord* Timken's Reply at 21–22.

Commerce asserts that Timken's argument is incorrect because Commerce does not have a practice of valuing scrap using the same surrogate source as raw materials. *See* Def.'s Mem. at 42–43. The Court finds that Commerce is not required to provide an explanation for not using the same surrogate to value steel and scrap in this case. *See Allied-Signal Aerospace Co. v. United States,* 28 F. 3d 1188, 1191 (Fed. Cir. 1994) ("[i]n view of the discretionary, case-by-case nature of [Commerce's] BIA [that is, best available information] determinations, [Commerce] is obligated only to use a methodology consistent with its statutory authority, and it is not required to supply a 'reasoned analysis' justifying its adoption."), *cert. denied,* 513 U.S. 1077 (1995); *see also National Steel Corp. v. United States,* 18 CIT 1126, 1130, 870 F. Supp. 1130, 1135 (1994) ("it appears the Federal Circuit has given Commerce broad discretion to change its methodology without explanation").

12 F. Supp. 2d at 455, explaining that "Commerce's authority to select appropriate surrogate values to determine [NV] based on FOP includes the authority to do so without adjustment")).

Furthermore, Commerce, relying on *Peer Bearing 1998,* 22 CIT at 481, 12 F. Supp. 2d at 455, contends that it acted within its discretion in not using Timken's proffered United States benchmarks to test Commerce's surrogate values of scrap because those proffered United States benchmarks did not contain the bearing quality steel used by PRC bearing producers. *See* Def.'s Mem. at 40–41. In particular, Commerce points out that

> "[t]he HTS category which Timken uses for its comparison (7204.41.0060 'borings, shovelings, and turnings') does not include scrap generated from bearing quality steel. * * * [Additionally,] [o]f the information contained on the record, only the broad U.S. HTS categories 7204.41 and 7204.49 provide for a break-down of scrap into subcategories based on the size and quality of scrap. However, these categories do not include bearing quality steel."

Id. (quoting Final Results, 63 Fed. Reg. at 63,847).

Finally, with respect to Timken's argument that Commerce failed to explain why it declined American Metal Market prices as an alternative surrogate to value scrap, Commerce argues that "Timken never presented this argument to Commerce in its case brief, as required by 19 C.F.R. § 353.38(c)(2)." Def.'s Mem. at 41. Commerce alleges that, Timken, therefore, "failed to exhaust its administrative remedies concerning this issue."[15] *Id.* at 42.

C. Analysis

As a preliminary matter, the Court addresses Commerce's argument that Timken failed to exhaust its administrative remedies. The exhaustion doctrine requires a party to present its claims to the relevant administrative agency for the agency's consideration before raising these claims to the Court. *See Unemployment Compensation Comm'n of Alaska v. Aragon,* 329 U.S. 143, 155, (1946) ("A reviewing court usurps the agency's function when it sets aside the administrative determination upon a ground not theretofore presented and deprives the [agency] of an

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[15] In its reply brief, Timken first points out that "in its preliminary determination comments, Timken submitted the American Metal Market prices pointing out that they * * * were representative of world market prices." Timken's Reply at 18 (citing Timken's Mem. Pub. Doc. 129). Next, Timken states that

> [i]n its case brief, Timken argued that it was unreasonable to use any surrogate value for undifferentiated scrap imports that did not account for the low quality of PRC scrap. In doing so, Timken compared the scrap values used in the preliminary determination to the American Metal Market prices, * * * and U.S. import statistics.

Timken's Reply at 18 (citing Timken's Mem. Pub. Doc. 280). Finally, Timken argues that "during the hearing [that is, the September 9, 1998 hearing], counsel for Timken specifically pointed out that evidence from the American Metal Market [prices] for shop turning prices provides [Commerce] with a world market benchmark of $82/MT. * * *" Timken's Reply at 19 (citing Timken's Mem. Pub. Doc. 294 at 33–35).

opportunity to consider the matter, make its ruling, and state the reasons for its action").[16]

The purpose behind the doctrine of exhaustion is to prevent courts from premature involvement in administrative proceedings, and to protect agencies "from judicial interference until an administrative decision has been formalized and its effects felt in a concrete way by the challenging parties." *Abbott Labs. v. Gardner,* 387 U.S. 136, 148–49, (1967); *see also Public Citizen Health Research Group v. Comm'r, FDA,* 740 F.2d 21, 29 (D.C. Cir. 1984) (pointing out that the "exhaustion doctrine * * * serv[es] four primary purposes: [(1)] it ensures that persons do not flout [legally] established administrative processes * * *; [(2)] it protects the autonomy of agency decisionmaking; [(3)] it aids judicial review by permitting factual development [of issues relevant to the dispute]; and [(4)] it serves judicial economy by avoiding [repetitious] administrative and judicial factfinding and by" resolving sole claims without judicial intervention).

While a plaintiff cannot circumvent the requirements of the doctrine of exhaustion by merely mentioning a broad issue without raising a particular argument, plaintiff's brief statement of the argument is sufficient if it alerts the agency to the argument with reasonable clarity and avails the agency with an opportunity to address it. *See generally, Hormel v. Helvering,* 312 U.S. 552 (1941); *see also Rhone Poulenc,* 899 F.2d at 1191. The sole fact of an agency's failure to address plaintiff's challenge does not invoke the exhaustion doctrine and shall not result in forfeiture of plaintiff's judicial remedies. *See generally, B-West Imports, Inc. v. United States,* 19 CIT 303, 880 F. Supp. 853 (1995). An administrative decision not to address the issue cannot be dispositive of the question whether or not the issue was properly brought to the agency's attention. *See, e.g., Allnutt v. United States DOJ,* 2000 U.S. Dist. LEXIS 4060 (D. Md. 2000).

In the case at bar, Timken sufficiently provided Commerce with an opportunity to address the issue of American Metal Market prices as a surrogate to value scrap when Timken: (1) "submitted the American Metal

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[16] There is however, no absolute requirement of exhaustion in the Court of International Trade in non-classification cases. *See Alhambra Foundry Co. v. United States ("Alhambra"),* 12 CIT 343, 346–47, 685 F. Supp. 1252, 1255–56 (1988). Section 2637(d) of Title 28 directs that "the Court of International Trade shall, where appropriate, require the exhaustion of administrative remedies." By its use of the phrase "where appropriate," Congress vested discretion in the Court to determine the circumstances under which it shall require the exhaustion of administrative remedies. *See Cemex, S.A. v. United States,* 133 F.3d 897, 905 (Fed. Cir. 1998). Therefore, because "each exercise of judicial discretion [does] not requir[e] litigants to exhaust administrative remedies," the court is authorized to determine proper exceptions to the doctrine of exhaustion. *Alhambra,* 12 CIT at 347, 685 F. Supp. at 1256 (citing *Timken Co. v. United States,* 10 CIT 86, 93, 630 F. Supp. 1327, 1334 (1986), *rev'd in part on other grounds, Koyo Seiko Co. v. United States,* 20 F.3d 1156 (Fed. Cir. 1994)).

In the past, the court has exercised its discretion to obviate exhaustion where: (1) requiring it would be futile, *see Rhone Poulenc, S.A. v. United States ("Poulenc"),* 7 CIT 133, 135, 583 F. Supp. 607, 610 (1984) ("it appears that it would have been futile for plaintiffs to argue that the agency should not apply its own regulation"), or would be "inequitable and an insistence of a useless formality" as in the case where "there is no relief which plaintiff may be granted at the administrative level," *United States Cane Sugar Refiners' Ass'n v. Block,* 3 CIT 196, 201, 544 F. Supp. 883, 887 (1982); (2) a subsequent court decision has interpreted existing law after the administrative determination at issue was published, and the new decision might have materially affected the agency's actions, *see Timken,* 10 CIT at 93, 630 F. Supp. at 1334; (3) the question is one of law and does not require further factual development and, therefore, the court does not invade the province of the agency by considering the question, *see id.; R.R. Yardmasters of Am. v. Harris,* 721 F.2d 1332, 1337–39 (D.C. Cir. 1983); and (4) plaintiffs had no reason to suspect that the agency would refuse to adhere to clearly applicable precedent. *See Philipp Bros., Inc. v. United States,* 10 CIT 76, 80, 630 F. Supp. 1317, 1321 (1986).

Market prices pointing out that they * * * were representative of world market prices," Timken's Reply at 18 (citing Timken's Mem. Pub. Doc. 129); (2) compared in its case brief to Commerce "the scrap values used [by Commerce] in the preliminary determination to the American Metal Market prices, * * * and U.S. import statistics," Timken's Reply at 18 (citing Timken's Mem. Pub. Doc. 280); and (3) during the September 9, 1998 hearing with Commerce, "pointed out that evidence from the American Metal Market [prices] for shop turning prices provides [Commerce] with a world market benchmark of $82/MT. * * *" Timken's Reply at 19 (citing Timken's Mem. Pub. Doc. 294 at 33–35). Moreover, Commerce concedes that

> Timken argue[d] that the values used by [Commerce] for scrap in the Preliminary Results are too high when compared with world market prices for scrap. * * * Timken state[d] that the scrap values selected by [Commerce] reflect prices of high-quality scrap, not the residue from bearing production. *Timken supports its argument by noting that scrap prices reported in the American Metal Market for 'shop turnings,' a low quality scrap, averaged only $82 per MT delivered, whereas the value [Commerce] selected cup and cone scrap was $150 per MT.*

63 Fed. Reg. at 63,846 (emphasis supplied).

The Court, therefore, concludes that Timken properly exhausted its administrative remedies and has the right to raise this issue to the Court.

The Court holds that Commerce's authority to select appropriate surrogate data includes the authority to base a calculation on these data without adjustment, if such method is reasonable. *See Peer Bearing 2001,* 25 CIT at ____, 182 F. Supp. 2d at 1305; *Timken 2001,* 25 CIT at ____, 166 F. Supp. 2d at 625; *Peer Bearing 1998,* 22 CIT at 481–82, 12 F. Supp. 2d at 456; *Timken 1999,* 23 CIT at 516, 59 F. Supp. 2d at 1377; *see also Chevron,* 467 U.S. at 844–45; *Shieldalloy,* 20 CIT at 1368, 947 F. Supp. at 532 ("The statute [that is, 19 U.S.C. § 1677b(c)] does not specify what constitutes best available information, nor does it prescribe a specific method for adjusting raw material prices to account for differences in grade or quality"). Nevertheless, Commerce's authority to select unadjusted data does not dispose of Commerce's obligation to address each comment properly brought before Commerce on the merits. Commerce's failure to address the merits of American Metal Market prices prevents the Court from reviewing the issue intelligibly. Therefore, the Court remands this issue to Commerce with instructions to explain whether or not the American Metal Market prices can serve as an alternative surrogate to value scrap and, if Commerce concludes that the American Metal prices present the "best available information" for the

purpose of such surrogate evaluation, to recalculate Commerce's determination accordingly.[17]

IV. Commerce's Reliance on Six Indian Producers' Reported Data in Commerce's Determination of Overhead, Selling, General and Administrative Expenses and Profit Rate

A. Background

While Commerce prefers to base FOPs information on industry-wide public information, Commerce found that information regarding overhead and SG&A rates for producers of subject merchandise during the period of review was not available. *See Final Results,* 63 Fed. Reg. at 63,850.

Section 1677b(c)(1) of Title 19 requires Commerce to "determine the [NV] of the subject merchandise on the basis of the value of the [FOPs] utilized in producing the merchandise and to which shall be added an amount for general expenses and profit plus the cost of containers, coverings, and other expenses." General expenses are the expenses that do not bear a direct relationship to the production of the merchandise at issue, such as SG&A expenses. The subsection also states that the valuation of FOPs "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 [Commerce]." *Id.* Section 1677b(c)(4) provides that, in valuing FOPs under paragraph (1) of § 1677b(c), Commerce "shall utilize, to the extent possible, the prices or costs of [FOPs] in one or more market economy countries. * * *"

In the *Preliminary Results,* Commerce used "information obtained from the fiscal year 1996–97 annual reports of eight Indian bearing producers" as surrogate values for factory overhead, SG&A and profit. 63 Fed. Reg. at 37,343; *see* Def.'s Mem., App. Ex. 7, 9.

Specifically, Commerce

> calculated factory overhead and SG&A expenses (exclusive of labor and electricity) as percentages of direct inputs (also exclusive of labor) and applied it to each producer's direct input costs. For profit, [Commerce] totaled the reported profit before taxes for the eight Indian bearing producers and divided it by the total calculated cost of production ("COP") of goods sold. This percentage was applied to each respondent's total COP to derive a company-specific profit value.

Preliminary Results, 63 Fed. Reg. at 37,343 (citing Def.'s Mem., App. Ex. 9).

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[17] The Court notes that the other four benchmarks proffered by Timken are not at issue because Timken conceded that

> [(1)] the first benchmark [that is, United States import statistics, HTS No. 7204.29.00] valued at $128/MT consisted of high quality waste which was not comparable to the low-quality waste generated by PRC producers; [(2)] [t]he second [that is, United States import statistics, HTS No. 7204.41.00.20] and third [that is, United States import statistics HTS No. 7204.41.0060] benchmarks, as [Commerce] noted, of $126 and $104 [per MT respectively], were for non-bearing quality steel scrap from the production of cages; * * * [(3)] the only logical surrogate value for low quality scrap based on the concerns articulated for the first time in its final determination was the American Metal Market prices.

Timken's Reply at 20–21 (citing Timken's Mem. Table 2 at 19).

In the *Final Results,* during the review at issue, Commerce concluded that an appropriate surrogate for determining overhead, SG&A (excluding labor), and profit rates was the average annual report data of six Indian producers of like or similar merchandise at issue. *See* 63 Fed. Reg. at 63,850. Commerce explained that,

> [i]n deriving these ratios, [Commerce] used the average of the Indian producers' reported data with respect to the numerator (reported overhead and SG&A expenses) and the denominator (direct input costs excluding labor), thus yielding internally consistent ratios. These ratios, when multiplied by [Commerce's] calculated FOP values, constitute the best available information concerning overhead and SG&A expenses that would be incurred by a PRC bearings producer[] given such FOP data.

Id.

Commerce also explained its determination to use data from only six of the Indian bearing producers and exclude data from Asian Bearing Company ("Asian") and National Engineering Company ("NEI") by stating:

> [Commerce] agree[s] with respondents that data for Asian and NEI should be excluded from the average of reported costs for Indian bearings producers. In the *Final Results of Antidumping Duty Administrative Review: Tapered Roller Bearings and Parts Thereof From the People's Republic of China,* 56 FR 67,590, 67,594 (Dec. 31, 1991), [Commerce] stated that, "[Commerce] believe[s] that Asian is not an appropriate surrogate primarily because the Auditor's Report notes that the financial statements are not presented in accordance with the generally accepted accounting principles ("GAAP") of India." In this review, the Auditor's Report included with Asian's 1996–97 financial statements expresses a clear reservation about how certain interest expenses (with their corresponding effects on depreciation and other expenses) have been reported, noting that the methodology is not in accordance with accounting principles recommended by the Institute of Chartered Accountants of India. The Auditor's Report also notes that Asian continues to be a "sick" company as defined by India's Sick Industrial Companies Act. Likewise, the auditors' endorsement of NEI's 1996–97 Financial Statements, as contained in the Auditor's Report, includes qualifications regarding, inter alia, the company's treatment of various overhead and SG&A expenses.
>
> With regard to Timken's arguments concerning Asian and NEI, although [Commerce] recognize[s], as respondents argue, that the overhead and SG&A ratios for Asian and NEI generally are higher than those of the other six producers, this apparent difference is not [Commerce's] primary reason for excluding the Asian and NEI data. Rather, [Commerce] ha[s] excluded the data for Asian and NEI in calculating surrogate overhead, SG&A and profit ratios primarily because, according to the Auditor's Reports, the methodology used in recording and reporting the financial condition of these two companies appears, in certain instances, to be inconsistent with the methodology (i.e., Indian GAAP) used by the remaining six

companies. Given these significant differences, it would be incongruous to combine the reported data of all eight companies.

Id. at 63,851.

B. Contentions of the Parties

1. Timken's Contentions

Timken argues that, since the material and labor costs[18] of the Indian bearing producers are higher than the surrogate material values, Commerce should "adjust the denominator for purposes of calculating ratios [that is, overhead and SG&A ratios] by the ratio of surrogate raw materials and labor values [that is, Indonesian steel and labor values] to the Indian producers' average materials and labor costs [that is, the eight Indian producers' average materials and labor costs]." Timken's Mem. at 47; *see Final Results,* 63 Fed. Reg. at 63,849. Timken further maintains that *Peer Bearing 1998,* 22 CIT 472, 12 F. Supp. 2d 445, and *Timken 1999,* 23 CIT 509, 59 F. Supp. 2d 1371, are distinguishable from the case at bar because in those cases, Commerce "relied on the annual report data of one Indian bearings producer to calculate ratios for overhead, SG&A and profit." Timken's Reply at 23; *see also* Timken's Mem. at 48 (stating that "there is a significant disparity between the Indian material and labor costs and the surrogate statistics is supported by the annual reports of eight Indian bearing producers"). Alternatively, Timken proposes that rather than use the eight Indian producers' average materials and labor costs, Commerce should have used the reported costs of Asian since it "only produces antifriction bearings and identified raw material input products in its annual report." Timken's Mem. at 21.

Timken also contends that Commerce should have made an adjustment for import duties incurred by the Indian bearing producers because "material costs in the annual reports included high import duties." Timken's Reply at 22; *see* Timken's Mem. at 47, 49. In particular, Timken argues that, despite Commerce's argument that the record does not contain the information necessary regarding the amount of import duties included in Commerce's calculation, Commerce could have calculated the import duties of three companies (SKF, ABC and NRB) because the record shows "the amount and percentage of raw materials imported" and the "cost, insurance, and freight, excluding import duties" of imported materials. Timken's Reply at 24.

Finally, Timken alleges that Commerce's exclusion of Asian and NEI from the calculation of overhead, SG&A, and profit ratios "was an arbitrary departure from agency practice and should be rejected." Timken's Mem. at 50. In particular, Timken maintains that "the aggregate annual

[18] Commerce argues that "Timken [is] incorrect in its statement that [Commerce] calculated overhead and SG&A costs as a percentage of materials and labor costs [because] 'neither direct or indirect labor was included in either the numerator or denominator of the surrogate ratios.'" Def.'s Mem. at 43–44 (quoting *Final Results,* 63 Fed. Reg. at 63,849). Timken, in turn, alleges that "[t]he record shows, however, that [Commerce] calculated the profit ratio from the annual reports based on a percentage of cost of production (including materials, overhead, SG&A, and labor)." Timken's Reply at 22–23 n.6 (citing Timken's Mem. Pub. Doc. 304, Attachment 3). The Court, however, is not presented with any evidence that the fact that Commerce derived the profit ratio from the annual reports automatically means that labor costs were included or excluded.

report data of all eight Indian bearing producers would have been more descriptive of the variety of companies in China than the data of only six producers * * * [,and] annual reports [of, Asian and NEI] included the figures necessary to adjust those annual reports to be GAAP-compliant." *Id.* at 51–52 (citing Timken's Mem. Pub. Doc. 290 and 129); *see also* Timken's Reply at 25 (Commerce "decided to reject otherwise desirable annual reports based on easily curable grounds without explanation"). Moreover, relying on *Notice of Final Determination of Sales at Less Than Fair Value: Bicycles From the People's Republic of China ("Bicycles From the PRC"),* 61 Fed. Reg. 19,026, 19,039 (Apr. 30, 1996), Timken argues that Commerce's refusal to use Asian in Commerce's calculation because of Asian's "sick" financial status "was an unexplained departure from agency practice" because Commerce "has previously made it clear that '[w]hether or not a company is profitable * * * is not necessarily a reason for rejecting that company's data for purposes of surrogate valuations for factory overhead and SG&A expenses.'" Timken's Mem. at 52 (quoting *Bicycles From the PRC,* 61 Fed. Reg. at 19,039).

2. Commerce's Contentions

Relying on *Peer Bearing 1998,* 22 CIT at 481, 12 F. Supp. 2d at 455, and *Timken 1999,* 23 CIT 509, 59 F. Supp. 2d 1371, Commerce maintains that "Commerce[] [has an] authority to select * * * surrogate values * * * without adjustment."[19] Def.'s Mem. at 44. Commerce further maintains that the methodology used in the case at bar allowed Commerce to derive internally consistent ratios of the Indian producers' overhead and SG&A expenses. *See* Def.'s Mem. at 44; *see also Final Results,* 63 Fed. Reg. at 63,850. Commerce points out that doing otherwise, that is, adjusting the underlying values of the Indian producers

> including the proposed alternative adjustment based solely on Asian Bearing's reported costs[,] would itself distort the ratios rather than correct the alleged distortions in [Commerce's] calculations.

Final Results, 63 Fed. Reg. at 63,850.

Commerce also argues that it properly declined to deduct the import duties "from the reported material costs [of] the Indian producers when calculating the overhead and SG&A ratios" because there was "no evidence as to the amount of duties, if any, included in the Indian producers' reported costs." *Id.; see* Def.'s Mem. at 45. Commerce points out that "'Timken has not provided any information regarding the amount of import duties that are included, nor has Timken provided a means of identifying and eliminating such duties from [Commerce's] calculations.'" Def.'s Mem. at 45 (quoting *Final Results,* 63 Fed. Reg. at 63,850).

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[19] Commerce argues that "Timken's attempt to distinguish this case from *Peer [Bearing 1998]* is unavailing. * * * Contrary to [Timken's] position, there is no meaningful difference between the one producer at issue in *Peer [Bearing 1998]* * * * and the eight producers involved here." Def.'s Mem. at 44–45.

Commerce further contends that it properly used data from only six of the Indian bearing producers and excluded the annual report data contained in Asian and NEI when calculating the ratios for overhead, SG&A and profit. *See* Def's Mem. at 46–48. Commerce explained that it rejected Asian and NEI annual report data because Commerce

> relied upon statements made by the companies' independent auditors that indicated that "the methodology used in recording and reporting the financial condition of these two companies appears, in certain instances, to be inconsistent with the methodology *(i.e.,* Indian GAAP) used by the remaining six companies."

Id. at 46 (quoting *Final Results,* 63 Fed. Reg. at 63,851); *see also* Def.'s Mem. at 46–48.

Moreover, relying on *Writing Instrument,* 21 CIT at 1195, 984 F. Supp. at 639, Commerce argues that "in determining whether a surrogate value represents the best available information, Commerce is authorized to determine the reliability of that value and, if it is established that the value is unreliable, decline to use that data for purposes of factor valuation." Def.'s Mem. at 47–48.

C. Analysis

"In the absence of a statutory mandate to the contrary, Commerce's actions must be upheld as long as they are reasonable." *Timken 1999,* 23 CIT at 516, 59 F. Supp. 2d at 1377; *see also Chevron,* 467 U.S. at 844–45. This Court has consistently articulated that Commerce's authority to select appropriate surrogate data includes the authority to base a calculation on these data without adjustment, if such method is reasonable. *See Peer Bearing 2001,* 25 CIT at ____, 182 F. Supp. 2d at 1305; *Timken 2001,* 25 CIT at ____, 166 F. Supp. 2d at 625; *Timken 1999,* 23 CIT at 516, 59 F. Supp. 2d at 1377; *Peer Bearing 1998,* 22 CIT at 482, 12 F. Supp. 2d at 456; *see also Chevron,* 467 U.S. at 844–45.[20]

In the case at bar, Commerce derived overhead, SG&A, and profit rates from the average annual report data of six Indian producers of like or similar merchandise. Commerce explained that the adjustment suggested by Timken would distort the experience of the Indian producers rather than cure any distortion in Commerce's calculation. *See Final Results,* 63 Fed. Reg. at 63,850. Moreover, although the Court could certainly question the perfection of Commerce's approach, the Court holds that, under the circumstances, Commerce acted reasonably in not subtracting import duties from the Indian producers' data.[21]

The Court finds that Commerce attempted to capture in its *rate* calculation the surrogates' (that is, the six Indian producers') experience in incurring overhead and SG&A expenses, and created a reasonable inter-

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[20] The Court is not persuaded by Timken's argument that *Peer Bearing 1998,* 22 CIT 472, 12 F. Supp. 2d 445, and *Timken 1999,* 23 CIT 509, 59 F. Supp. 2d 1371, are distinguishable from the case at bar because in this case Commerce relied on more than one Indian bearings producer to calculate ratios for overhead, SG&A and profit.

[21] The Court disagrees with Timken's argument that Commerce could have calculated import duties of SKF, ABC and NRB because the record shows "the amount and percentage of raw materials imported" and the "cost, insurance, and freight, excluding import duties" of imported materials. Timken's Reply at 24. The Court finds that it does not follow from this argument that Commerce knows how much of these import costs are attributable to import duties.

nally consistent *ratio* that, as imperfect as it might be, does not violate the boundaries set by 19 U.S.C. § 1677b(c). The mere fact that one of the actual factors is likely to be higher while the other one is likely to be lower than the corresponding data derived from the records of the Indian producers does not empower the Court to uphold Timken's suggestion as a more palatable alternative. *See American Spring Wire,* 8 CIT at 22, 590 F. Supp. at 1276 (stating that "[t]he court may not substitute its judgment for that of the [agency] when the choice is 'between two fairly conflicting views, even though the court would justifiably have made a different choice had the matter been before it *de novo*'" and quoting *Penntech Papers,* 706 F.2d at 22–23 (quoting, in turn, *Universal Camera,* 340 U.S. at 487–88)).

Finally, the Court finds that Commerce acted reasonably within its discretion in excluding the annual report data contained in Asian and NEI when calculating the ratios for overhead, SG&A and profit. In particular, Commerce pointed out that it

> relied upon statements made by the companies' [that is, Asian's and NEI's] independent auditors that indicated that "the methodology used in recording and reporting the financial condition of these two companies appears, in certain instances, to be inconsistent with the methodology *(i.e.,* Indian GAAP) used by the remaining six companies."

Def.'s Mem. at 46 (quoting *Final Results,* 63 Fed. Reg. at 63,851).

Timken may not usurp Commerce's role as fact finder and substitute their analysis for the result reached by Commerce.

Accordingly, the Court sustains Commerce's determination to use the average annual report data of six Indian bearing producers as a surrogate for determining overhead, SG&A and profit rates as reasonable, in accordance with law and supported by substantial evidence.

CONCLUSION

This case is remanded to Commerce to: (1) provide the Court with an explanation as to why export statistics from Japan to India are not the "best available information" for the purpose of choosing a surrogate to value hot-rolled steel bar used to produce TRB cups and cones; and (2) explain whether or not the American Metal Market prices can serve as an alternative surrogate to value scrap and, if Commerce concludes that the American Metal Market prices present the "best available information" for the purpose of such surrogate evaluation, to recalculate Commerce's determination accordingly. All other issues are affirmed.