Decisions of the United States Court of International Trade

Slip Op. 07–168

JINAN YIPIN CORPORATION, LTD., and SHANDONG HEZE INTERNATIONAL TRADE AND DEVELOPING COMPANY, Plaintiffs, v. **UNITED STATES,** Defendant, and **FRESH GARLIC PRODUCERS ASSOCIATION, CHRISTOPHER RANCH, L.L.C., THE GARLIC COMPANY, VALLEY GARLIC, and VESSEY AND COMPANY, INC.**, Defendant-Intervenors.

Before: Timothy C. Stanceu, Judge
Consol. Court No. 04–00240

PUBLIC*

[Remanding for redetermination the United States Department of Commerce's final results in an administrative review of an antidumping duty order on fresh garlic from the People's Republic of China]

Dated: November 15, 2007

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Kelley Drye Collier Shannon (*Michael J. Coursey* and *Adam H. Gordon*) for defendant-intervenors Fresh Garlic Producers Association, Christopher Ranch, L.L.C., The Garlic Company, Valley Garlic, and Vessey and Company, Inc.

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* With the consent of the parties, this public version is being issued without the redaction of any information contained in the confidential version of this Opinion and Order.

OPINION AND ORDER

Stanceu, Judge: Plaintiffs Jinan Yipin Corporation, Ltd. ("Jinan Yipin") and Shandong Heze International Trade and Developing Company ("Shandong") contest certain aspects of a final determination ("Final Results") issued by the International Trade Administration, United States Department of Commerce ("Commerce" or "the Department") in the eighth administrative review of the antidumping duty order on fresh garlic ("subject merchandise") imported from the People's Republic of China ("China" or the "PRC"). *See Fresh Garlic From the People's Republic of China: Final Results of Antidumping Duty Administrative Review and New Shipper Reviews*, 69 Fed. Reg. 33,626 (Jun. 16, 2004) ("*Final Results*").[1] Before the court are Jinan Yipin's and Shandong's motions for judgment upon the agency record under USCIT Rule 56.2.

In support of its motion, plaintiff Jinan Yipin contends that Commerce acted contrary to law: (1) in applying, through the use of the "facts otherwise available" and "adverse inferences" provisions of 19 U.S.C. § 1677e (2000), an antidumping duty rate of 376.67 percent to the sales of subject merchandise that Jinan Yipin's U.S. sales affiliate made to "Houston Seafood," one of its customers in the United States, based on possible affiliation between Jinan Yipin and Houston Seafood; (2) when, in calculating the U.S. affiliate's indirect selling expenses, Commerce increased the indirect selling expenses reported by Jinan Yipin based on a resort to facts otherwise available and adverse inferences; (3) in adjusting the selling price of Jinan Yipin's subject merchandise for certain inspection fees which, according to plaintiffs, would not have been incurred but for the existence of the antidumping duty order; and (4) in determining surrogate values for garlic seed, water, and packing cartons.[2] Jinan Yipin's Rule 56.2 Mot. for J. Upon the Agency R. ("Jinan Yipin's Mot."); Br. in Supp. of Jinan Yipin's Rule 56.2 Mot. for J. Upon the Agency R. 2–4 ("Jinan Yipin's Br. in Supp."). Plaintiff Shandong, an exporter of subject merchandise, joins in Jinan Yipin's arguments challenging the determination of surrogate values for garlic seed, water, and packing cartons. Shandong Heze's Rule 56.2 Mot. for J. Upon the Agency R.

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[1] Commerce defined the scope of the order to encompass "all grades of garlic, whole or separated into constituent cloves, whether or not peeled, fresh, chilled, frozen, provisionally preserved, or packed in water or other neutral substance, but not prepared or preserved by the addition of other ingredients or heat processing." *Final Results* at 33,627. Commerce noted that "[t]he differences between grades are based on color, size, sheathing, and level of decay." *Id.*

[2] Jinan Yipin stated a claim concerning the Department's surrogate value for ocean freight in its complaint but omitted this claim from the issues that it presented for judicial review in its brief in support of its motion for judgment on the agency record, in which it expressly declined to address the issue. *See* Jinan Yipin's Br. in Supp. 2–4, 61. Therefore, Jinan Yipin's motion under Rule 56.2 does not raise before the court a claim pertaining to the surrogate value of ocean freight. *See* USCIT R. 56.2(c).

1–2 ("Shandong's Mot."); Shandong Heze's Letter in Supp. of Jinan Yipin's Rule 56.2 Mot. for J. Upon the Agency R. 1.

Defendant United States argued initially that the Final Results are fully in accordance with law and therefore should be sustained in all respects. Def.'s Mem. in Opp'n to Pls.' Rule 56.2 Mots. for J. Upon the Agency R. 1 (Def.'s Mem. in Opp'n). In a post-hearing submission, defendant changed its apparent position with respect to the issue of possible affiliation between Jinan Yipin and Houston Seafood, requesting that the court grant a voluntary remand for the limited purpose of allowing Commerce to investigate that issue further. Def.'s Supplemental Br. in Resp. to the Court's Questions of May 22, 2006 at 2 ("Def.'s Supplemental Br."). Jinan Yipin opposes such a remand. Reply of Jinan Yipin to Def.'s Post-Hearing Br. 9–10 ("Jinan Yipin's Reply to Def.'s Supplemental Br.").

Fresh Garlic Producers Association and its individual members, Christopher Ranch, L.L.C., The Garlic Company, Valley Garlic, and Vessey and Company, Inc. (collectively "defendant-intervenors"), are domestic producers of garlic that were petitioners in the antidumping duty investigation resulting in the antidumping duty order. They intervened in support of the position of defendant United States in this litigation but did not submit briefs or participate in the hearing conducted by the court on plaintiffs' motion for judgment upon the agency record.

The court concludes that the Final Results are, in some respects, unsupported by substantial evidence on the agency record and otherwise contrary to law. Accordingly, the court will remand the matter to Commerce for reconsideration and redetermination in accordance with this Opinion and Order.

I. BACKGROUND

Commerce issued its antidumping duty order on imports of fresh garlic from China in 1994. *Antidumping Duty Order: Fresh Garlic From the People's Republic of China*, 59 Fed. Reg. 59,209 (Nov. 16, 1994). In 2002, Commerce conducted a new shipper review of Jinan Yipin. In that review, Commerce determined that "[t]he weighted-average dumping margin for subject merchandise manufactured and exported by Jinan Yipin for the period November 1, 2000, through October 31, 2001 is 0.00 percent." *Fresh Garlic From the People's Republic of China: Final Results of Antidumping Duty New Shipper Review*, 67 Fed. Reg. 72,139, 72,140 (Dec. 4, 2002) ("*Jinan Yipin New Shipper Review*"). Commerce subsequently initiated the administrative review at issue in this action, the eighth administrative review, for the period November 1, 2001 to October 31, 2002 ("period of review" or "POR") and subjected to that review entries of subject merchandise exported by Jinan Yipin and Shandong. *Initiation of Antidumping and Countervailing Duty Admin. Reviews*, 67 Fed. Reg. 78,772, 78,772–73 (Dec. 26, 2002).

Commerce issued the preliminary results of the eighth administrative review in December 2003 ("Preliminary Results"). *See Fresh Garlic from the People's Republic of China: Preliminary Results of Antidumping Duty Admin. Review and New Shipper Reviews*, 68 Fed. Reg. 68,868 (Dec. 10, 2003) ("*Preliminary Results*"). In the Preliminary Results, Commerce preliminarily assigned to Jinan Yipin a weighted average percentage antidumping duty margin of 168.06 percent. *Preliminary Results*, 68 Fed. Reg. at 68,873. Commerce further preliminarily determined that Shandong did not make sales of subject merchandise below normal value for the period of review. *Id.*

Commerce issued the Final Results in June 2004. *Final Results*, 69 Fed. Reg. 33,626. Commerce recalculated the weighted average percentage margin for entries of Jinan Yipin's merchandise, reducing it to 115.81 percent. *Id.* at 33,629. Contrary to the Preliminary Results, Commerce also determined that Shandong had sold merchandise at prices below normal value. Commerce calculated a weighted average percentage antidumping duty margin of 43.30 percent for Shandong's merchandise. *Id.*

Jinan Yipin and Shandong each commenced an action under 19 U.S.C. § 1516a (2000) to contest the Final Results. The court consolidated the cases. Each plaintiff moves for judgment upon the administrative record.

II. DISCUSSION

The court exercises jurisdiction pursuant to 28 U.S.C. § 1581(c) (2000), under which the Court of International Trade is granted exclusive jurisdiction of any civil action commenced under 19 U.S.C. § 1516a. 28 U.S.C. § 1581(c). The court reviews the Final Results on the basis of the agency record. *See* 28 U.S.C. § 2640(b) (2000); 19 U.S.C. § 1516a(b)(1)(B)(i). Upon such review, the court must "hold unlawful any determination, finding, or conclusion found . . . to be unsupported by substantial evidence on the record, or otherwise not in accordance with law." 19 U.S.C. § 1516a(b)(1)(B)(i). "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." *Consol. Edison Co. v. NLRB*, 305 U.S. 197, 229 (1938).

The court addresses below the following issues that plaintiff Jinan Yipin raised in its motion for judgment upon the agency record: (A) whether Commerce lawfully applied "facts otherwise available" and "adverse inferences" under 19 U.S.C. § 1677e when it applied an antidumping duty rate of 376.67 percent to the sales of subject merchandise made by the U.S. affiliate of Jinan Yipin to Houston Seafood; (B) whether Commerce, in calculating the U.S. affiliate's indirect selling expenses, lawfully resorted to facts otherwise available and adverse inferences to increase the indirect selling expenses reported by Jinan Yipin; (C) whether Commerce lawfully adjusted the constructed export price of Jinan Yipin's subject merchandise to

account for certain inspection fees; and (D) whether Commerce lawfully determined surrogate values for garlic seed, water, and packing cartons.

Finally, the court considers Shandong's challenge to Commerce's determination of surrogate values for garlic seed, water, and packing cartons. In this context the court addresses defendant's arguments that Shandong's motion does not comply with the court's Rules, that Shandong failed to exhaust its administrative remedies, and that Shandong is not entitled to relief because Jinan Yipin's arguments are company-specific and therefore do not show that Commerce's determinations for Shandong's factors of production are unsupported by substantial evidence on the record.

A. Commerce Erred in Applying a 376.67 Percent Antidumping Duty Rate to the Sales of Jinan Yipin's Subject Merchandise to Houston Seafood

Under the antidumping laws, antidumping duty represents the amount by which the "normal value"[3] of the imported subject merchandise exceeds the "export price"[4] or the "constructed export price"[5] for that merchandise. 19 U.S.C. § 1673 (2000). In an administrative review of an antidumping duty order, Commerce is required to determine "(i) the normal value and export price (or constructed export price) of each entry of the subject merchandise, and (ii) the dumping margin for each such entry." *Id.* § 1675(a)(2)(A) (2000). For sales of subject merchandise made to an unaffiliated purchaser, Commerce uses "export price." *See id.* § 1677a(a). For sales of subject merchandise made to an affiliated purchaser, Commerce must determine a "constructed export price." *See* 19 U.S.C. § 1677a(b).

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[3] "Normal value" usually is determined by the price for which the "foreign like product" corresponding to the subject merchandise (generally, identical or like merchandise made by the same foreign producer in the same foreign country, as determined according to 19 U.S.C. § 1677(16) (2000)) is first sold, or offered for sale, for consumption in the exporting country. 19 U.S.C. § 1677b(a)(1) (2000). Where, as here, the subject merchandise is produced in a nonmarket economy country, normal value is determined according to special procedures set forth in 19 U.S.C. § 1677b(c), under which normal value usually is computed based on the value of factors of production in a market economy country or countries at a level of economic development comparable to the nonmarket economy country. *See* 19 U.S.C. § 1677b(c).

[4] "Export price" usually refers to the price at which the subject merchandise is first sold, before the date of importation into the United States, by the producer or exporter outside of the United States, to an unaffiliated purchaser in the United States, or to an unaffiliated purchaser for exportation to the United States, with certain adjustments. 19 U.S.C. § 1677a(a) (2000).

[5] The statute defines "constructed export price" as "the price at which the subject merchandise is first sold (or agreed to be sold) in the United States before or after the date of importation by or for the account of the producer or exporter of such merchandise *or by a seller affiliated with the producer or exporter*, to a purchaser *not affiliated with the producer or exporter*, as adjusted under subsections (c) and (d) of this section." 19 U.S.C. § 1677a(b) (emphasis added).

Jinan Yipin sold subject merchandise in the United States through an affiliated U.S. sales company, American Yipin Produce Company ("American Yipin"). Commerce therefore was required to determine a constructed export price. *See id.* Under § 1677a(b), Commerce was required to determine constructed export price according to the price at which the subject merchandise was first sold, or agreed to be sold, in the United States to a purchaser not affiliated with Jinan Yipin, with various adjustments. *Id.* Some of Jinan Yipin's subject merchandise was sold to Houston Seafood. Thus, determining an antidumping duty margin for the merchandise sold to Houston Seafood required Commerce to determine whether Jinan Yipin and Houston Seafood were "affiliated" for purposes of § 1677a(b).

To determine whether entities are affiliated, Commerce is to apply 19 U.S.C. § 1677(33), which sets forth the statutory definition of "affiliated persons."[6] If Commerce concluded that Jinan Yipin and Houston Seafood were affiliated persons under § 1677(33) when the sales to Houston Seafood were made, Commerce then would have been required to determine constructed export price according to the price at which the subject merchandise was first resold to a purchaser unaffiliated with Jinan Yipin. *See id.*

The court will address the Department's findings regarding the issue of affiliation of Jinan Yipin and Houston Seafood by considering (1) whether Commerce actually determined that Jinan Yipin and Houston Seafood were affiliated, (2) whether Commerce supported with substantial record evidence any findings related to a determination of such affiliation, and (3) whether Commerce supported with substantial record evidence certain findings necessary to support reliance on facts otherwise available and adverse inferences in determining the antidumping duty rate for sales of subject merchandise to Houston Seafood.

1. The Final Results Present Vague and Inconsistent Conclusions on the Issue of Affiliation Between Jinan Yipin and Houston Seafood

The Final Results are ambiguous and vague as to whether Commerce actually determined that Jinan Yipin and Houston Seafood were affiliated. In its response to the Department's questionnaire,

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[6] The statute provides that the following persons shall be considered to be "affiliated" or "affiliated persons": "(A) Members of a family, including brothers and sisters (whether by the whole or half blood), spouse, ancestors, and lineal descendants. (B) Any officer or director of an organization and such organization. (C) Partners. (D) Employer and employee. (E) Any person directly or indirectly owning, controlling, or holding with power to vote, 5 percent or more of the outstanding voting stock or shares of any organization and such organization. (F) Two or more persons directly or indirectly controlling, controlled by, or under common control with, any person. (G) Any person who controls any other person and such other person." It further provides that "[f]or purposes of this paragraph, a person shall be considered to control another person if the person is legally or operationally in a position to exercise restraint or direction over the other person." 19 U.S.C. § 1677(33).

Jinan Yipin reported the sales that American Yipin made to Houston Seafood as sales to an unaffiliated party. Commerce, in the Final Results, appears to have rejected that characterization. Commerce stated in the Final Results that Jinan Yipin did not provide "correct and thorough responses" to Commerce's questions before, during and after verification, and that this inadequacy related to the issue of "[w]hether Jinan Yipin reported some sales to an affiliated party as unaffiliated-party sales . . . ." *Final Results*, 69 Fed. Reg. at 33,627. This statement implies that, due to alleged inadequacies in Jinan Yipin's responses to its inquiries, Commerce was unable to determine whether Jinan Yipin and Houston Seafood were affiliated. Commerce then stated in the Final Results that to address this inadequacy, "[Commerce] selected a rate of 376.67 percent to apply as adverse facts available to Jinan Yipin's sales to an *affiliated customer* that it reported as *unaffiliated-party sales transactions*."[7] *Id.* at 33,627–628 (emphasis added) (stating further that "the Department has applied adverse facts available to the sales to Jinan Yipin's affiliated customer . . . because Jinan Yipin failed to identify affiliated parties and, in particular, *its affiliations to Houston Seafood* . . . in its questionnaire responses." (emphasis added)). This sentence, in apparent contradiction to the discussion where Commerce determined it did not have sufficient information, expresses a determination by Commerce that Jinan Yipin and Houston Seafood indeed were affiliated within the meaning of the statute and that Jinan Yipin, through a failure to respond to the best of its ability to Commerce's requests for information, incorrectly reported the sales as sales that occurred between unaffiliated entities.

In a lengthy internal memorandum ("Decision Memorandum"), which the Final Results incorporate by reference, Commerce discusses the affiliation issue but is similarly vague as to its conclusion with respect to affiliation. *Issues and Decision Mem. for the Admin. Review and New Shipper Reviews of the Antidumping Duty Order on Fresh Garlic from the People's Republic of China* (June 7, 2004) (Admin. R. Doc. No. 254) ("*Decision Mem.*"); *see Final Results*, 69 Fed. Reg. at 33,627. The Decision Memorandum refers to another internal memorandum, the "FA Memorandum," in stating as follows:

> The Department did *not* indicate in the *FA Memorandum* that the information which it discovered so late in the proceeding indicated that Houston Seafood *was affiliated* with American

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[7] Commerce uses the shorthand term "adverse facts available" to refer to two separate procedures. Specifically, the Department uses "facts otherwise available" under 19 U.S.C. § 1677e(a) when needed information is unavailable on the record or otherwise deficient according to § 1677e(a). *See* 19 U.S.C. § 1677e(a). When selecting from among the facts otherwise available, Commerce uses inferences adverse to a party that fails to cooperate by not acting to the best of its ability in responding to the Department's requests for information. *See id.* § 1677e(b).

> Yipin. What we did determine in the *FA Memorandum*, and we are clarifying in this decision, is that Jinan Yipin did not cooperate to the best of its ability in providing information pertaining *to all of its affiliates* during the POR. Thus, it is no surprise that some unanswered questions remain in the record of this review. This is a direct result of American Yipin's inadequate responses to the Department's questionnaires.

Decision Mem. at 75–76 (emphasis added) (citing *Fresh Garlic from the People's Republic of China–Preliminary Results of Admin. Review for the Period Nov. 1, 2001, through Oct. 31, 2002: Use of Facts Otherwise Available for Jinan Yipin Corp., Ltd. (Jinan Yipin)* (Dec. 1, 2003) (Admin R. Doc. No. 176) ("*FA Mem.*")). The quoted language in the Decision Memorandum appears ambiguous because of its reference to Jinan Yipin's alleged failure to cooperate to the best of its ability in providing information pertaining to all of its "affiliates," a term that might be construed to include Houston Seafood.

A conclusion of actual affiliation is not equivalent to a conclusion that the Department was unable to make an affiliation determination because of a party's inadequate responses to its inquiries. If, for example, Commerce's theory had been that Jinan Yipin's inadequate responses to its inquiries prevented Commerce from determining whether or not affiliation between Jinan Yipin and Houston Seafood existed at the time that sales of subject imported garlic were made to Houston Seafood, Commerce would have been required to satisfy the statutory requirements of 19 U.S.C. § 1677e(a) for the use of "facts otherwise available" and the requirements of 19 U.S.C. § 1677e(b) for treatment of the two entities as if they were affiliated, as an adverse inference. *See* 19 U.S.C. § 1677e(a), (b). Commerce does not unambiguously state that such was its theory; to the contrary are the several indications of a conclusion of affiliation. A conclusion of actual affiliation, whether for all of the period of review or for some identified portion of it, could be sustained only on the basis of clearly-expressed findings of fact that are supported by substantial evidence on the record.

The court would have to engage in guesswork to decide whether Commerce found affiliation for some portion of the period of review, for all of the period of review, or not at all. The court, therefore, lacks a single and consistent ground upon which to evaluate the Final Results. In reviewing a determination of an administrative agency, a court may not choose from among alternate or inconsistent theories that the agency puts forth. "It will not do for a court to be compelled to guess at the theory underlying an agency's action; nor can a court be expected to chisel that which must be precise from what the agency has left vague and indecisive." *SEC v. Chenery Corp.*, 332 U.S. 194, 196–97 (1947).

The lack of clarity compels the court to view the Final Results as resting on vague and inconsistent conclusions on the question of

whether, and as to what period of time, Commerce found actual affiliation between Jinan Yipin and Houston Seafood. This shortcoming in the Final Results is sufficient, standing alone, to require a remand to the Department for reconsideration and redetermination.

2. Commerce Has Not Made Findings of Fact Sufficient to Support a Conclusion of Affiliation Between Jinan Yipin and Houston Seafood During the Period of Review

Although the Department's inconsistent expressions of its conclusions are alone sufficient to preclude the court from sustaining the Final Results, the court discerns additional shortcomings in the Department's analysis of the affiliation issue. Commerce did not make findings of fact that are sufficient to support a conclusion that affiliation, as defined in 19 U.S.C. § 1677(33), existed between Jinan Yipin and Houston Seafood during the entire period of review or during a specific segment of it. Commerce, in the Final Results and the Decision Memorandum, expresses few clear findings of fact relevant to the potential affiliation of Jinan Yipin and Houston Seafood and addresses inadequately record evidence to the contrary.

In the FA Memorandum, Commerce concluded that there was a "substantial likelihood of affiliation" between Jinan Yipin and Houston Seafood during the period of review. *FA Mem.* at 6. Commerce stated that "Houston Seafood and American Yipin could be considered affiliated for purposes of the Department's analysis" based on a finding of family affiliation, as defined in 19 U.S.C. § 1677(33)(A). *Decision Mem.* at 74–75. Commerce made a factual finding that an employee of American Yipin, Mr. Henry Lee, who served as the sales manager of American Yipin during some portion of the period of review, was in a position to control the prices that Jinan Yipin charged Houston Seafood at the same time that his brother, Mr. Edward Lee, held an ownership interest in Houston Seafood. *Id.* at 74; *FA Mem.* at 6. Commerce considered Edward Lee, as a result of his ownership interest in Houston Seafood, to have been in a position to influence or control the prices that Houston Seafood paid. According to Commerce, "[i]n terms of the statutory language, Edward Lee, as a co-owner, controlled Houston Seafood, and his 'affiliated' brother, as sales manager, controlled American Yipin's commercial decisions during part of the POR." *Decision Mem.* at 74. In support of an apparent conclusion that affiliation existed during some portion of the period of review, apparently the portion beginning on November 1, 2001 and ending on March 29, 2002, Commerce expressed in the Decision Memorandum a finding that American Yipin and Houston Seafood "negotiated at least two transactions during this time . . . ." *Id.*

Commerce also found, and Jinan Yipin does not dispute, that Edward Lee began serving as sales manager for American Yipin at some point during the period of review. According to Commerce, Ed-

ward Lee had stated at verification that he became involved with American Yipin in August 2002 and that his involvement resulted in the relocation of American Yipin to Louisiana, where he resided. *FA Mem.* at 6. Jinan Yipin stated in its response to Commerce's first supplemental questionnaire that American Yipin moved its offices from Houston, Texas to Westwego, Louisiana in September 2002. *Letter from Grunfeld, Desiderio, Lebowitz, Silverman & Klestadt, LLP to Sec'y of Commerce* (June 10, 2003), Attach. at 8–9 (*Supplemental Questionnaire Resp. for Jinan Yipin Corp., Ltd.*) (Admin. R. Doc. No. 84) ("*First Supplemental Questionnaire Resp*.").

Disputing the Department's affiliation analysis, Jinan Yipin directs the court to its having filed on the administrative record a contract for the sale of Edward Lee's shares in Houston Seafood and proof of payment for this sale "indicat[ing] that Mr. Lee had sold his entire interest in Houston Seafood in March of 2002, approximately six months prior to the start of his employment with American Yipin." Jinan Yipin's Br. in Supp. 9. Jinan Yipin also points to a letter that Houston Seafood filed for the record "confirming that Edward Lee had not been involved with Houston Seafood since the sale of his ownership interest in March 2002." *Id.* at 10. The record contains evidence of a sale of Edward Lee's shares in Houston Seafood that occurred on March 29, 2002. *See FA Mem.* at 4. Although Commerce, in the FA Memorandum, raised vague questions about Edward Lee's credibility and the proof of the sale of the shares, Commerce not only acknowledged the existence on the record of evidence that the divestiture of the shares occurred on that date but also identified a "purchaser of the Houston Seafood shares from Edward Lee during the period of review." *Id.* Commerce made no finding of fact to the contrary. The court concludes that Commerce found as a fact that the sale of Edward Lee's interest in Houston Seafood occurred during the period of review and that Commerce acknowledged record evidence that the sale occurred on March 29, 2002.

Although Commerce's apparent theory was that Henry Lee served as the sales manager of American Yipin during the portion of the period of review that began on November 1, 2001 and ended on March 29, 2002, the Decision Memorandum devotes insufficient attention to the question of whether substantial record evidence establishes the actual time period during which Henry Lee served as American Yipin's sales manager. Jinan Yipin argues that "American Yipin's payroll records demonstrate that Henry Lee began his employment with American Yipin in July 2002" and that "[t]he first American Yipin payroll record for Henry Lee appears on July 31, 2002." Jinan Yipin's Br. in Supp. 15–16 (citing *U.S. Sales Verification of Jinan Yipin Corp., Ltd., in the 2001/2002 Admin. Review of the Antidumping Duty Order of Fresh Garlic from the People's Republic of China* (Nov. 24, 2003), Ex. 6–A (Confidential Admin. R. Doc. No. 39) ("*Confidential Verification Report*")). The evidence Commerce considered

to be to the contrary is a statement in Commerce's verification report: "Mr. Edward Lee, the sales manager of American Yipin, explained that his brother, Mr. Henry Lee, was the sales manager for the company when it was located in Texas." *U.S. Sales Verification of Jinan Yipin Corp., Ltd., in the 2001/2002 Admin. Review of the Antidumping Duty Order of Fresh Garlic from the People's Republic of China* 3 (Nov. 24, 2003) (Admin. R. Doc. No. 167) ("*Verification Report*"). This paraphrase of Edward Lee's statement at verification is not inconsistent with the payroll evidence that Henry Lee began his employment at American Yipin in July 2002 (when, according to Jinan Yipin's questionnaire response, the company was still located in Houston, Texas). It does not constitute substantial evidence that Henry Lee was the sales manager of American Yipin on or prior to March 29, 2002.

Among the questions the court asked the parties following oral argument was the following: "What specific evidence establishes an affiliation between American Yipin and Houston Seafood for any portion of the period of review?" *Letter from Timothy C. Stanceu, Judge, to Counsel* 2 (May 22, 2006). Defendant responded that "at verification, Commerce learned for the first time that Edward Lee was American Yipin's sales manager and that Henry Lee, Edward Lee's brother, preceded Edward Lee as American Yipin's sales manager" and that "[a]t no time did Edward Lee, or any other American Yipin employee, allege that anyone else was sales manager of American Yipin during the period of review except for Henry Lee and Edward Lee." Def.'s Supplemental Br. 20. This argument is unpersuasive. Like the Decision Memorandum, defendant's argument fails to address the question of whether Edward Lee owned an interest in Houston Seafood at the same time that his brother was American Yipin's sales manager. Defendant's argument that no one at American Yipin alleged that there was another sales manager who served during the period of review is unconvincing in the absence of a factual finding, supported by record evidence, that Commerce ever asked a representative of American Yipin the question whether Henry Lee, or anyone else, served as sales manager of American Yipin between November 1, 2001 and March 29, 2002.

Defendant also responded that "Commerce's finding of affiliation between Houston Seafood and American Yipin is supported by other information in the record, as well[,]" mentioning that "Commerce found that Houston Seafood's customer list identified several of Edward Lee's other affiliated companies as customers, and Houston Seafood was even listed as a customer on the customer lists of some of the other affiliated companies." *Id.* at 21 (citing *FA Mem.* at 5). Citing the FA Memorandum, defendant argues that "[i]n fact, Commerce determined that the relationship between all of these entities was 'complex and fluid in terms of both time and control' and that 'Edward Lee at different points in time seems to have controlled, or

shared control with others of, the pricing and sales functions of the various companies discussed above.' " *Id.* at 22 (*quoting FA Mem.* at 5). This argument misses the point. Evidence of affiliations of Edward Lee with customers of Houston Seafood are not evidence of an affiliation of Jinan Yipin, through American Yipin, with Houston Seafood.

Defendant also argued that "Commerce also found that American Yipin's payment terms with Houston Seafood were 'on average more advantageous than the terms offered to American Yipin's other customers.' " *Id.* The negotiation of the time period in which a buyer may pay a seller for merchandise may be the product of various factors other than affiliation. A finding that Houston Seafood was allowed more than the average time period to pay for merchandise is insufficient to support the legal conclusion of affiliation according to the criteria of 19 U.S.C. § 1677(33), under which "a person shall be considered to control another person if the person is legally or operationally in a position to exercise restraint or direction over the other person." 19 U.S.C. § 1677(33).

Citing a questionnaire response of Jinan Yipin stating that " 'certain sales had post-invoice billing adjustments[,]' " defendant also argues that "Commerce explained this meant that for 'merchandise shipped in April and possibly even later' it was possible that prices were determined while Edward Lee owned Houston Seafood." Def.'s Supplemental Br. 23 (quoting *First Supplemental Questionnaire Resp.*). This argument rests on speculation, not on findings of fact that are supported by substantial evidence. Commerce appears to have assumed that the term "post-invoice billing adjustments" necessarily refers to renegotiations of sales contracts, an assumption that is not grounded in specific findings or evidence. Moreover, as discussed previously, the record lacks substantial evidence that Henry Lee began employment at American Yipin on or before March 29, 2002. Commerce has failed to support with substantial record evidence its apparent finding of fact that Edward Lee's ownership interest in Houston Seafood on and before March 29, 2002 had the potential to affect sales that Jinan Yipin or American Jipin made to Houston Seafood at any time during the period of review, regardless whether those sales were made before, on, or after March 29, 2002.

In its supplemental brief, defendant requests that the court remand this matter to Commerce "to allow further inquiry into Houston Seafood and its owner's relationships with Edward Lee and his affiliates during the period of review" and to allow Commerce "to inquire as to the terms of negotiations and sales of garlic from Jinan Yipin . . . ." Def.'s Supplemental Br. 24. Jinan Yipin, while seeking a remand for redetermination, opposes defendant's proposed voluntary remand and specifically opposes the reopening of the record for the collection of additional evidence on the affiliation issue, on the ground that the record contains no ambiguity regarding Commerce's

reasoning in its finding of affiliation between Jinan Yipin and Houston Seafood and its decision to apply facts otherwise available and adverse inferences. Jinan Yipin's Reply to Def.'s Supplemental Br. 9–10.

Because of the absence of essential findings of fact and the lack of substantial evidence supporting a finding that Henry Lee was the sales manager of American Yipin when Edward Lee held an ownership interest in Houston Seafood, the court views as unsatisfactory Commerce's analysis of affiliation, or possible affiliation, between American Yipin and Houston Seafood. As discussed later in this opinion, the court will issue a remand order that addresses the affiliation issue. That order allows a reopening of the record for a limited purpose with respect to the affiliation issue.

3. The Final Results Cannot Be Sustained Upon Commerce's Findings that Jinan Yipin Withheld Information on the Affiliation Issue or Substantially Impeded Commerce's Access to Information Needed to Resolve that Issue

Subsection (a) of 19 U.S.C. § 1677e directs Commerce to use "facts otherwise available" when "necessary information is not available on the record" or when any of four conditions specified in subparagraph (a)(2) is met. 19 U.S.C. § 1677e(a). Among the four conditions are the situations in which a party "withholds information that has been requested by the administering authority" or "significantly impedes a proceeding under this subtitle." *Id.* § 1677e(a)(2)(A), (C). In the Final Results, Commerce reiterated the conclusion it had reached in the Preliminary Results with respect to § 1677e(a), *i.e.*, Commerce concluded that resort to facts otherwise available was warranted because Jinan Yipin "did not provide information critical to the calculation of an antidumping duty margin and impeded the conduct of the administrative review by not providing correct and thorough responses to [the Department's] questions, before, during, and following verification." *Final Results*, 69 Fed. Reg. at 33,627. The court concludes that certain of the findings of fact on which Commerce based its resort to facts otherwise available and adverse inferences were not supported by substantial record evidence.

Commerce stated in the Final Results that "the Department has applied adverse facts available to the sales to Jinan Yipin's affiliated customer . . . because Jinan Yipin failed to identify affiliated parties and, in particular, its affiliations to Houston Seafood and Bayou Dock in its questionnaire responses." *Id.* at 33,628. To the extent that this finding pertains to the sales made to Houston Seafood, it cannot be sustained upon judicial review because it presumes that Jinan Yipin and Houston Seafood are affiliated parties. As discussed above, the Final Results express vague and inconsistent conclusions on the issue of affiliation between Jinan Yipin and Houston Seafood. Moreover, defendant now seeks leave of the court to investigate that

issue further. Defendant nevertheless advocates that the court sustain Commerce's use of facts otherwise available based on Commerce's findings that Jinan Yipin withheld requested information and significantly impeded the review. The court is unable to do so because the affiliation analysis in the Final Results invokes 19 U.S.C. § 1677e(a)(2)(A), the "withholds information" provision, and 19 U.S.C. § 1677e(a)(2)(C), the "significantly impedes a proceeding" provision, essentially on the premise that Jinan Yipin's responses to questions withheld from Commerce the fact of Jinan Yipin's affiliation with Houston Seafood–an affiliation that Commerce does not unambiguously find to have existed and for which the record lacks substantial evidence. *See* 19 U.S.C. § 1677e(a)(2)(A), (C).

In its supplemental brief, defendant attempts to justify the Department's conclusions that Jinan Yipin withheld requested information, and significantly impeded the review, by discussing various questions in section A of the Department's questionnaire and Jinan Yipin's responses. Def.'s Supplemental Br. 5–11. Defendant concludes that "[i]n summary, although there were multiple opportunities for Jinan Yipin to provide information about American Yipin and Edward Lee (and the affiliated customer, Houston Seafood) in response to the Section A questionnaire, Jinan Yipin repeatedly failed to provide this information." *Id.* at 10. This argument is unpersuasive because defendant fails to identify any specific requests for information in the original questionnaire that required Jinan Yipin to disclose Edward Lee's employment by American Yipin as sales manager or his ownership interest in Houston Seafood.

Defendant argues that Jinan Yipin should have interpreted certain questions about Jinan Yipin's corporate structure and management that were presented in Section A of the questionnaire as requests for information pertaining to American Yipin. *Id.* at 8–10. As an example, defendant directs the court to Commerce's asking Jinan Yipin, in Question A.2.1 of the original questionnaire, to "[p]lease identify the people who currently manage your company and explain how they were selected for these positions[,]" arguing that Edward Lee's role as sales manager of American Yipin should have been disclosed in the response. *Id.* at 8 (internal quotation marks omitted). The shortcoming in Commerce's argument is that the quoted question, in asking for information about "your company," cannot reasonably be construed as a request for information about another company with which Jinan Yipin is affiliated. Defendant argues that "anyone who has participated in previous administrative reviews would be aware that Commerce considers the management of affiliated companies just as essential to its antidumping analysis as the management of respondent's headquarters, and in some respects, such as calculating the constructed export price, even more essential." *Id.* at 9. The court does not agree with defendant's argument. If, as defendant argues, it was essential and routine for Commerce to

be provided with information about the identity of managers of separate but affiliated companies, then Commerce needed to request that specific information. Defendant maintains that "[a]s with any other question, if Jinan Yipin had believed the term 'company' was unclear in Question A.2.1., the proper procedure would have been to ask Commerce for clarification, rather than providing no response whatsoever." *Id.* The implication of defendant's argument is that Jinan Yipin should have interpreted the word "company" or the words "your company" according to something other than the ordinary and unambiguous meaning. The court is unable to conclude that Jinan Yipin was remiss in interpreting the word "company" to refer to Jinan Yipin or that Jinan Yipin should have sought "clarification" on Commerce's use of that term.

According to defendant's argument, Commerce, due to Jinan Yipin's failure to disclose requested information in Section A of the questionnaire, "(1) did not know Edward Lee was involved in this review, (2) did not know Houston Seafood existed under a different name on the customer list for Jinan Yipin, (3) did not know Edward Lee was affiliated with or owned Houston Seafood at ANY point in time, and (4) essentially knew nothing about American Yipin's activities during the period of review." *Id.* at 10–11. As to the first and third points, the court is unable to find in Section A any information request by Commerce that required disclosure of Edward Lee's involvement in the review or his ownership interest in Houston Seafood. Similarly, as to the second point, the fact that Houston Seafood was listed under a different name on Jinan Yipin's customer list does not support a conclusion that Jinan Yipin withheld requested information.[8] The fourth point in the quoted statement from defendant's brief–that Commerce essentially knew nothing about American Yipin's activities during the period of review–is not an accurate characterization of the record facts. Jinan Yipin disclosed in its Section A response the fact that American Yipin, located in Westwego, Louisiana, was its sales affiliate in the United States. *Letter from Grunfeld, Desiderio, Lebowitz, Silverman & Klestadt, LLP to Sec'y of Commerce* (Feb. 21, 2003), Attach. 1 at 11 (*Section A Resp. of Jinan Yipin Corp., Ltd.*) (Admin. R. Doc. No. 42). As defendant acknowledges, Jinan Yipin also informed Commerce in its Section A response that "its 'president and vice president,' as well as the 'principals and sales manager of its U.S. affiliate, American Yipin' were 'authorized to negotiate sales.' " Def.'s Supplemental Br. 8.

Defendant argues that the Department's first supplemental questionnaire presented Jinan Yipin "with another opportunity to ex-

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[8] According to defendant's supplemental brief, "Houston Seafood underwent a name change during the period of review and respondents requested proprietary treatment for its new name. Thus, this entity is referred to consistently herein as 'Houston Seafood.' " Def.'s Supplemental Br. 6, n.1.

plain American Yipin [*sic*] and Edward Lee's affiliations." *Id.* at 11. However, the essential question is not whether the first supplemental questionnaire was such an opportunity. The essential question is whether Jinan Yipin's responses withheld information relevant to a conclusion of affiliation between Houston Seafood and Jinan Yipin (either directly or through its affiliation with American Yipin) that Commerce actually requested. The record evidence consisting of the actual questions and responses does not support Commerce's finding that such information was withheld. Defendant fails to show that any of the questions in the first supplemental questionnaire specifically directed, or otherwise required, Jinan Yipin to provide the name of American Yipin's sales manager. Defendant points specifically to supplemental question A.2.a, which asked Jinan Yipin to " 'identify any positions that your owners, directors and managers hold with other companies and/or entities[,]' " arguing that "[t]his was a perfect opportunity for Jinan Yipin to report Houston Seafood's relationship with Edward Lee, a sales manager during the period of review, yet Jinan Yipin chose not to provide this information, instead responding that 'none' of 'Jinan Yipin's owners, directors, or managers hold any positions with other companies.' " *Id.* at 11 (quoting *Supplemental Questionnaire* A.2.a); *see First Supplemental Questionnaire Resp.* 2. Jinan Yipin cannot logically be faulted for failing to provide information beyond the scope of the question that Commerce asked.

Following verification, Commerce sent a questionnaire ("third supplemental questionnaire") to Jinan Yipin. In the first question, after stating that Houston Seafood (and two other companies, Louisiana Newpack and Bayou Dock Seafood ("Bayou Dock")) appeared to have been affiliated with American Yipin and Jinan Yipin for at least part of the period of review, Commerce asked Jinan Yipin to respond to Section A of the original questionnaire "with regard to these companies" and to provide official copies of certain documents related to Houston Seafood, Louisiana Newpack, and Bayou Dock. *Letter from Grunfeld, Desiderio, Lebowitz, Silverman & Klestadt, LLP to the Sec'y of Commerce* (Nov. 12, 2003), Attach. at 1 (*3rd Supplemental Questionnaire for Jinan Yipin Corp., Ltd.*) (Admin. R. Doc. No. 161). Jinan Yipin responded that the Department was incorrect and that "[r]ecord evidence in this review already demonstrates that there is no 'affiliation' within the established meaning of that term between American Yipin or Jinan Yipin and Hosuton [*sic*] Seafood Corp., Louisiana Newpack and Bayou Dock." *Id.* Jinan Yipin provided materials related to Louisiana Newpack and Bayou Dock with the response and indicated it would provide the Houston Seafood materials under separate cover. *Id.* at 2, Ex. 1.

Commerce did not provide a satisfactory explanation of why Jinan Yipin, in its response to the third supplemental questionnaire, should be considered to have withheld requested information about a

possible relationship between Houston Seafood and Jinan Yipin or American Yipin. Also unexplained is why, if Commerce still was uncertain after verification as to the existence of such a relationship, the third supplemental questionnaire made no attempt to obtain additional information or clarification relevant to determining the date on which Henry Lee began his employment with American Yipin.

In summary, the court is unable to find in the administrative record substantial evidence to support a finding that Jinan Yipin withheld information relevant to the issue whether Jinan Yipin was affiliated with Houston Seafood within the meaning of 19 U.S.C. § 1677(33) or significantly impeded the review with respect to that issue. Therefore, the court is unable to sustain Commerce's reliance on "facts otherwise available" under 19 U.S.C. § 1677e(a)(2)(A) or (C).

4. On Remand, Commerce Must Redetermine the Weighted Average Percentage Antidumping Duty Margin for Jinan Yipin and May Not Treat the Sales of Subject Merchandise to Houston Seafood that Were Negotiated After March 29, 2002 as Affiliated Sales

Commerce expressed no findings of fact upon which the court could sustain a conclusion that an affiliation between Jinan Yipin and Houston Seafood could have existed after March 29, 2002. Commerce's affiliation analysis depended on Edward Lee's and Henry Lee's family relationship. As discussed previously, Commerce made a finding of fact, based on evidence on Consol. Court No. 04–00240 Page 26 the record, that Edward Lee sold his ownership interest in Houston Seafood during the period of review, and Commerce acknowledged record evidence that the sale occurred on March 29, 2002. Commerce made no findings of fact to the contrary. Commerce also found as a fact that at least two sales to Houston Seafood were negotiated during that period. Commerce's assigning of the 376.67 percent antidumping duty rate to the remainder of the sales of Jinan Yipin's garlic to Houston Seafood that occurred during the period of review was, therefore, contrary to Commerce's own findings of fact and without a rational basis. Commerce's attempt to justify its application of the 376.67 percent rate to sales after March 29, 2002 through resort to facts otherwise available and adverse inferences fails when viewed in the context of the findings of fact that Commerce made and did not make. Moreover, as discussed previously, Commerce's findings of fact concerning an alleged withholding of information and impeding of the review are unsupported by substantial record evidence. For all of these reasons, the court concludes that Commerce, on remand, must recalculate Jinan Yipin's weighted average percentage antidumping duty margin to correct the error that occurred when Commerce treated as affiliated party sales the sales to Houston Seafood that were negotiated on and after March 29, 2002. As a consequence of Commerce's own findings of fact and

the errors discussed above, Commerce, on remand, may not treat sales of Jinan Yipin's subject merchandise to Houston Seafood that were negotiated after March 29, 2002 as affiliated sales.

The assignment of the 376.67 percent rate to the two or more transactions that Commerce found to have been negotiated during the period beginning November 1, 2001 and ending March 29, 2002 is also contrary to law, but for different reasons. Commerce concluded that an affiliation or possible affiliation existed between Jinan Yipin and Houston Seafood during that period based on its apparent finding that Henry Lee began his employment with American Yipin prior to July 2002. As discussed previously, the record as a whole lacks substantial evidence to support any such finding. The evidence consisting of the July 31, 2002 payroll record is inconsistent with such a finding, and the paraphrase of the statement made by Edward Lee at verification is inconclusive on this point.

In determining that the assignment of the 376.67 percent rate to these two or more transactions was contrary to law, the court does not overlook certain record evidence that supports Commerce's finding that American Yipin's payroll records were not in all respects accurate. *See infra* Section B (addressing the issue of indirect selling expenses). For this reason, Commerce was justified in its reluctance to find, based on the July 31, 2002 payroll record, that Henry Lee began his employment with American Yipin no sooner than July 2002. The issue of when Henry Lee's employment began is critical to determining whether Commerce acted according to law in invoking its authority under 19 U.S.C. § 1677e in determining an antidumping margin for those two or more transactions. Accordingly, the court will allow Commerce, on remand, to reopen the record for the limited purpose of obtaining evidence to determine the start date of Henry Lee's employment, if it so chooses. Should Commerce conclude based on new record evidence that affiliation existed for sales to Houston Seafood negotiated on or before March 29, 2002, it also must justify as appropriate and not punitive the application of any rate that results from the use of facts otherwise available and adverse inferences. *See F.Lli de Cecco di Filippo Fara S. Martino S.p.A. v. United States*, 216 F.3d 1027, 1032 (Fed. Cir. 2000).

Because Commerce found as a fact, based on record evidence, that Edward Lee sold his interest in Houston Seafood during the period of review and acknowledged record evidence that the sale occurred on March 29, 2002, and because critical findings of fact upon which Commerce invoked its authority under 19 U.S.C. § 1677e are unsupported by substantial evidence, the court in its discretion denies Commerce's request for a general reopening of the record so that Commerce may conduct additional fact finding on the affiliation issue.

B. In Using Facts Otherwise Available and Adverse Inferences to Recalculate Jinan Yipin's Indirect Selling Expense Factor, Commerce Relied on Findings that Are Not Supported by Substantial Record Evidence

Pursuant to 19 U.S.C. § 1677a(d)(1), Commerce must reduce the price used to establish constructed export price by the amount of any of various expenses incurred in selling the subject merchandise in the United States. *See* 19 U.S.C. § 1677a(d)(1). The expenses to be deducted include sales commissions, "expenses that result from, and bear a direct relationship, to the sale," selling expenses covered by the seller on behalf of the purchaser, and "any selling expenses" not covered by the other provisions. *Id.* at § 1677a(d)(1)(A)-(D).

In response to Commerce's questionnaire, Jinan Yipin calculated, as a percentage of American Yipin's total sales for 2002, an indirect selling expense factor ("ISE factor") for application to all of American Yipin's U.S. sales during the period of review, using the total indirect selling expenses that were set forth in American Yipin's 2002 profit and loss statement and that were not reported elsewhere. *See* Jinan Yipin's Br. in Supp. 33; *see also FA Mem.* at 11. Invoking its authority to use facts otherwise available and adverse inferences, Commerce recalculated Jinan Yipin's reported ISE factor by adding to American Yipin's reported total indirect selling expenses all salary and benefits expenses that were incurred in 2002 by another company, Bayou Dock, an importer and distributor of seafood products that was located near American Yipin in Westwego, Louisiana. *See Decision Mem. at* 87–88. Commerce did so based on its findings that Jinan Yipin withheld information and impeded the review by underreporting American Yipin's indirect selling expenses and by failing to disclose certain facts that Commerce learned for the first time at verification, which established that American Yipin and Bayou Dock shared employees and, according to Commerce, also shared salaries, computers, office space, accounting software and records, overhead expenses, and other expenses. *Id.*

In the FA Memorandum, Commerce set forth its findings of fact that Edward Lee was the owner and president of Bayou Dock, that two employees of American Yipin, Bonnie Dufrene and Martha Bourge, also were employees of Bayou Dock, that Edward Lee and the other two Bayou Dock employees were paid consistently by Bayou Dock, and that Jinan Yipin's reported indirect selling expenses did not include salaries for American Yipin's first three months of operation in Westwego, Louisiana and did not include any general office start-up expenses, such as office supplies, equipment, and overhead. *FA Mem.* at 11–12. The FA Memorandum also stated that American Yipin officials told Commerce officials at verification that Edward Lee spends ninety percent of his time working for American Yipin, that his current activities for Bayou Dock are minimal, and that "Ms. Dufrene spends 50 to 75 percent of her time

working for American Yipin, depending on the workload, and the rest of her time working for Bayou Dock." *Id.* at 11. "They explained that Ms. Bourge is a temporary employee and works for either company as needed." *Id.* The FA Memorandum also stated that in response to Commerce's question at verification as to how selling activities were allocated between American Yipin and Bayou Dock, "Edward Lee responded (with agreement by the two other employees, Ms. Dufrene and Ms. Bourge) that there [was] never any overlap of the two companies and that they do not do work for one company while at the other company." *Id.* at 12. Citing the Verification Report, the FA Memorandum stated that at verification Edward Lee "explained that American Yipin is a completely separate entity from Bayou Dock and the selling activities and accounting records are kept separately." *Id.* Commerce observed at verification, however, that Ms. Bourge, when at Bayou Dock, had the option of opening accounting records for American Yipin on the main screen of the accounting software. *Decision Mem.* at 87 (quoting *FA Mem.* at 12). Commerce stated that "we have determined that, by sharing employees, salaries, computers, office space, accounting software and records, overhead expenses, and other expenses, American Yipin and Bayou Dock were managed and operated in a manner that is not consistent with two totally unaffiliated business entities during the period of review." *Id.* (quoting *FA Mem.* at 12).

Based on the findings discussed above, Commerce concluded that Jinan Yipin withheld information pertinent to the calculation of Jinan Yipin's antidumping duty margin when it failed to report as American Yipin's indirect selling expenses the expenses that were incurred by Bayou Dock and failed to act to the best of its ability in providing the necessary or accurate information on indirect selling expenses when it responded to the Department's questionnaires. *FA Mem.* at 12–13. Commerce invoked its authority under 19 U.S.C. § 1677e(a) and (b) in adding, as facts otherwise available and adverse inferences, all of Bayou Dock's salary and benefits expenses that were incurred in 2002 to American Yipin's reported total indirect selling expenses. *Id.*; *Decision Mem.* at 87–88.

Jinan Yipin argues that Commerce's calculation of its ISE factor is based on factual inaccuracies and is not supported by record evidence. Jinan Yipin's Br. in Supp. 36. Jinan Yipin contests Commerce's finding that American Yipin did not incur any salary expense for office staff for three months after opening, citing the Verification Report and exhibits for record evidence that Henry Lee continued to receive salary from American Yipin during September-December 2002 and that Ms. Dufrene and Ms. Bourge received payment from American Yipin in December 2002 and a "sizable payment" in January 2003. *Id.* at 36–37 (citing *Confidential Verification Report* Ex. 6–A). Concerning Commerce's finding that it could not locate a specific expense of American Yipin for office supplies, Jinan

Yipin identifies in American Yipin's reported selling expenses "over $3,000 in a category called 'office/computer.' " Pls.' Reply to Def.'s Opp'n to Pls.' Mot. for J. on the Agency Record 10, n.6 ("Jinan Yipin's Reply"). Jinan Yipin also takes issue with Commerce's finding that at verification Edward Lee stated, with the agreement by Ms. Dufrene and Ms. Bourge, that there was never any overlap of the two companies and that the employees do not do work for one company while at the other company. Jinan Yipin's Br. in Supp. 37. Jinan Yipin directs the court's attention to "affidavits placed on the record by every American Yipin employee," stating that Edward Lee "did *not* make an unequivocal statement that American Yipin employees never do work for American Yipin while at Bayou Dock or vice versa." *Id.*

Commerce's determination of Jinan Yipin's ISE factor relies on a finding of fact that Jinan Yipin and Bayou Dock " 'shar[ed] employees, salaries, computers, office space, accounting software and records, overhead expenses, and other expenses.' " *Decision Mem.* at 87 (quoting *FA Mem.* at 12). Commerce referred to "findings that Bayou Dock incurred certain indirect selling expenses on behalf of Jinan Yipin's sales of fresh garlic in the United States." *FA Mem.* at 12. Commerce concluded that Jinan Yipin had failed to include these expenses as indirect selling expenses in its questionnaire response. *Id.* at 12–13. The court concludes that substantial evidence supports a finding that some indirect selling expenses were under-reported or irregularly reported. However, certain of Commerce's specific findings on this general issue lack evidentiary support in the record.

The court discerns a lack of substantial record evidence for Commerce's finding that American Yipin did not pay any salaries for the first three months after relocating to Louisiana. This finding is inconsistent with the evidence of payments by American Yipin to Henry Lee during September-December 2002. *See* Jinan Yipin's Br. in Supp. 36 (citing *Confidential Verification Report* Ex. 6-A). Substantial record evidence does support, however, a finding, or at least a reasonable inference, that not all salary expenses of American Yipin's selling activities were included in Jinan Yipin's reported data. Jinan Yipin does not appear to contest the finding of fact that Edward Lee was paid no salary by American Yipin following American Yipin's move to Louisiana, and the record contains no other explanation as to how compensation for Edward Lee's activities on behalf of American Yipin was reflected in the business records and reported data. This lack of an explanation is all the more significant in light of Commerce's finding–also uncontested by Jinan Yipin–that Commerce officials were told at verification that Edward Lee spends ninety percent of his time working for American Yipin and that his activities for Bayou Dock are minimal. Although there is record evidence that Ms. Dufrene and Ms. Bourge received payments from American Yipin in December 2002 and substantial payments in

January 2003, the apparently deferred payments raise additional, unanswered questions concerning possible irregularities in the reporting of their salary expenses. Jinan Yipin does not appear to dispute that Ms. Dufrene and Ms. Bourge were not paid until December 2002 for work performed for American Yipin following the move of the office to Louisiana the previous September.

Commerce's general finding that American Yipin shared computers, office space, accounting software and records, overhead expenses, and other expenses appears to be overly broad given the specific findings and evidence cited by Commerce. The shared employees were Ms. Dufrene (who is listed in the Verification Report as American Yipin's "Import and Logistic Manager") and Ms. Bourge (listed therein as "Bookkeeper"). *See Verification Report* Attach. I. Concerning shared office space, these employees, according to evidence relied on by both Jinan Yipin and by defendant, sometimes performed functions for one company at the location of the other company. Commerce cites evidence that Ms. Bourge could access American Yipin's accounting software from a computer located at Bayou Dock, using common software. *Decision Mem.* at 87 (quoting *FA Mem.* at 12). Defendant has not directed the court to record evidence of any other shared " 'overhead expenses, and other expenses.' " *See id.* (quoting *FA Mem.* at 12).

Based on the record evidence supporting a finding that Jinan Yipin did not properly report all of its indirect selling expenses, the court concludes that Commerce had a reasonable basis upon which to make an upward adjustment in Jinan Yipin's ISE factor by adding some expenses incurred by Bayou Dock and to do so by invoking the procedures of 19 U.S.C. § 1677e(a) and (b). Based on substantial record evidence, Commerce reasonably concluded that Jinan Yipin did not "act[ ] to the best of its ability" in reporting the required indirect selling expense information. 19 U.S.C. § 1677e(b). The court concludes, however, that the Final Results do not contain a satisfactory explanation of why it was reasonable and appropriate to add *all* the 2002 salary and benefits expenses of Bayou Dock, a distributor of seafood products, to American Yipin's reported total indirect selling expenses for the sale of subject garlic, as an application of facts otherwise available and adverse inferences. The evidence as a whole pertaining to the scope of possible expenses incurred by Bayou Dock that properly should have been reported as expenses of American Yipin does not adequately support Commerce's broad finding that Jinan Yipin and Bayou Dock " 'shar[ed] employees, salaries, computers, office space, accounting software and records, overhead expenses, and other expenses.' " *Decision Mem.* at 87 (quoting *FA Mem.* at 12). The errors in reporting indirect expenses did not pertain to the entire period of review but only to that portion affected by American Yipin's move to Louisiana in September 2002.

On remand, Commerce must reconsider its calculation of American Yipin's ISE factor based on all record evidence, including specifically the record evidence that refutes some of the findings of fact on which Commerce based that calculation. In selecting from among the facts otherwise available as an adverse inference, Commerce must adhere to its obligation to create the proper deterrent to noncooperation without doing so in a way that is punitive. *See de Cecco*, 216 F.3d at 1032 (Fed. Cir. 2000).

C. Commerce Did Not Act Contrary to Law in Deducting the Full Amount of Inspection Fees when Calculating Jinan Yipin's Constructed Export Price

During the period of review, Jinan Yipin incurred certain charges as a result of the inspections of some of its garlic exports by United States Customs and Border Protection ("Customs"), the United States Department of Agriculture ("USDA"), and the United States Food and Drug Administration ("FDA"). *See Decision Mem.* at 89–90. Commerce determined that these inspection charges are within the scope of 19 U.S.C. § 1677a(d)(1)(D), which includes "any selling expenses" not covered by the other provisions of the subsection, and deducted them as part of its calculation of the constructed export price for Jinan Yipin's garlic. *Id.* at 90.

According to Jinan Yipin, some of the inspection charges resulted directly from the antidumping duty order and, therefore, when deducted resulted in an artificially inflated dumping margin contrary to the intended purpose of 19 U.S.C. § 1677a(d)(1). Jinan Yipin's Br. in Supp. 60–61. Jinan Yipin argues that *Daewoo Electronics Co. v. United States*, 13 CIT 253, 270, 712 F. Supp. 931, 947 (1989), *rev'd on other grounds*, 6 F.3d 1511 (Fed. Cir. 1993), *cert. denied*, 512 U.S. 1204 (1994) and *Federal-Mogul Corp. v. United States*, 17 CIT 88, 107, 813 F. Supp. 856, 871–72 (1993), establish a policy against the deduction of expenses incurred as a direct result of an antidumping duty order. *Id.* at 60. During the review, Jinan Yipin submitted correspondence from its U.S. customs broker which alleged that, because garlic from China was the subject of an antidumping duty order, Jinan Yipin's containers were "picked more frequently for inspection." *Id.* at 59 (quoting *Confidential Verification Report* Ex. 9) (internal quotation marks omitted). Plaintiff also submitted follow-up correspondence in which the broker stated that Jinan Yipin's containers were "4 or 5 times more likely" to be examined than a nonagricultural product not subject to an antidumping order. *Id.* (quoting *Confidential Verification Report* Ex. 9) (internal quotation marks omitted).

Defendant argues that Commerce acted in accordance with law when it deducted the inspection charges. According to defendant, "Commerce has long determined that inspection charges are costs that are required to be deducted from constructed export price calcu-

lations pursuant to [19 U.S.C. §] 1677a(d)(1)(D)." Def.'s Mem. in Opp'n 46 (citing *Alhambra Foundry Co. v. United States*, 12 CIT 343, 354, 685 F. Supp. 1252, 1261 (1988) and *Southwest Fla. Winter Vegetable Growers Assoc. v. United States*, 7 CIT 99, 105, 584 F. Supp. 10, 17–18 (1984)). Defendant also points out that two of the agencies responsible for the inspection fees are uninvolved in the enforcement of antidumping duty orders, and that the third, Customs, may inspect the subject merchandise for a multitude of reasons unrelated to antidumping duty orders. *Id.* at 46–47.

The USDA and FDA have broad authority to inspect imported agricultural products for reasons that are unrelated to the collection or assessment of antidumping duties. *See* 7 U.S.C. § 7731(b)(1) (2000) (authorizing the Secretary of Agriculture to "stop and inspect, without a warrant, any person or means of conveyance" entering the U.S. to determine if the person or means carries "any plant, plant product, biological control organism, plant pest, noxious weed, or article subject to this chapter . . . ."); *see also* 21 U.S.C. § 381(a) (2000) (providing the Secretary of Health and Human Services the power to test samples of imported food to determine whether the food was "manufactured, processed, or packed under insanitary conditions . . . ."). Customs is authorized by law to inspect imported merchandise for any number of reasons–or no reason at all. *See* 19 U.S.C. § 1581(a) (2000) (allowing Customs officials broad authority to "at any time . . . examine, inspect, and search [any vessel or vehicle] and every part thereof and any person, trunk, package, or cargo on board . . . .").

Jinan Yipin has failed to ground its challenge to Commerce's deduction of the inspection charges on any record evidence that these charges, or any portion of them, were the direct result of the antidumping duty order. The customs broker's statements that are the basis of Jinan Yipin's argument are entirely speculative. *See* Jinan Yipin's Br. in Supp. 59. They point to no specific instance in which any agency made a decision to inspect Jinan Yipin's merchandise because of the existence of the antidumping duty order and provide no factual basis for imputing this rationale to the inspecting agencies. *See id.*

The court concludes that Commerce's deduction of the inspection charges in determining constructed export price was not contrary to law. Based on the record evidence, Commerce was justified in rejecting the claim that the inspection charges were the direct result of the antidumping duty order and in concluding that the inspection fees were a selling expense that was properly deducted in the calculation of constructed export price.

D. The Department's Surrogate Valuations of Jinan Yipin's Garlic Seed, Water, and Cardboard Cartons Were Based on Findings Unsupported by Substantial Record Evidence or Were Otherwise Not in Accordance With Law

When merchandise is produced in a non-market economy ("NME") such as China, Commerce presumes that factors of production are under state control and that home market sales are not reliable indicators of normal value. *See* 19 U.S.C. §§ 1677(18)(A), (C), 1677b. Accordingly, Commerce calculates normal value by isolating each factor of production in the production process in the NME country and assigning to it a value from a surrogate market economy country using the "best available information." *See id.* § 1677b(c)(1). The factors of production include, but are not limited to, labor, raw materials, energy and other utilities, and representative capital cost, including depreciation. *Id.* § 1677b(c)(3). In valuing the factors of production, Commerce must use the "best available information regarding the values of such factors in a market economy country or countries considered appropriate by [Commerce]." *Id.* § 1677b(c)(1). Although "best available information" is not defined in the antidumping statute, the statute directs Commerce to use surrogate values that are "(A) at a level of economic development comparable to that of the nonmarket economy country, and (B) significant producers of comparable merchandise." *Id.* § 1677b(c)(4). Commerce adds to the total factors of production an estimated amount for general expenses and profit, plus the cost of containers, coverings, and other expenses. *Id.* § 1677b(c)(1).

1. Commerce Did Not Support with Substantial Record Evidence the Findings Underlying the Department's Surrogate Valuation of Jinan Yipin's Garlic Seed

In the administrative review at issue here, the eighth administrative review, Commerce selected India as the surrogate market economy country. Garlic seed is one of the factors of production that Commerce valued.[9] Commerce valued Jinan Yipin's garlic seed at 50 Indian rupees ($1.03) per kilogram, which is the price set forth in several "News Letters" of the National Horticultural Research and Development Foundation ("NHRDF") for Indian varieties of garlic seed that were developed by NHRDF and sold by NHRDF in India. *Factors Valuations for the Preliminary Results of the Admin. Review and New Shipper Reviews* 2–3. (Dec. 1, 2003) (Admin. R. Doc. No. 170) ("*Factors Valuations Mem.*"). Commerce used this 50 rupees-per-kilogram value at the urging of the petitioners in the antidumping duty investigation, who submitted for the record the NHRDF

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[9] According to the record evidence, garlic seed consists of cloves of garlic, which after planting grow into new bulbs.

News Letters, all of which listed a 50 rupees-per-kilogram price for the two varieties. *See id.*; *Decision Mem.* at 5, 10. The News Letters placed on the record pertain to the period between July 2001 and December 2002. *Factors Valuations Mem.* at 2. In conducting the new shipper review of Jinan Yipin, Commerce had relied on the NHRDF price for two Indian varieties of garlic seed, "Agrifound Parvati" and "Yamuna Safed," in valuing Jinan Yipin's garlic seed. *Jinan Yipin New Shipper Review*, 67 Fed. Reg. at 72,140. In the Preliminary Results, Commerce based its use of the 50 rupees-per-kilogram value on the NHRDF seed price for Agrifound Parvati, Yamuna Safed-3, and three other NHRDF garlic varieties, Yamuna Safed, Yamuna Safed-2, and Agrifound White. *Preliminary Results*, 68 Fed. Reg. 68,873; *Decision Mem.* at 10. In the Decision Memorandum, Commerce revised its determination, explaining that "[u]pon closer review of the bulb diameter and number of cloves per bulb of each variety, we find that only the Agrifound Parvati and the Yamuna Safed-3 varieties match the subject merchandise closely in these key characteristics." *Decision Mem.* at 10. Commerce, however, also noted that "[t]his narrowing of the selection does not change the amount of the value for the final results because the prices for all of the varieties we used in the preliminary results were identical." *Id.*

Jinan Yipin argued during the administrative review that the Department's valuation of Jinan Yipin's garlic seed at 50 rupees per kilogram was aberrational relative to all other sources of Indian garlic prices on the record of the review. Jinan Yipin's Br. in Supp. 40 (citing *Letter from Grunfeld, Desiderio, Lebowitz, Silverman & Klestadt, LLP to Sec'y of Commerce* (Mar. 23, 2004), Attach. at 28–37 (Admin. R. Doc. No. 223) ("*Jinan Yipin's Case Br.*")). The price Commerce selected, according to Jinan Yipin, is more than 65 percent higher than the highest average price in India for domestic wholesale grade A garlic. *Id.* at 44 (citing *Jinan Yipin's Case Br.* at 33). Jinan Yipin further argued during the administrative review that Commerce should have valued garlic seed according to values for imported garlic obtained from Indian import data, as it had done in the seventh administrative review, the administrative review that immediately preceded the one at issue. *Decision Mem.* at 3; *see* Jinan Yipin's Br. in Supp. 45. Based on the Indian import statistics, Jinan Yipin advocated during the administrative review a surrogate value of 16.22 rupees per kilogram for garlic seed. *Letter from Grunfeld, Desiderio, Lebowitz, Silverman & Klestadt, LLP to Sec'y of Commerce* (June 30, 2003), Attach. at 3–4 (Admin. R. Doc. No. 101) ("*Jinan Yipin's Surrogate Value Submission*").

Before the court, Jinan Yipin contends that because NHRDF is a government-sponsored research center, not a seller or exporter of garlic, the NHRDF price is neither a market price nor a countrywide price in India. Jinan Yipin's Br. in Supp. 43–44. It also argues that the NHRDF price is not representative of Jinan Yipin's garlic

seed because Jinan Yipin produces purple garlic and not white garlic such as that represented by the NHRDF varieties, which, although not genetically modified, are scientifically-developed "clonal/hybrid" varieties. *Id.* at 42. Jinan Yipin argues that Commerce should have rejected the NHRDF data and valued garlic seed using the Indian import statistics or, in the alternative, using other domestic Indian prices for garlic that are on the record in the proceeding, including prices contained in the June 2003 market research report placed on the record by petitioners, *Market Research on Fresh Whole Garlic in India. Id.* at 46; *Letter from Collier Shannon Scott, PLLC to Sec'y of Commerce* (June 30, 2003) ("*Petitioner's Surrogate Value Submission*"), Ex. 7 ("*Market Research on Fresh Whole Garlic in India*") (located in App. to Pls.' Br. in Supp. of Their Rule 56.2 Mot., Public Version, Ex. 12).

Defendant argues that the court should sustain Commerce in the use of the NHRDF data to determine surrogate value because Commerce found, according to record evidence, that those data are the most product-specific information on the record with which to value Jinan Yipin's garlic seed. Def.'s Mem. in Opp'n 31–34. Defendant's principal argument is that Commerce selected the two NHRDF varieties because they match two characteristics of Jinan Yipin's garlic–average bulb diameter and number of cloves per bulb–that affect significantly the price of garlic in the marketplace. *See id.*

The court concludes that Commerce did not support with substantial record evidence certain findings of fact, set forth in the Decision Memorandum, upon which Commerce relied in valuing Jinan Yipin's garlic seed according to the NHRDF prices instead of other record information. For its findings on bulb size and number of cloves per bulb for Agrifound Parvati and Yamuna Safed-3, Commerce relied on the aforementioned market research report, *Market Research on Fresh Whole Garlic in India*, that petitioners submitted for the record of the review. *See Decision Mem.* at 8–11. Commerce, however, made no mention of certain factual information that is inconsistent with its findings. That factual information concerns the characteristics of Indian garlic imports and is set forth in the very market research report upon which Commerce relies. *See id.* Although the market research report contains record evidence supporting a finding that Agrifound Parvati and Yamuna Safed-3 are comparable to the subject merchandise with respect to bulb diameter and the number of cloves per bulb, the same publication refutes findings essential to the Department's choice to use the NHRDF data over the import data.

In discussing its reasons for choosing the NHRDF prices over the import data, Commerce made the following findings of fact in the Decision Memorandum:

> The pricing information of the two selected varieties represent the most product-specific information on the record. The alter-

> native information, Indian import data, is considerably less product-specific because we cannot ascertain the quality or nature (*i.e.*, bulbs, loose cloves, etc.) of the garlic products entered under the applicable [Harmonized Tariff Schedule] category. In the *Seventh Administrative Review*, we selected the import data over the NHRDF pricing data submitted by the petitioners. In this review, however, they submitted detailed information about the seed varieties that enabled us to draw significant similarities between certain pricing information from NHRDF and and [*sic*] the subject merchandise.

Id. at 11. Commerce found that the garlic produced by Jinan Yipin and Shandong "had a diameter in excess of five centimeters" and that "[a]t the verification of Jinan Yipin's factors-of-production data, . . . the average number of cloves per bulb [was] fourteen." *Id.* at 10. Commerce relied on information in the market research report for its conclusion that the Agrifound Parvati and the Yamuna Safed-3 varieties "match the subject merchandise closely in these key characteristics." *Id.* Exhibit 4.2 of that report lists Agrifound Parvati as having a diameter of 50 to 65 millimeters and 10 to 16 cloves per bulb. *Market Research on Fresh Whole Garlic in India* at 14. Yamuna Safed-3 is shown therein as having a diameter of 50 to 60 millimeters (average 58.7 millimeters) and 15 to 18 cloves per bulb. *Id.*

The finding regarding product specificity is unsustainable on this record; specifically, given the record evidence, the court cannot affirm the Department's finding that "[t]he alternative information, Indian import data, is considerably less product-specific because [Commerce] cannot ascertain the quality or nature (*i.e.*, bulbs, loose cloves, etc.) of the garlic products entered under the applicable [Harmonized Tariff Schedule] category." *Decision Mem.* at 11. As discussed in detail below, the publication presents factual evidence–which Commerce did not reference or discuss in the Decision Memorandum–that Chinese garlic imports constitute the overwhelming majority of all garlic imported in India, that Chinese garlic is imported in the form of whole bulbs, not loose cloves, and that these imports are comparable to the subject merchandise with respect to bulb diameter and number of cloves per bulb.

Discussing Indian imports of Chinese garlic, the market research report states that "Chinese garlic is *imported in whole bulb form* and is large bulbed with a diameter greater than 40 mm (mostly in the range of 50–65 mm)." *Market Research on Fresh Whole Garlic in India* at 3. Discussing typical characteristics of Chinese garlic imported into the Indian market, the report describes a cloves-to-bulb ratio of 10–15. *Id.* at 29. The report states that "most of the garlic imported into India is from China," that "China and Hong Kong SAR now account for over 95% of garlic imports into India," and that imports from Hong Kong are believed to be essentially of Chinese ori-

gin. *Id.* at 26–27. For the period April 1, 2001 to March 31, 2002, which overlaps the first five months of the period of review, the data in the report indicate an import share for China and Hong Kong of 95.3 percent of total imports by volume.[10] *Id.* at 26–29. For the partial period of April 1, 2002 to December 31, 2002, which overlaps the remaining seven months of the period of review, the data show an import percentage of percentage of 96.2 percent by volume for China and Hong Kong.[11] *Id.* For the former period, the report lists an average import value of 20.36 rupees per kilogram; for the latter, the average import value is 15.30 rupees per kilogram. *Id.* at 27.

Stating that the only other exporting country of significance is Malaysia, the report speculates that a significant part of the Malaysian imports are of Chinese origin based on the close similarity in import values and the lack of a traditional garlic exporting industry in Malaysia. *Id.* Data in the report show that neither Hong Kong's nor Malaysia's garlic exports to India were at significant levels.[12] *Id.* at 26–29 (showing that imports from Hong Kong were 0.8 percent and 1.8 percent of total imports by volume in the two periods, respectively, and that imports from Malaysia were 2.4 percent and 2.0 percent by volume, respectively). Even if imports from Hong Kong and Malaysia were disregarded, prices in the import data would be determined almost exclusively by the Chinese garlic imports.

The market research report also includes information on the quality of Chinese garlic imports. Commerce, while specifically stating that it was not making its valuation choice based on production yields of different varieties of garlic, further justified its choice of NHRDF garlic over the import data by reasoning that Commerce could not "ascertain the quality" of the imported garlic represented by the import data. *Decision Mem.* at 11. This observation is not consistent with the discussion of Chinese garlic imports in the market research report. The report found Chinese garlic imports to be of high production-yielding varieties and to have large bulbs, due principally to cultivation in the long-day zone north of 30 degrees North

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[10] For the period April 1, 2001 to March 31, 2002, the tables indicate that of a total import quantity of 36,186.94 metric tons, 34,199.5 metric tons are from China and 289 metric tons are from Hong Kong. *Market Research on Fresh Whole Garlic in India* at 26–29. Hence, the tables indicate that 95.3 percent of imports are from China and Hong Kong.

[11] For the period April 1, 2002 to December 31, 2002, the tables indicate that of a total import quantity of 28,264.5 metric tons, 26,671.5 metric tons are from China and 512 metric tons are from Hong Kong. *Id.* Hence, the tables indicate that 96.2 percent of imports are from China and Hong Kong.

[12] For the period April 1, 2001 to March 31, 2002, the tables indicate that of a total import quantity of 36,186.94 metric tons, 289 metric tons are from Hong Kong and 881 metric tons are from Malaysia. *Id.* Hence, the tables indicate that 0.8 percent of imports are from Hong Kong and 2.4 percent are from Malaysia. For the period April 1, 2002 to December 31, 2002, the tables indicate that of a total import quantity of 28,264.5 metric tons, 5.12 metric tons are from Hong Kong and 562 metric tons are from Malaysia. *Id.* Hence, the tables indicate that 1.8 percent of imports are from Hong Kong and 2.0 percent are from Malaysia.

latitude. *Market Research on Fresh Whole Garlic in India* at 3–4. In sum, the market research report informs that Indian imports consist almost entirely of Chinese garlic and that such Chinese garlic imports are high production-yielding, large-bulb varieties. The report specifically states that Agrifound Parvati "is very similar to the Chinese garlic sold in India" and specifically is similar with respect to bulb size and number of cloves per bulb. *Id.* at 4. Hence, Commerce's assumption that the garlic represented by the import data differs significantly from the subject merchandise is contradicted by the record evidence considered as a whole.

Due to the failure to analyze the record data on Indian imports of Chinese garlic, the Department's choice of the NHRDF data over the import data does not rest on findings supported by substantial record evidence and is not supported by adequate reasoning. The consequence of these shortcomings is the more serious due to the huge discrepancy between the value Commerce selected, 50 rupees per kilogram, and the prices for the garlic imports indicated in the report, which, as discussed previously, are roughly in the range of 15 to 20 rupees per kilogram. The Department's analysis cannot convince a reasonable mind, based on the record evidence before Commerce, that a producer in India of garlic of a variety comparable to that produced by Jinan Yipin or Shandong reasonably would be expected to incur a cost of 50 rupees per kilogram for the garlic seed that it routinely uses to produce its crop. The court, therefore, is unable to reach the conclusion that Commerce based its valuation of garlic seed on the "best available information." *See* 19 U.S.C. § 1677b(c)(1). Accordingly, on remand, the court will direct Commerce to reconsider and redetermine its valuation of garlic seed as a factor of production and to base its analysis of this issue on findings of fact that are supported by substantial record evidence. The court will allow Commerce to reopen the record if necessary for this purpose.

2. The Department's Surrogate Value for Jinan Yipin's Use of Water Is Unreasonable and Unsupported by Findings of Fact for Which There Is Record Evidence

In its calculation of the normal value of the subject merchandise, Commerce included as a factor of production a surrogate value for the irrigation water that Jinan Yipin used in its garlic cultivation. Commerce determined a value for water in the Preliminary Results, stating that "[w]e valued water using the averages of municipal water rates from Asian Development Bank's *Second Water Utilities Data Book: Asian and Pacific Region* (October 1997)." *Preliminary Results*, 68 Fed. Reg. at 68,873. Commerce limited its discussion of the water issue to the Preliminary Results. The Final Results contain no discussion of the issue. Instead, the Final Results reference discussion of the "Valuation of Water" in the Decision Memorandum,

which was appended to the Final Results. *Final Results*, 69 Fed. Reg. at 33,627, 33,630. Commerce sets forth its position in a brief, four-paragraph discussion in the Decision Memorandum. *Decision Mem.* at 14–16. The Department's discussion does not indicate any change from the valuation method specified in the Preliminary Results. *See id.*

Jinan Yipin argues that Commerce should not include water as a separate factor of production because doing so would not reflect the company's actual farming experience, citing record evidence that Jinan Yipin obtained its water for free and incurred only the utility cost of pumping the water from a local river. Jinan Yipin's Br. in Supp. 46–50. Jinan Yipin further objects that the Department's valuation of water as a separate factor of production resulted in double counting of the costs for water. *Id.* Jinan Yipin contends that the costs for water should be considered to be included in the surrogate value for factory overhead, or for selling, general and administrative expenses ("SG&A") that Commerce obtained from financial statement data of an Indian tea producer, Parry Agro Industries, Inc. ("Parry Agro"). *Id.*

Defendant maintains that because water indisputably is a raw input and thereby a factor of Jinan Yipin's garlic production, Commerce was required by 19 U.S.C. § 1677b(c) to select a surrogate value for Jinan Yipin's water use. *See* Def.'s Mem. in Opp'n 35–36. As support for the conclusion by Commerce that no double counting of the value of water occurred in the administrative review, defendant argues that Parry Agro's overhead expenses did not include a line item for water and that there is no record evidence that irrigation water is essential to tea production in India. *Id.* at 36.

Congress provided in 19 U.S.C. § 1677b(c)(3) that "the factors of production utilized in producing merchandise include, but are not limited to– . . . quantities of raw materials employed . . . [and] amounts of energy and other utilities consumed. . . ." 19 U.S.C. § 1677b(c)(3). As indicated by the statutory language "include, but are not limited to," the reference to raw materials as well as utilities, and the reference to general expenses, Commerce has considerable discretion in deciding how it will treat a particular production input or cost when identifying factors of production. *See id.* Moreover, the Court of Appeals for the Federal Circuit has commented that Commerce has wide discretion with respect to surrogate value determinations under 19 U.S.C. § 1677b. *See Nation Ford Chem. Co. v. United States*, 166 F.3d 1373, 1377 (Fed. Cir. 1999) ("While § 1677b(c) provides guidelines to assist Commerce in this process, this section also accords Commerce wide discretion in the valuation of factors in the application of those guidelines."). That is not to suggest, however, that the court may sustain a surrogate value determination that lacks a reasonable explanation for the choice that Com-

merce made or that rests on findings of fact that are unsupported by substantial evidence on the record.

From the discussion in the Decision Memorandum, it appears that Commerce considered the irrigation water to be a raw material rather than a utility. *See Decision Mem.* at 15 (explaining that "regardless of whether respondents purchased or collected water, the Department still uses the quantity of *raw materials* employed in its calculation of constructed value." (emphasis added)). Commerce apparently based its decision to treat irrigation water as a direct factor of production on its finding of fact that "irrigation of the [garlic] crops requires large quantities of water, and this is clearly different from water used by a company for incidental purposes." *Id.* In doing so, the Department departed from its factors-of-production analysis in the Jinan Yipin New Shipper Review, in which it stated as follows: "We treated water as a variable overhead expense rather than a direct material." *Jinan Yipin New Shipper Review*, 67 Fed. Reg. at 72,140.

The court does not agree with defendant's argument that Commerce was required by 19 U.S.C. § 1677b(c) to treat Jinan Yipin's irrigation water as a "raw material" to the exclusion of any other method of valuing the input. Defendant's statutory construction argument is inconsistent with the breadth of discretion indicated by the plain meaning of the provision. Irrigation water used in growing crops is not necessarily construed as falling within all common meanings of the term "raw material" as used in § 1677b(c)(3)(B); moreover, Commerce's discretion stems from its administering a statute that expressly allows for treatment of an input as a component of "general expenses" rather than as a raw material cost. The court views § 1677b(c) as affording Commerce the discretion to include water in its valuation of overhead or to value the energy cost of producing water instead of valuing water as a raw material where doing so would produce a more accurate determination of normal value under § 1677b(c) and, therefore, a more accurate antidumping duty margin. *See Parkdale Int'l v. United States*, 475F.3d 1375, 1380 (Fed. Cir. 2007) (stating that "an overriding purpose of Commerce's administration of antidumping laws is to calculate dumping margins as accurately as possible . . . ."), *petition for cert. filed*, 76 U.S.W. 3046 (Jul. 16, 2007) (No. 07–65); *see also Lasko Metal Products, Inc. v. United States*, 43 F.3d 1442, 1443 (Fed. Cir. 1994) (stating that "there is much in the statute that supports the notion that it is Commerce's duty to determine margins as accurately as possible . . . .").

Commerce's reasons for valuing water separately, as stated in the Decision Memorandum, do not include a statement of the conclusion of law that defendant is advocating before the Court. *See Decision Mem.* at 14–16. As such, defendant's legal argument is a *post hoc* rationalization, not a reason that Commerce stated for its choice of method. The court must evaluate Commerce's decision on surrogate

valuation of water based on the reasons Commerce put forth. *See NEC Home Electronics, Ltd. v. United States*, 54 F.3d 736, 743 (Fed. Cir. 1995) (stating that the court is "powerless to affirm an administrative action on a ground not relied upon by the agency." (citation omitted)); *see also Burlington Truck Lines, Inc. v. United States*, 371 U.S. 156, 168–69 (1962) (holding that "courts may not accept . . . *post hoc* rationalizations for agency action . . . ."). The only presentation of those reasons is in the four-paragraph discussion in the Decision Memorandum. *Decision Mem.* at 14–16. That discussion, however, is inadequate to support the choice that Commerce made. Missing from the discussion are essential findings of fact and reasoning adequate to explain why Commerce chose its particular method over available alternatives.

Most of the discussion in the Decision Memorandum is directed to Commerce's attempt to refute arguments made by Jinan Yipin during the administrative review, in particular Jinan Yipin's reliance on certain decisions of the Court of International Trade. The only sentence in the first two paragraphs of the discussion of the water issue in the Decision Memorandum that explains Commerce's choice is a sentence in the second paragraph: "Moreover, water is a direct factor of production of garlic because irrigation of the crops requires large quantities of water, and this is clearly different from water used by a company for incidental purposes." *Id.* at 15. The remainder of the first two paragraphs is directed to refuting Jinan Yipin's "double-counting" argument, citing the decision of the Court of International Trade in *Pacific Giant, Inc. v. United States*, 26 CIT 894, 223 F. Supp. 2d 1336 (2002) for the proposition that Commerce, under 19 U.S.C. § 1677b(c), constructs factors of production based on quantities of inputs, not the costs associated with those inputs. *See id.* at 14–15. The third paragraph distinguishes the holding in *Pacific Giant from Rhodia, Inc. v. United States*, 25 CIT 1278, 185 F. Supp. 2d 1343 (2001), on which plaintiffs relied in arguing before Commerce that Commerce should not value water because Jinan Yipin would not have incurred a cost for water if operating in a market economy. *See id.* at 12, 15. The fourth paragraph is devoted generally to a discussion of *Fuyao Glass Industry Group Co. v. United States*, 27 CIT 1892 (2003), a decision on which Jinan Yipin relied in the administrative review for its double-counting argument. *See id.* at 15–16. The fourth paragraph includes two points intended as a refutation of Jinan Yipin's double counting argument. *See id.* at 15. The first point is that the financial statements of Parry Agro do not indicate that Parry Agro, the tea producer Commerce chose as a surrogate for SG&A, incurred a cost for water; the second point is the lack of record evidence that tea production in India requires irrigation water. *See id.*

The discussion of the water issue in the Decision Memorandum does not include a satisfactory explanation of why Commerce be-

lieved, as it apparently did, that a more accurate determination of normal value would result from a decision to value water as a raw material rather than to treat water as a variable overhead expense, as it had in the *Jinan Yipin New Shipper Review*, or to value the energy cost that Jinan Yipin incurred to pump water out of a local river. Commerce's resolution of the irrigation water issue is also unsatisfactory in two other respects. First, in relation to the "double counting" issue, Commerce presumed, without making actual findings of fact, that Parry Agro's financial statement did not include water in SG&A and that cultivation of tea in India does not require irrigation, and there appears to be no record evidence upon which such findings of fact could have been based. Absent such findings and evidentiary support on the record, the conclusion by Commerce that double counting did not occur is unsustainable. Second, the decision by Commerce to value water according to averages of municipal water rates is given no explanation in the Decision Memorandum and appears to rest upon an assumption, and not upon a finding of fact, that producers of garlic in India typically irrigate their garlic crops using water supplied by municipal utilities, at costs associated with such utilities. The Decision Memorandum does not cite record evidence that could support such a finding.

In summary, the method by which Commerce addressed the question of irrigation water lacks essential findings of fact and relies instead on mere assumptions, which find no apparent support in record evidence. The analysis does not include a rational explanation for the choice that Commerce made.[13] On remand, Commerce must reconsider its surrogate value analysis for water use and redetermine this factor based on findings of fact that are supported by substantial record evidence. Commerce must present its reasons for selecting from among the possible methods of valuing this factor, *e.g.*, valuation of the raw material or of the required energy consumption, explaining why the method it chooses results in the most accurate antidumping margin. Commerce may reopen the record, if necessary, to obtain additional information.

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[13] The Department's citation in the Decision Memorandum to the decision of the Court of International Trade in *Pacific Giant*, on which defendant also relies in its brief opposing plaintiffs' motion for judgment upon the agency record, does not remedy the deficiencies in Commerce's analysis in this case. *See* Def.'s Mem. in Opp'n 37–38. *Pacific Giant*, which involved an administrative review of an antidumping duty order on freshwater crawfish tail meat from China, considered an issue of the cost of water used in crawfish tail meat production facilities. *See Pacific Giant, Inc. v. United States*, 26 CIT 894, 895, 904–05, 223 F. Supp. 2d 1336, 1338, 1346 (2002). The holding in the case cannot justify a result where, as here, Commerce based its factor-of-production analysis upon unsupported assumptions rather than essential findings of fact and failed to provide a rational explanation for its choice.

3. Commerce Did Not Demonstrate that Its Valuation of Jinan Yipin's Cardboard Packing Cartons Was Based on the Best Available Information on the Record

In determining the normal value of Jinan Yipin's merchandise, Commerce used a surrogate value of 124.91 rupees per kilogram for the cardboard cartons in which Jinan Yipin packed its garlic. Commerce stated in the Preliminary Results that it calculated this value "using import data from the *World Trade Atlas* that covered the period of review." *Preliminary Results*, 68 Fed. Reg. at 68,873. The Preliminary Results directed the reader to an internal memorandum for "a detailed description of all the surrogate values used." *Id.* That memorandum (the "Factors Valuations Memorandum") relied on Indian import data under subheading 4819.1001 of the Indian tariff schedule, which bears the article description "Boxes of Corrugated Paper & Paper Board," in determining the 124.91 rupees-per-kilogram value. *Factors Valuations Mem.* at 12, Attach. 13. The Final Results do not address the carton valuation issue except by reference to the incorporated Decision Memorandum, *Final Results*, 69 Fed. Reg. at 33,627, which adopts the determination made in the Preliminary Results, *i.e.*, valuation of the cartons at 124.91 rupees per kilogram. *Decision Mem.* at 18–20.

Jinan Yipin argues that Commerce's carton valuation based on the Indian import statistics is distorted because Indian tariff subheading 4819.1001 includes various types of specialty cartons dissimilar to packing boxes plaintiff used and because the listed values include, for some cartons, air freight charges to which Jinan Yipin's boxes were not subject. Jinan Yipin's Br. in Supp. 51–54. Jinan Yipin advocates a value of 32.38 rupees per box, which it calculated as an average of price quotes that it obtained from four Indian vendors of cardboard cartons and that it submitted for the record during the review.[14] *See id.* at 54–58; *see also Jinan Yipin's Surrogate Value Submission* Ex. 14 at 1. Jinan Yipin argues that because the quotes pertain to boxes of the type actually used by Jinan Yipin, its proposed surrogate value is based on data more specific than the import data. Jinan Yipin's Br. in Supp. 55–57. Jinan Yipin further contends that the surrogate value based on import data "is more than 350% higher than the average price of domestic packing boxes." *Id.* at 57. Defendant counters that the Indian import data is the best available information because it is sufficiently specific to the input being val-

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[14] Although average price is correctly calculated at 32.38 rupees per *box* in the exhibit to the plaintiff's surrogate value submission, the text of the submission incorrectly states that the average price is 32.38 rupees per *kilogram*. *See Letter from Grunfeld, Desiderio, Lebowitz, Silverman & Klestadt, LLP to Sec'y of Commerce* (June 30, 2003), Attach. at 8, Ex. 14 at 1 (Admin. R. Doc. No. 101) ("*Jinan Yipin's Surrogate Value Submission*"). Plaintiff impliedly acknowledges this error in its brief supporting judgment on the agency record. *See* Jinan Yipin's Br. in Supp. 57 n.11.

ued and superior to the Indian price quotes in its contemporaneity with the period of review, its representation of a range of prices, and its public availability. Def.'s Mem. in Opp'n 39–44.

The court does not sustain Commerce's choice of surrogate value for Jinan Yipin's cartons. Commerce has not shown that it based its 124.91 rupees-per-kilogram value on the "best available information" as required by 19 U.S.C. § 1677b(c)(1). The Indian import data presented in the *World Trade Atlas*, although contemporaneous with the period of review, do not bear a reasonable relationship to the boxes used by Jinan Yipin to pack its garlic.

Jinan Yipin used three types of paper cartons for packing. *Letter from Grunfeld, Desiderio, Lebowitz, Silverman & Klestadt, LLP to the Sec'y of Commerce* (Mar. 4, 2003), Ex. D–8 at 1 (Admin. R. Doc. No. 43). About 90 percent of the boxes it used were of a single type, and the three types of boxes it used did not differ significantly from each other in either weight or capacity.[15] *Id.* The single-page excerpt from the *World Trade Atlas* on which Commerce relied for its valuation of Jinan Yipin's boxes reveals that the average value of boxes of corrugated paper or paperboard imported into India from individual countries varied widely, as follows: China, 38.74 rupees per kilogram; United Kingdom, 74.41 rupees per kilogram; Austria, 112.49 rupees per kilogram; Phillippines, 157.43 rupees per kilogram; and Spain, 239.05 rupees per kilogram.[16] Commerce did not explain why it used the import data despite this variation. Without further information, it would be illogical to assume that the country of origin, rather than substantial variations in the types of boxes imported, produced the wide variation in listed values. An average per-kilogram value obtained from all data on the page, therefore, would not appear to be a reasonable approximation of the value of Jinan Yipin's boxes.

Further, the court observes that data from six source countries–China, Thailand, Indonesia, South Korea, North Korea, and Finland–and the data in an "[u]nspecified" category, are crossed off on the *World Trade Atlas* page that Commerce placed on the record. *See Factors Valuations Mem.*, Attach. 13. It appears from the data on the page and Commerce's result that Commerce calculated its carton

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[15] Jinan Yipin reported that it used three types of boxes: paper cartons weighing 750 grams with the capacity to hold 9.6 kilograms; paper cartons weighing 800 grams with the capacity to hold 10 kilograms; and paper cartons weighing 900 grams with the capacity to hold 30 pounds (13.6 kilograms). *Letter from Grunfeld, Desiderio, Lebowitz, Silverman & Klestadt, LLP to the Sec'y of Commerce* (Mar. 4, 2003), Ex. D–8 at 1 (Admin. R. Doc. No. 43) ("*Section D Resp.*"). For each cubic ton of garlic packed, Jinan Yipin used about 17,000 of the 9.6 kilogram boxes, about 4,000 of the 10 kilogram boxes, and about 250,000 of the 13.6 kilogram boxes. *Id.*

[16] The *World Trade Atlas* data on the record provide the quantity and value of imports under Indian tariff subheading 4819.1001 for each source country. *See Factors Valuations Mem.* Attach. 13.

price of 124.91 rupees per kilogram by excluding the data on imports in these seven crossed-off categories.[17] China and Thailand are two of the three largest source countries of boxes within the subheading. *Id.* Had Commerce used the entire set of *World Trade Atlas* import data on the page, it would have obtained a value of 109.88 rupees per kilogram. The Decision Memorandum does not explain why Commerce excluded data from the seven categories. However, even had Commerce included the data from the seven categories, Commerce's analysis still would be unsupported by the record evidence due to the unsuitability of the import data considered as a whole, as indicated by the apparent variations in the boxes that the import data represent.

Jinan Yipin placed on the record "trade intelligence data" that presents descriptions of merchandise included in Indian tariff subheading 4819.1001. *Jinan Yipin's Surrogate Value Submission* Attach. at 7–8, Ex. 13. These descriptions indicate that the tariff subheading is quite broad in scope.[18] Commerce characterized these data as not concurrent with the period of review and insufficiently detailed to support a conclusion that the merchandise covered by the import data "differ[s] significantly" from Jinan Yipin's garlic packing boxes. *Decision Mem.* at 18. As discussed previously, however, Commerce's own source of Indian import data, the *World Trade Atlas*, does not support a finding that the Indian import data are reasonably representative of Jinan Yipin's boxes and is suggestive of wide variations in types of containers. The court, therefore, would conclude that Commerce's choice of valuation is unsupported by substantial evidence even if the trade intelligence data were not on the record. Moreover, the trade intelligence data pertain to a period that overlaps with part of the period of review.[19] The trade intelligence data lend further support to the court's conclusion that Commerce's valu-

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[17] According to the datasheet on record, the total quantity of box imports under this subheading for the period of review is 1,473,898 kilograms and the total value of the imports is 184,110,193 rupees. *Factors Valuation Mem.* Attach. 13. The average price calculated by Commerce, 124.91 rupees per kilogram, is based upon the latter values. *Id.* at 12. If imports from China, Thailand, Indonesia, South Korea, North Korea, Finland, and unspecified sources are included, the total quantity of box imports is 2,231,631 kilograms and the total value of the imports is 245,213,759 rupees. *See id.* Attach. 13. The average price using these totals is 109.88 rupees per kilogram.

[18] Included are descriptions for "empty carton boxes," "printed gift boxes for DVD," "gift boxes for C.C.P. with rad layer with radio," "gift boxes+manual+stickers," "rackings '3' boxes for chest freezers," "printed shoe boxes," and "pretty boxes for quickcam expr." *Jinan Yipin's Surrogate Value Submission* Ex. 13.

[19] The period of review covers imports from November 1, 2001 to October 31, 2002. The fourth entry in the intelligence data on record shows the date as "July 3, 2002" and is therefore concurrent with the period of review. *Jinan Yipin's Surrogate Value Submission* Ex. 13 at 1. While the year of many of the other entries is not fully legible, the entries follow the months of the calendar year, starting in June and ending in May. *Id.* at Ex. 13 at 1–3. The court concludes that the data contained therein are chronological from June 2002 to May 2003 and partially overlap the period of review.

ation decision is unsatisfactory on this record because it is based on import data that are not reasonably representative of Jinan Yipin's packing cartons.

Jinan Yipin's surrogate value submission advocated use of a value of 32.38 rupees per box. *Jinan Yipin's Surrogate Value Submission* Ex. 14 at 1. Commerce's valuation is more than three times higher; under Commerce's method Jinan Yipin's boxes would be valued at approximately 111.06 rupees per box.[20] Commerce rejected Jinan Yipin's submission of price quotes from Indian suppliers of cartons because these quotes were not contemporaneous with the period of review and not representative of a range of prices during the period of review. *Decision Mem.* at 18–19. Defendant attempts to bolster this rationale by also pointing to the fact that the quotes are not derived from a public source. Def.'s Mem. in Opp'n 41. The price quotes, however, are vastly superior to the Indian import data in an important respect: they are specific to the factor being valued. Commerce's rationale concerning the date of the quotes, which were eight months after the close of the period of review, and its rationale concerning the temporal range are not convincing absent evidence of significant price fluctuation in a short time. Moreover, the defendant's argument as to the non-public nature of the quotes is a *post hoc* rationalization not relied upon by Commerce in the Decision Memorandum.

Because the data used by Commerce to calculate the surrogate value were not reasonably representative of Jinan Yipin's cartons and yielded a calculated result that was more than three times higher than the price quotes, the court cannot conclude that Commerce used the "best available information" or that it supported its choice with record evidence or adequate reasoning. *See* 19 U.S.C. § 1677b(c)(1). The court will direct Commerce to reconsider this issue and redetermine the valuation of this factor as applied to Jinan Yipin. Commerce may reopen the record, if necessary, to obtain additional information.

4. Shandong Raised Valid Claims Relating to the Surrogate Value of Garlic Seed and Water But May Not Obtain Relief on its Claim Relating to Cartons Because the Record is Deficient in Required Information

In its USCIT Rule 56.2 motion, Shandong seeks relief from Commerce's valuation of its garlic seed, irrigation water, and packing cartons. Shandong did not submit a brief in support of its motion but

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[20] Under Commerce's analysis, a kilogram of boxes in India should be valued at 124.91 rupees. *Factors Valuations Mem.* at 12. Jinan Yipin used about 17,000 of the 750 gram boxes, about 4,000 of the 800 gram boxes, and about 250,000 of the 900 gram boxes for every cubic ton of garlic packed. *Section D Resp.* Ex. D–8 at 1. Based on this data, the average cost per box, for Jinan Yipin's boxes under Commerce's analysis is 111.06 rupees.

instead relies on the arguments of Jinan Yipin. *See* Shandong's Mot. 1–2.[21] Defendant makes three arguments in opposing Shandong's motion. Defendant first contends that Shandong's motion violated USCIT Rule 7(f)(1) because, in adopting in full another party's brief, Shandong fails to set forth its grounds "with particularity." Def.'s Mem. in Opp'n 47. Defendant then argues that because Shandong did not challenge before the Department the agency's surrogate value conclusions for garlic seed, water, and cartons, it has failed to exhaust its administrative remedies. *Id.* at 48–49. Finally, defendant contends that, in the event the court reaches the merits of Shandong's claims, it should deny relief because Jinan Yipin's arguments are company-specific and therefore do not show that Commerce's determinations for Shandong's factors of production are unsupported by substantial evidence. *Id.* at 49.

The court concludes that Shandong's Rule 56.2 motion is sufficiently particular to comply with the Court's Rules. The court further concludes that Shandong's claims regarding garlic seed and water are not barred by the doctrine of exhaustion, because Shandong's failure to raise these claims did not prevent Commerce from actually considering these two issues at the agency level. With respect to the surrogate factors for garlic seed and water, the court concludes that Shandong is entitled to a remand because Commerce's determinations do not rest on findings supported by substantial record evidence and are otherwise not in accordance with law, and because the record contains sufficient information on Shandong's use of garlic seed and water. However, the court concludes that, by application of the exhaustion principle, Shandong is precluded from obtaining relief on the surrogate value of its cartons because it failed to place on the record specific evidence that would have enabled Commerce to conclude that better record evidence existed with which to value those cartons.

In alleging that Shandong's 56.2 motion runs afoul of USCIT Rule 7(f)(1), defendant is challenging the method by which Shandong contests the Final Results–specifically, its adopting arguments in another party's brief rather than presenting its own, independent analysis. The court concludes that Shandong did not violate USCIT Rule 7(f)(1) by adopting in full Jinan Yipin's arguments on surrogate factors. Defendant's citation to USCIT Rule 7(f)(1), a general rule dealing with motions, does not specifically address the issue defen-

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[21] Shandong's motion states as follows: "Shandong Heze agrees with Plaintiff Jinan Yipin of [*sic*] all of the arguments that Jinan Yipin made in paragraphs III, IV and V concerning the valuation of garlic seed, irrigation water and packing cartons, respectively, in its January 10, 2005 Brief in Support of Jinan Yipin's Rule 56.2 Motion. Since all the arguments that Shandong Heze intends to make regarding these three issues would be the same as that in Jinan Yipin's January 10, 2005 Brief in Support, Shandong Heze will not file a Brief in Support of this Rule 56.2 Motion for Judgment upon the Agency Record." Shandong's Mot. 1–2.

dant raises. *See* USCIT R. 7(f)(1). The specific requirements for a USCIT Rule 56.2 motion are set forth in USCIT Rule 56.2(c). *See* USCIT R. 56.2(c). The USCIT Rule 56.2 motion submitted by Shandong is sufficiently particular in that it seeks a remand and a recalculation of the surrogate values for garlic seed, water, and cartons, for the reasons stated in Jinan Yipin's brief. USCIT Rule 56.2(c) does not provide that a party may not rely on another party's arguments in support of its Rule 56.2 motion.

Shandong's failure to challenge before the Department the surrogate value conclusions for garlic seed and water do not require dismissal of its claims. This court has discretion under 28 U.S.C. § 2637(d) (2000) to determine the circumstances under which the court will require exhaustion of administrative remedies. 28 U.S.C. § 2637(d) (the court "shall, where appropriate, require the exhaustion of administrative remedies."); *see Cemex, S.A. v. United States*, 133 F.3d 897, 905 (Fed. Cir. 1998) (reasoning that " 'where Congress has not clearly required exhaustion, sound judicial discretion governs[.]' ") (quoting *McCarthy v. Madigan*, 503 U.S. 140, 144 (1992)). The court exercises its discretion to permit Shandong's garlic seed and water claims.

Although Shandong did not raise arguments on garlic seed and water below, Commerce actually considered these issues at the agency level through the arguments of Jinan Yipin and another respondent. *See Decision Mem.* at 3–6, 8–16. Specifically, Jinan Yipin argued that Commerce should value garlic seed using Indian import statistics rather than NHRDF price lists and that Commerce erred in valuing water as a separate input. *Id.* at 3–6, 12–13. The court may excuse a party's failure to raise an argument before the administrative agency if, as occurred in this case, the agency in fact considered the issue. *See Holmes Prod. Corp. v. United States*, 16 CIT 1101, 1104 (1992) (citing *Washington Assoc. for Television and Children v. F.C.C.*, 712 F.2d 677, 682–83 n.10 (D.C. Cir. 1983) (reasoning that "[t]his exception can be seen as a variant of the futility exception, since it would almost surely be futile for a party to raise an objection already made by someone else."')). "[C]ourts have waived exhaustion if the agency has had an opportunity to consider the identical issues presented to the court . . . but which were raised by other parties, or if the agency's decision, or a dissenting opinion, indicates that the agency had the opportunity to consider the very argument pressed by the petitioner on judicial review." *Natural Resources Def. Council, Inc. v. EPA*, 824 F.2d 1146, 1151 (D.C. Cir. 1987) (internal quotation marks, brackets, and citations omitted).

In support of its exhaustion argument, defendant cites to nonbinding, distinguishable case law. *See* Def.'s Mem. in Opp'n 48 (citing *Rubberflex Sdn. Bhd. v. United States*, 23 CIT 461, 468, 59 F. Supp. 2d 1338, 1345 (1999) (where the court declined to hear certain arguments made by plaintiff because the arguments were not included in

the case brief submitted to the agency) and *Federal-Mogul Corp. v. United States*, 18 CIT 785, 803, 862 F. Supp. 384, 401 (1994) (where the court declined to hear a claim by plaintiff that was not made at the administrative level)). In contrast to the factual situations in *Rubberflex* and *Federal-Mogul Corp.*, Shandong's garlic seed and water valuation arguments were before Commerce as a part of Jinan Yipin's case brief. Record evidence specific to Shandong was before the agency regarding garlic seed, water, and electricity usage as related to water. *See Verification of the Resp. of Shandong Heze International Trade and Developing Company in the Antidumping Duty Admin. Review of Fresh Garlic from the People's Republic of China* at 14–16, Ex. 14, 26 (Jan. 5, 2004) (Confidential Admin. R. Doc. No. 45) ("*Shandong's Verification Report*"). For example, in its discussion of garlic in the Decision Memorandum, Commerce noted that, like Jinan Yipin, the garlic produced by Shandong "had a diameter in excess of five centimeters." *Decision Mem.* at 10. There is also record evidence on how Shandong acquired its water. *See Letter from Lee & Xiao to Sec'y of Commerce* (July 29, 2003), Attach. 1 at 4–5 (*Second Supplemental Questionnaire*) (Confidential Admin. R. Doc. 23).

For the reasons set forth in the preceding section of the Opinion and Order, the court concludes that the Department's choice of the NHRDF data on garlic over the import data does not rest on findings supported by substantial record evidence and is not supported by adequate reasoning. The court further concludes that the method by which Commerce addressed the question of irrigation water lacks essential findings of fact and relies instead on mere assumptions, which find no apparent support in record evidence. Accordingly, on remand, the court is directing Commerce to reconsider and redetermine its valuations of garlic seed and water use for both Jinan Yipin and Shandong and to base its analyses of these issue on findings of fact that are supported by substantial record evidence.

The court concludes, however, that Shandong cannot obtain relief on Commerce's valuation of its cartons. When submitting the Indian price quotes, Jinan Yipin stated that "the Department should use these quotes because they are domestic prices, product specific and more representative *of the boxes used by Jinan Yipin and Harmoni*" than the boxes covered by the import data. *Jinan Yipin's Surrogate Value Submission* Attach. at 8 (emphasis added). The record evidence relevant to the question of whether Shandong's cartons were similar to Jinan Yipin's cartons is extremely limited. *See Letter from Lee & Xiao to Sec'y of Commerce* (June 19, 2003), Attach. at Ex. D-2 (Admin. R. Doc. No. 87); *Shandong's Verification Report* Ex. 18 at 1. Shandong did not take the opportunity to direct the court to record information demonstrating that it would have been reasonable for Commerce to use Jinan Yipin's price quotes in estimating the value of Shandong's cartons, such as, for example, information on carton dimensions. Shandong apparently did not place on the record before

Commerce any additional information demonstrating that the Indian price quotes obtained by Jinan Yipin are representative of Shandong's packing boxes. In view of these shortcomings in Shandong's claim, the court is unwilling to speculate that the Indian price quotes obtained by Jinan Yipin are reasonably representative of the value of Shandong's cartons. In summary, the court concludes that Shandong failed to exhaust its administrative remedies when it declined to place sufficient information on the record concerning the characteristics of its cartons, and, accordingly, declines to award relief on Shandong's claim pertaining to this factor.

IV. CONCLUSION AND ORDER

For the reasons discussed above, the court sustains Commerce's decision with respect to the treatment of inspection fees as an indirect selling expense and with respect to the calculation of a surrogate value for Shandong's packing cartons.

The court concludes that Commerce erred in treating sales of Jinan Yipin's merchandise to Houston Seafood that were negotiated on and after March 29, 2002 as affiliated party sales and also erred in invoking its authority to use facts otherwise available and adverse inferences with respect to those sales. Commerce further erred in assigning a rate of 376.67 percent to the two or more sales to Houston Seafood that it found to have been negotiated during the period of November 1, 2001 to March 29, 2002.

The court concludes that Commerce's inclusion in American Yipin's reported total indirect selling expenses of all of Bayou Dock's 2002 salary and benefits expenses was based in part on findings of fact that were not supported by substantial evidence on the record.

The court concludes that the surrogate values that Commerce assigned to Jinan Yipin's and Shandong's use of garlic seed and water, and to Jinan Yipin's packing cartons, were unsupported by substantial record evidence and, with respect to the use of water, lacked findings of fact necessary to the analysis.

Based on the court's conclusions and the foregoing discussion, the court affirms in part and remands in part the Department's *Final Results of Antidumping Duty Administrative Review and New Shipper Reviews*, 69 Fed. Reg. 33,626 (Jun. 16, 2004), and it is hereby

ORDERED that this matter is remanded for further administrative proceedings consistent with this Opinion and Order; it is further

ORDERED that Commerce shall redetermine the weighted average percentage antidumping duty margin that it applied in the Final Results to Jinan Yipin's merchandise for the period of review as required in this Opinion and Order and, in so doing, shall not treat as affiliated sales those sales of Jinan Yipin's merchandise to Houston Seafood that were negotiated after March 29, 2002; it is further

ORDERED that Commerce shall reconsider its decision to apply the rate of 376.67 percent to the two or more sales to Houston Sea-

food that it determined to have been negotiated during the period of November 1, 2001 to March 29, 2002 and shall redetermine that rate based on findings of fact that are supported by substantial evidence on the record; it is further

ORDERED that Commerce, in redetermining the rate to be applied to the two or more sales to Houston Seafood that it determined to have been negotiated during the period of November 1, 2001 to March 29, 2002, may reopen the record for the sole purpose of determining the beginning date for the employment of Mr. Henry Lee by American Yipin; it is further

ORDERED that Commerce shall reconsider its decision to include all of Bayou Dock's 2002 salary and benefits expenses in the calculation of Jinan Yipin's indirect selling expense factor and, in determining a new weighted average percentage antidumping duty margin to be applied to Jinan Yipin's merchandise, shall redetermine the indirect selling expense factor based on findings of fact that are supported by substantial evidence on the record; it is further

ORDERED that Commerce shall redetermine the surrogate values of Jinan Yipin's garlic seed, use of water or the energy cost of producing water, and packing cartons; it is further

ORDERED that Commerce shall redetermine the weighted average percentage antidumping duty margin that it applied in the Final Results to Shandong's merchandise for the period of review as required in this Opinion and Order and, in so doing, shall redetermine the surrogate values of Shandong's garlic seed and use of water or the energy cost of producing water; it is further

ORDERED that in redetermining surrogate values Commerce may reopen the record as necessary to obtain additional information; it is further

ORDERED that Commerce shall ensure that all redeterminations are based on sufficient findings of fact and that the findings of fact are supported by substantial record evidence and shall provide on remand the reasons supporting its various redeterminations; and it is further

ORDERED that Commerce shall have one hundred twenty (120) days from the date of this Order to complete and file its remand determination; plaintiffs shall have forty-five (45) days from that filing to file comments; and Commerce shall have thirty (30) days after plaintiffs' comments are filed to file any reply.

Slip Op. 07–175

NMB SINGAPORE LTD., et al., Plaintiffs, v. UNITED STATES, Defendant, and THE TIMKEN COMPANY, Defendant-Intervenor.

Before: WALLACH, Judge
Consol. Court No.: 06–00182

PUBLIC VERSION

[Plaintiffs' Rule 56.2 Motions for Judgment Upon the Agency Record are DENIED; and the Agency's Determination is AFFIRMED.]

Dated: November 30, 2007

Sidley Austin LLP, (*Neil R. Ellis* and *Neil C. Pratt*) for Plaintiffs JTEKT Corporation and Koyo Corporation of U.S.A.

Crowell & Moring LLP, (*Matthew P. Jaffe, Robert A. Lipstein* and *Sobia Haque*) for Plaintiffs NSK Corporation and NSK Ltd.

Michael A. Hertz, Deputy Attorney General; *Jeanne E. Davidson*, Director, Commercial Litigation Branch, Civil Division, U.S. Department of Justice (*Michael D. Panzera*); and *Arthur D. Sidney*, Office of the Chief Counsel for Import Administration, U.S. Department of Commerce, of Counsel, for Defendant United States.

Stewart and Stewart, (*Terence P. Stewart, Eric P. Salonen* and *Sarah V. Stewart*) for Plaintiff and Defendant-Intervenor the Timken Company.

OPINION

Wallach, Judge:

I
INTRODUCTION

This case comes before the court on Plaintiffs' Rule 56.2 Motions for Judgment Upon the Agency Record. Plaintiffs JTEKT Corporation and Koyo Corporation of U.S.A. (collectively "JTEKT"), NSK Corporation and NSK Ltd. (collectively "NSK"), and The Timken Company ("Timken") challenge aspects of the determination of the Department of Commerce ("Commerce" or "the Department") in *Ball Bearings and Parts Thereof from Japan and Singapore; Five-year Sunset Reviews of Antidumping Duty Orders; Final Results*, 71 Fed. Reg. 26,321 (May 4, 2006), as amended by *Ball Bearings and Parts Thereof from Japan; Five-year Sunset Review of Antidumping Duty Order: Amended Final Results*, 71 Fed. Reg. 30,378 (May 26, 2006).

This opinion concerns the Department's second five-year (sunset) review of the antidumping order covering ball bearings from Japan. *Antidumping Duty Orders: Ball Bearings, Cylindrical Roller Bearings, and Spherical Plain Bearings, and Parts Thereof From Japan*, 54 Fed. Reg. 20,904 (May 15, 1989) ("*1989 AD Order*"). Because dumping continued above *de minimis* levels after the issuance of the order and through the period of review, and import volumes declined

over the life of the order, Commerce's determination is AFFIRMED, and Plaintiffs JTEKT and NSK's Motions for Judgment Upon the Agency Record are DENIED. Because Commerce properly reported a more recently calculated dumping margin to the International Trade Commission ("ITC"), Plaintiff Timken's Motion for Summary Judgment Upon the Agency Record is DENIED. The court has jurisdiction pursuant to 28 U.S.C. § 1581(c).

II
BACKGROUND

As a result of investigations by Commerce and the ITC into antifriction bearings (other than tapered roller bearings) and parts thereof from Japan, Commerce issued an antidumping order in May 1989. *1989 AD Order*, 54 Fed. Reg. 20,904. Since the issuance of the antidumping order, the Department has conducted annual administrative reviews of ball bearings from Japan and in 1999 conducted its first sunset review in which it found that revocation of the antidumping duty order would likely lead to continuation or recurrence of dumping at the same rates as found in the original investigation. Memorandum from Stephen J. Claeys, Deputy Assistant Sec'y for Import Admin. to Joseph A. Spetrini, Acting Assistant Sec'y for Import Admin. ("Preliminary Decision Memo") (December 28, 2005) at 2–3 (citing *Final Results of Expedited Sunset Reviews: Antifriction Bearings From Japan*, 64 Fed. Reg. 60,275, 60,280 (November 4, 1999) ("*First Sunset Review*")).

In June 2005 Commerce published a notice of initiation of the second five-year review of the order. *Initiation of Five-year "Sunset" Reviews*, 70 Fed. Reg. 31,423 (June 1, 2005) ("*Notice of Initiation*"). The domestic interested party, Timken, filed a notice of intent to participate in accordance with 19 C.F.R. § 351.218(d)(1)(i), and several "interested parties," within the meaning of 19 U.S.C. § 1677(9)(A), including NSK and JTEKT, filed timely substantive responses. *See Ball Bearings and Parts Thereof From Japan and Singapore; Five-Year Sunset Reviews of Antidumping Duty Orders; Preliminary Results*, 70 Fed. Reg. 76,754 (December 28, 2005) ("*Preliminary Results*"); *see also* Preliminary Decision Memo at 3–4. As a result, the Department commenced a full sunset review. *Preliminary Results*, 70 Fed. Reg. at 76,754.

On December 28, 2005 Commerce published the Issues and Decision Memorandum accompanying its *Preliminary Results* of the full sunset reviews; in this memorandum, Commerce concluded that revocation of the orders would likely lead to the continuation or recurrence of dumping. Preliminary Decision Memo at 13. Commerce in its analysis addressed issues raised by the respondents in their substantive responses to the notice of initiation. *Id.* at 4–5. In response to the arguments presented by the Japanese respondents, Commerce concluded that dumping was likely to recur because dumping mar-

gins were above *de minimis* levels throughout the period of review and the value and weight of imports declined post-order and remained below pre-order levels. *Id.* at 10. Commerce specifically declined to alter its calculation of the original margins and rejected the respondents' argument that its methodology was invalidated by the World Trade Organization ("WTO") decisions on the practice of "zeroing" because the use of the methodology remained valid under United States law. *Id.* at 9–10; *see also Preliminary Results*, 70 Fed. Reg. at 76,755 (citing the Statement of Administrative Action ("SAA") accompanying the Uruguay Round Agreements Act ("URAA"), Pub. L. No. 103–465, H. Doc. 103–316, vol. VI at 659, 1032 (1994); *Corus Staal BV v. United States*, 395 F. 3d 1343 (Fed. Cir. 2005)).

The Department also rejected NSK's assertion that the order should be revoked because of a lack of domestic support for its continuation. Preliminary Decision Memo at 10. The Department stated that there is "no threshold that the domestic industry must meet in order to participate in sunset reviews," so long as the domestic respondents timely filed a valid notice of intent to participate. *Id.* Because the Department determined in the first sunset review that its calculations "were probative of behavior without the discipline of the orders," it decided to resubmit the same margins during the second review. *Id.* at 12; *see First Sunset Review*, 64 Fed. Reg. at 60,280.

In May 2006, Commerce issued its *Final Results* of the second sunset review, in which it affirmed, in part, its findings in the *Preliminary Results* and concluded that revocation of the antidumping duty order would likely lead to the continuation or recurrence of dumping.[1] *Final Results*, 71 Fed. Reg. 26,321; Memorandum to David M. Spooner, Assistant Sec'y for Import Admin. to Stephen J. Claeys, Deputy Assistant Sec'y for Import Admin. (May 4, 2006) ("Decision Memo") at 4–5. Commerce decided that that it was reasonable to conclude that dumping was likely to recur if the order was revoked because dumping margins had been above *de minimis* in the original investigation and in all fifteen subsequent administrative reviews. Decision Memo at 4–5. Commerce, furthermore, concluded that the application of its margin-calculation methodology is in accordance with the dumping statute and that respondents did not provide adequate evidence to support their claims that absent Commerce's methodology, weighted-average margins would be zero or *de minimis*. *Id.* at 5.

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[1] Although Commerce largely incorporated by reference the *Preliminary Results* in the *Final Results*, it did not include a chart detailing Apparent Consumption and Imports from Japan as a Share Thereof in the period 1987–2004 which had been included in the *Preliminary Results*. *Preliminary Results*, Attachment 2, BBs-Apparent Consumption and Imports from Japan as a Share Thereof.

With respect to Commerce's duty to report to the ITC the magnitude of the margin of dumping likely to prevail if the orders are revoked, Commerce in its *Final Results* rejected Timken's argument that the Department should affirm its *Preliminary Results* and use the margins calculated for the original investigation. *Id.* at 7–8. Instead, Commerce agreed with the respondents that the rates calculated for JTEKT and NSK in the five most recent reviews were a more appropriate gauge of the margins likely to prevail if the order were revoked. *Id.* at 9. Consequently, Commerce revised its margins in the *Final Results* and determined that the margins likely to prevail were 12.78% and 8.28%[2] for JTEKT and NSK respectively, compared to 73.55% and 42.99% in the original investigation. *Id.* Commerce also affirmed its position that it did not act contrary to law by commencing a sunset review on the basis of one domestic party's response to its notice of initiation. *Id.* at 11.

On June 2, 2006 petitioners, NMB Singapore Ltd., Pelmec Industries (PTE) Ltd., and NMB Techs. Corp. (collectively "NMB Singapore"), NTN Corporation, NTN Bearing Corp. of Am., Am. NTN Bearing Mfg. Corp., NTN-BCA Corp. NTN Bower Corp., NTN Driveshaft, and NTN Kugellagerfabrik GmbH (collectively "NTN"), NSK and JTEKT timely commenced separate civil actions contesting Commerce's *Final Results* pursuant to 28 U.S.C. § 1581(c). *See* NMB Singapore Summons, Ct. No. 06–00182 (June 2, 2006); NTN Summons, Ct. No. 06–00185 (June 2, 2006); JTEKT Summons, Ct. No. 06–00187 (June 2, 2006); NSK Summons, Ct. No. 0600190 (June 2, 2006). On June 5, 2006 Timken timely commenced an action as a producer within the meaning of 19 U.S.C. § 1677(9)(C) pursuant to 28 U.S.C. § 2631(c). Timken Summons, Ct. No. 06–00188 (June 5, 2006). On July 31, 2006 this court granted Timken's motions to intervene as of right in the actions commenced by Plaintiffs JTEKT and NSK. Order, Ct. No. 06–00187 (July 31, 2006); Order, Ct. No. 06–00190 (July 31, 2006). On the same day the court granted Plaintiffs JTEKT and NSK's motions to intervene as of right in the action commenced by Timken. Order (NSK), Ct. No. 06–00188 (July 31, 2006); Order (JTEKT), Ct. No. 06–00188 (July 31, 2006). On August 30, 2006, the Court granted Defendant the United States' consent motion to consolidate *NMB Singapore Ltd., et al. v. United States*, Ct. No. 06–00182, *NTN Corp. et al. v. United States*, Ct. No. 06–00185; *JTEKT Corp. et al. v. United States*, Ct. No. 06–00187; *Timken Co. v. United States*, Ct. No. 06–00188; and *NSK Corp. and NSK Ltd. et al. v. United States*, Ct. No. 06–00190 under lead case *NMB Singapore Ltd., et al. v. United States*, Ct. No. 06–00182. On November 14, 2006 and November 16, 2006 respectively, NTN and NMB Singapore filed notices of dismissal pursuant to USCIT R.

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[2] This figure was subsequently changed in the Department's *Amended Final Results* to 8.25% following consideration of NSK's ministerial-error allegation. 71 Fed. Reg. at 30,378.

41(a)(1)(A). The claims addressed in this opinion, as a consequence, pertain only to the Department's review of the order on ball bearings from Japan.

III
STANDARD OF REVIEW

In reviewing antidumping duty determinations this court "shall hold unlawful any determination, finding, or conclusion found . . . to be unsupported by substantial evidence on the record, or otherwise not in accordance with law." 19 U.S.C. § 1516a(b)(1)(B)(i). Substantial evidence is "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Huaiyin Foreign Trade Corp. v. United States*, 322 F.3d 1369, 1374 (Fed. Cir. 2003) (citing *Consol. Edison Co. v. N.L.R.B.*, 305 U.S. 197, 229, 83 L. Ed. 126, 59 S. Ct. 206 (1938)). It 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 Mar. Comm'n*, 383 U.S. 607, 619–20, 86 S. Ct. 1018, 16 L. Ed. 2d 131 (1966) (citing *N.L.R.B. v. Nevada Consol. Copper Corp.*, 316 U.S. 105, 106, 62 S. Ct. 960, 86 L. Ed. 1305 (1942)).

The existence of substantial evidence is determined by "considering the record as a whole, including evidence that supports as well as evidence that 'fairly detracts from the substantiality of the evidence.' " *Huaiyin Foreign Trade Corp.*, 322 F.3d at 1374 (citing *Atl. Sugar, Ltd. v. United States*, 744 F.2d 1556, 1562 (Fed. Cir. 1984)). The substantial evidence standard requires that "all of the competent evidence must be considered, whether original or supplemental, and whether or not it supports the challenged conclusion." *Heisig v. United States*, 719 F.2d 1153, 1157 (Fed. Cir. 1983).

In reviewing an agency's construction of a statute the court applies the *Chevron* two-prong analysis, which first looks at whether Congress has spoken directly to the issue and second, where Congressional intent is unclear "the question for the court is whether the agency's answer is based on a permissible construction of the statute." *Chevron*, 467 U.S. at 842–43. The agency's construction need not be the only reasonable interpretation or even the most reasonable interpretation. *Zenith Radio Corp. v. United States*, 437 U.S. 443, 450, 98 S. Ct. 2441, 57 L. Ed. 2d 337 (1978). Thus, "[a]s long as the agency's methodology and procedures are reasonable means of effectuating the statutory purpose, and there is substantial evidence in the record supporting the agency's conclusions, the court will not impose its own views as to the sufficiency of the agency's investigation or question the agency's methodology." *Ceramica Regiomontana v. United States*, 10 CIT 399, 405, 636 F. Supp. 961 (1986) (citing *Chevron U.S.A. Inc. v. Nat. Res. Def. Council*, 467 U.S. 837, 843, 104 S. Ct. 2778, 81 L. Ed. 2d 694 (1984)).

IV
DISCUSSION

A
Commerce's Determination that Revocation of the Antidumping Order Covering Ball Bearings from Japan would Lead to the Continuation and Recurrence of Dumping was Supported by Substantial Evidence and is in Accordance with Law

1
Commerce Lawfully Determined to Conduct a Sunset Review Based Upon the Participation of One Domestic Interested Party

Plaintiffs NSK argue that the antidumping order on ball bearings from Japan should be revoked for lack of domestic support. Memorandum of Points and Authorities in Support of NSK's Motion for Judgment Upon the Agency Record ("NSK's Brief") at 27, 31. NSK challenges Commerce's decision to initiate a full sunset review on the basis of the participation of only one domestic interested party. *Id.* at 6–7, 27. Plaintiffs assert that the regulations which require that Commerce only conduct a full sunset investigation if the combined responses of interested non-domestic parties account for more than 50% of total exports of the subject merchandise results in disparate treatment of foreign interested parties. *Id.* at 27. NSK also contests how Commerce decides the adequacy of the substantive responses received by domestic and foreign respondents for purposes of 19 U.S.C. § 1675(c)(3)(B), and argues that Commerce has failed to create similar thresholds for domestic and foreign interested parties. *Id.* at 27–28; *see* 19 U.S.C. § 1675(c)(3)(B); 19 C.F.R. § 351.218(e)(1)(i)-(ii).

Defendant contends that it properly determined that there was sufficient participation by the domestic industry in accordance with requirements set forth in 19 C.F.R. 351.218(e)(1)(i). Defendant's Response to Plaintiffs' Motions for Judgment Upon the Agency Record ("Defendant's Response") at 10. Commerce also argues that the statutory scheme does not require that that it treat domestic and respondent interested parties the same in determining whether responses to a notice of initiation are adequate. *Id.* at 11. Consequently Commerce concludes that it did not act contrary to law when it decided to conduct a full sunset review based on the participation of only one domestic interested party. *Id.*

Pursuant to statute, Commerce is expected to conduct a review of an antidumping order every five years after its issuance. 19 U.S.C. § 1675(c)(1). In that connection, Commerce's mandate is to issue a notice of initiation in which it requests that that "interested parties," as defined in 19 U.S.C. § 1677(9), submit certain relevant informa-

tion relating to their willingness to participate in the review and the likely effects of revocation of the order. 19 U.S.C. § 1675(c)(2). Commerce requires that at least one domestic interested party files a notice of intent to participate in the sunset review. 19 U.S.C. § 1675(c)(3)(A); 19 C.F.R. § 351.218(d)(1)(iii)(B)(7). If no domestic interested party responds, Commerce may revoke the order. 19 U.S.C. § 1675(c)(3)(A); 19 C.F.R. § 351.218(d)(1)(iii)(B)(3). If an interested party's response is deemed "inadequate" Commerce may, without further investigation, issue a final determination based on the facts available. 19 U.S.C. § 1675(c)(3)(B).

In the regulations promulgated to implement Section 1675, Commerce requires that "substantive responses" submitted by all interested parties must, *inter alia*, contain "[a] statement regarding the likely effects of revocation of the order . . . which must include any factual information, argument, and reason to support such statement;" and "[f]actual information, argument, and reason concerning the dumping margin . . . that is likely to prevail if the Secretary revokes the order." 19 C.F.R. § 351.218(d)(3)(ii)(F)-(G). For both domestic and respondent interested parties, Commerce will evaluate the adequacy of responses on a case-by-case basis, but has broadly defined what constitutes adequate responses to a notice of initiation. 19 C.F.R. § 351.218(e)(1)(i)-(ii). For respondent interested parties to meet the threshold, Commerce requires that they submit substantive responses, as defined above, and in addition, that they represent 50% of the volume of the total exports in question. 19 C.F.R. § 351.218(e)(1)(ii)(A).

Commerce's determination not to revoke the order on the basis of inadequate responses or the lack of response by a domestic producer, does not give rise to legal challenge where, as here, the domestic response was submitted in accordance with all applicable regulations. Commerce's rules for the treatment of domestic and respondent interested parties are unambiguous. Neither the statute nor the regulations prohibit Commerce from treating responses received by domestic interested parties differently than those received by respondent interested parties. Neither the statute nor the regulations compel Commerce to construe the term "inadequate" for purposes of evaluating the responses of domestic and respondent interested parties.

The purpose of the antidumping statute is to "protect domestic manufacturing against foreign manufacturers who sell at less than fair market value." *Koyo Seiko Co., Ltd. v. United States*, 20 F.3d 1156, 1159 (Fed Cir. 1994). The fact that Congress included a threshold requirement of domestic support before initiating an antidumping investigation is indicative that Congress did not perceive a need to impose a similar threshold to launch a review of an order resulting from such an investigation. *See* 19 U.S.C. § 1673a(c)(4). Indeed, of the methods in which to initiate sunset reviews mandated by the

WTO General Agreement on Tariffs and Trade, the United States opted to automatically initiate sunset reviews, as opposed to initiating reviews only in response to a request by the domestic industry. *See* Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade, Article 11.3 (1994). In addition, the applicable regulations provide the framework for Commerce to determine the adequacy of responses. 19 C.F.R. § 351.218(d)(3). Here, the domestic interested party filed a substantive response to the notice of initiation which contained the required information and Commerce, as a result, correctly decided to launch an investigation. Similarly, Plaintiffs NSK and JTEKT filed substantive responses as respondent "interested parties" that also met the Department's threshold as adequate responses. Accordingly, Commerce did not abuse its discretion by launching a sunset review based on the participation of only one domestic interested party.

2
Commerce is Not Obligated to Adjust Margins Calculated in Prior Reviews Retroactively to Reflect WTO Decisions

NSK challenges the Department's methodology used to calculate dumping margins in the original investigation and argue that, had Commerce followed WTO decisions in its fair-value analysis, its margins would have been zero or *de minimis* in multiple reviews, and Commerce, as a result, would have revoked the order. NSK's Brief at 15–21. Specifically, NSK argues that the likelihood determination that is undertaken during a sunset review involves "imports entered after the effective date of the potential revocation of the order" and is therefore an inquiry into evidence similar to conducting a new investigation. *Id.* at 18 (quoting *AG der Dillinger Huttenwerke et al. v. United States*, 26 CIT 298, 317, 193 F. Supp. 2d 1339 (2002) ("*Dillinger*")). In addition, NSK asserts that Commerce is required to apply "current law" to any sunset review, irrespective of the date of issuance of the order.[3] *Id.*

NSK notes that in a March 6, 2006, announcement in the Federal Register, Commerce modifies its prior position on whether to offset less than fair value sales with fair value sales ("zeroing"[4]) and states its intention to apply the offset in future investigations where it applies an average-to-average methodology. *Id.* at 19; *Antidumping Proceedings: Calculation of the Weighted Average Dumping Margin During an Antidumping Duty Investigation*, 71 Fed. Reg. 11,189

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[3] Plaintiffs concede that Commerce may apply "old" law in a sunset review provided that the agency can demonstrate that applying new law does not lead to the most accurate results. NSK's Brief at 18 (citing *Dillinger*, 26 CIT at 317–18).

[4] "Zeroing" is the practice of assigning the value of zero to negative margin transactions in the calculation of the weighted average margin. *See, e.g., Corus Staal BV v. United States*, 2007 LEXIS 22531 at *1–2 n.2 (Fed. Cir. 2007).

(March 6, 2006) ("*Antidumping Proceedings*").[5] NSK however, contends that even if Commerce selects a methodology other than the average-to-average methodology, "current legal developments confirm that the agency's practice of zeroing should be eliminated from whatever dumping calculation Commerce makes." NSK's Brief at 20. In addition, NSK argues that Commerce, "if good cause is shown," may consider factors other than weighted average dumping margins determined in the original investigation and subsequent reviews, and that, based on the legislative history of the statute, Commerce has substantial discretion to adjust margins as it deems appropriate. *Id.* at 16–17 (citing 19 U.S.C. § 1675a(c)(1)(A); 19 U.S.C. § 1975a (c)(2)).

Defendant maintains that its determination not to revoke the order is in accordance with law because it was not obligated to adjust respondents' prior margins to reflect WTO decisions concerning the practice of "zeroing." Defendant's Response at 18. Defendant reasons that those decisions have not yet been implemented into U.S. law, and in any event, would operate prospectively only from such a date as the decisions are implemented. *Id.*

In a likelihood determination, Commerce is to decide, in accordance with the Statement of Administrative Action accompanying the Uruguay Rounds Agreements Act that revocation is likely to lead to continuation or recurrence of dumping in instances where "declining import volumes are accompanied by the continued existence of dumping margins after the issuance of an order." SAA at 889. Here, Commerce based its decision on the fact that margins on ball bearings from Japan had been above *de minimis* during the original investigation and in fifteen subsequent reviews. Decision Memo at 5. As a result, Commerce reasonably concluded that while "[d]eclining margins alone normally are not determinative as to whether revocation of an antidumping order is not likely to lead to continuation or recurrence of dumping . . . continuing margins at any level would lead to a finding of likelihood." *Id.* at 4. In response to NSK's contention that Commerce refused to adjust the margins, and "zero" negative margins, the Department correctly remarked that the WTO panel decisions cited by Plaintiffs "had no effect upon the margins calculated in previous administrative proceedings" and that "imple-

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[5] In a request for comments on the issue, Commerce stated that:

> [T]he Department usually makes comparisons between average export prices and average normal values and does not offset any dumping that is found with the results of comparisons for which the average export price exceeds the average normal value. A recent WTO dispute settlement report has found that the United States application of this methodology was inconsistent with our WTO obligations. In response to this report, the Department will abandon the use of average-to-average comparisons without such offsets.

Antidumping Proceedings, 71 Fed. Reg. at 11,189.

mentation of the WTO panel decisions is prospective and relates only to new investigations using average-to-average comparisons." Defendant's Response at 19–20. Commerce's decision in this case is consistent with Federal Circuit precedent which has repeatedly upheld Commerce's margin-calculation methodology. Defendant's Response at 22; *see also Corus Staal BV*, 395 F.3d 1343, 1348–50 (Fed. Cir. 2005); *Timken Co. v. United States*, 354 F.3d 1334, 1344–45 (Fed. Cir. 2004).

This court has continuously affirmed Commerce's non-dumped sales methodology relating to margins calculated pre- or post-URAA dumping law. *See, e.g., Paul Muller Industrie GmbH & Co. v. United States*, 435 F. Supp. 2d 1241 (CIT 2006); *NSK Ltd. v. United States*, 358 F. Supp. 2d 1276 (CIT 2005); *SNR Roulements v. United States*, 341 F. Supp. 2d 1334 (CIT 2004); *PAM, S.p.A. v. United States*, 265 F. Supp. 2d 1362 (CIT 2003); *Timken v. United States*, 26 CIT 1072, 240 F. Supp. 2d 1228 (2002); *Bowe Passat Reinigungs-Und Waschereitechnik GmbH v. United States*, 20 CIT 558, 926 F. Supp. 1138 (1996); *Serampore Industries Pvt., Ltd. v. United States*, 11 CIT 866, 675 F. Supp. 1354 (1987). Accordingly, Commerce acted in conformity with prevailing law in determining that prior margins were calculated using an appropriate methodology and properly used those margins, without adjustments, in its sunset review to ascertain the likelihood of dumping. A WTO decision does not take precedent over U.S. law absent its adoption into law by the United States Congress. *See* SAA at 1032 ("Reports issued by panels or the Appellate Body under the DSU have no binding effect under the law of the United States and do not represent an expression of U.S. foreign trade policy."); *see also* 19 U.S.C. § 3533. Commerce acted consistently with governing law when it declined to adjust NSK's margins on the basis of the WTO decisions.

NSK's argument that the court should apply the practice of zeroing retroactively in reliance on Commerce's March 6, 2006 Federal Register notice is also not supported by law. *Antidumping Proceedings*, 71 Fed. Reg. at 11,189. Commerce in its Federal Register notice expressed its intent to "offset any dumping that is found with the results of comparisons for which the average export price exceeds the average normal value" and "abandon the use of average-to-average comparisons without such offsets." *Id.* However, the implementation of the WTO decision is prospective and relates only to new investigations using average-to-average comparisons. Commerce expressly stated in its March 6 notice that "*[a]ny changes in methodology will be applied in all investigations initiated on the basis of petitions received on or after the first day of the month following the date of publication of the Department's final notice of the new weighted average dumping margin calculation methodology.*" *Id.* (emphasis added). Commerce published its *Final Modification* on December 27, 2006, modified on January 26, 2007, at which time Commerce specified

that it would "apply the final modification in all current and future antidumping investigations as of the effective date." *Antidumping Proceedings: Calculation of the Weighted-Average Dumping Margin During an Antidumping Investigation; Final Modification*, 71 Fed. Reg. 77,722 (December 27, 2006) ("*Final Modification*"); *Antidumping Proceedings: Calculation of the Weighted-Average Dumping Margins in Antidumping Investigations; Change in Effective Date of Final Modification*, 72 Fed. Reg. 3783 (January 26, 2007) ("*Amended Final Modification*"). The effective date of the modification was set at February 22, 2007. *Amended Final Modification*. As a result, Commerce expressly stated that it would not be applying the modification retroactively.

The sunset investigation to which this matter relates was initiated in June 2005, not as a new investigation, but as a review. *Notice of Initiation*, 70 Fed. Reg. at 31,423. In addition, Commerce did not apply the average-to-average methodology to which the offset applies. Commerce thus acted in accordance with law when it determined that it was not required to adjust NSK's margins retroactively.

3
Commerce Adequately Examined the Volume of Imports Before and After the Issuance of the Order and Determined that Import Volumes Decreased Since the Issuance of the Order

Plaintiffs JTEKT challenge Commerce's finding that the total weight and value of Japanese ball bearings imported "decreased substantially" post-order and remained "well-below pre-order levels." JTEKT's Brief at 3–4, 6 (citing Preliminary Decision Memo at 10). Instead, JTEKT contends that the value of imports did not decrease post-order and that the average value of imports immediately preceding the second sunset review was over $296 million, more than 25% higher than the average value of imports in the two years prior to the imposition of the order in 1989. *Id.* at 6, 10 (citing Preliminary Decision Memo, U.S. Imports Statistics). JTEKT also argues that the mere 10% difference between the average weight in the two years preceding the imposition of the order, as compared with the average weight imported over the period of review does not support the Department's conclusion that dumping is likely to continue or recur if the order were revoked. *Id.* at 10–11. JTEKT asserts that a simple comparison of pre- and post-order figures does not adequately inform Commerce's likelihood determination, but that the numbers must be considered concurrently with market trends. *Id.* at 7, 12. As a result, JTEKT argues that the Department acted contrary to its statutory mandate which directs it to consider "the volume of imports of the subject merchandise for the period before and the period after the issuance of the antidumping duty order." *Id.* at 9 (citing 19 U.S.C. § 1675a(c)(1)(B)). According to JTEKT, the available data in-

dicates that the total weight and value of imports from Japan remained stable during the past 15 years and did not decrease significantly and that the Department's conclusion therefore is not supported by substantial evidence and not in accordance with law. *Id.* at 4.

NSK argues that the agency failed: (1) to consider the pre- and post-order volume of subject imports; (2) to collect data about subject import volumes; and (3) to analyze import-volume databases. NSK's Brief at 6. Specifically NSK contends that Commerce failed to collect data relating to the volume of subject imports, but relied on non-volume data to conclude in its *Preliminary Results* that imports by weight and value had remained below pre-order volumes for the duration of the order. NSK's Brief at 5, 21–23. NSK submits that import data furnished by Timken in its substantive response demonstrated that imports of ball bearings from Japan had comparatively increased by value during the period 2000–2004 relative to the 1987–1990 period of review. *Id.* at 5 (citing Timken's Substantive Response, Pub. Doc. 12, at 10 (July 1, 2005)). NSK argues that an accurate analysis of the import value in conjunction with the export weight data suggests that import volume has remained stable pre- and post order. *Id.* at 24–25.

In the alternative, NSK argues that the data supports revocation of the antidumping order. NSK's Brief at 23–26. NSK provides a table in its brief, upon which it concludes that "the value of subject imports is more than 25 percent higher for the past five years than the average value of subject imports for the years preceding the order." *Id.* at 24 (citing PRM, Pub. Doc. 46, Attachment). NSK contends that a corresponding decline in domestic consumption implies that additional imports, upon revocation of the order, are unlikely to yield increased market share. *Id.* NSK, furthermore, argues that the weight of post-order imports levels, on average, is not significantly below pre-order levels and that, therefore, revocation of the order would not likely lead to continuation or recurrence of dumping. *Id.* at 25.

Defendant argues that its finding that revocation of the order would likely lead to the continuation or recurrence of dumping was in accordance with law and supported by substantial evidence because dumping continued above *de minimis* levels after the issuance of the order and throughout the period of review, and because import volumes declined over the life of the order. Defendant's Response at 18. Defendant also contends that its analysis of import volume comports with the statute because Commerce's interpretation of the statute to permit analysis of weighted import volumes was a reasonable exercise of its discretion. Defendant further argues that it is not obligated to analyze volume in terms of average weight. *Id.* at 28–29.

Commerce is required to consider "the volume of imports of the subject merchandise for the period before and the period after the is-

suance of the antidumping duty order." 19 U.S.C. § 1675a(c)(1)(B). The SAA provides that "[d]eclining import volumes accompanied by the continued existence of dumping margins after the issuance of the order may provide a strong indication that, absent an order, dumping would be likely to continue, because the evidence would indicate the exporter needs to dump to sell at pre-order volumes." SAA at 889. Here, Commerce reviewed the Japanese export statistics provided by the parties to the investigation, which indicated that the volume of imports at no point, from the imposition of the order until 2004, exceeded the import volumes in 1988 and 1989, prior to the discipline of the order. *See, e.g.*, Decision Memo, Attachment 4, Japanese Ministry of Finance ("MOF") Trade Statistics. As a result, Commerce reasonably concluded that the volume of Japanese imports continued to decrease from the imposition of the order throughout the period of review and for the life of the order.

Plaintiffs JTEKT and NSK fail to set forth valid support for the proposition that Commerce is required to provide its analyses using average, as opposed to per annum, figures in its assessment of the volume of imports. *See* JTEKT's Brief at 10–11; NSK's Brief at 25. NSK's contention that because the decrease in average post-order import levels is not "significantly below" pre-order levels, Commerce's likelihood determination is flawed, is likewise unsupported as they do not provide that there is a threshold Commerce must meet to take into account a decrease in import volumes. *See* NSK's Brief at 25. Notwithstanding these assertions, the statute and the SAA do not speak to the use of averages, and the SAA specifically notes that declining import volumes coupled with dumping may be a strong indicator that dumping would likely continue. *See* SAA at 889. In fact, the SAA states that a finding of no dumping margins accompanied by steady imports, or increasing imports, may indicate that foreign importers do not need to dump in order to maintain market share in the United States. *Id.* at 889–90. Here, Commerce determined that dumping continued above *de minimis* levels and identified a steady decrease in import volumes and therefore reasonably concluded that dumping was likely to recur. Preliminary Decision Memo at 10; *see also Final Results* at 4. In addition, Commerce expressly stated in its *Final Results* that it considered market share in its analysis. Decision Memo at 9.

4

Commerce Acted within its Discretion in Determining that it Did Not Require Additional Fact-Gathering in Order to Adequately Make a Determination Based on the Information Provided by the Parties

Plaintiffs NSK argue that Commerce failed to fulfill its statutory obligation to conduct a full sunset review by not engaging in additional fact-gathering and basing its decision purely on the informa-

tion submitted by the parties. NSK's Brief at 11–13. NSK says that Commerce's inactivity is contrary to statute. *Id.* at 12. In support of this contention, NSK cites *Dillinger* for the proposition that the statute "does not charge any interested party with the ultimate burden of persuasion" and that "rather than place a burden of proof on either the foreign or the domestic interested party, the statute provides that parties may submit information in their response to Commerce's notice of initiation of review." 26 CIT at 303–04. NSK suggests that it was incumbent upon Commerce to issue questionnaires based on the respondents' substantive filings and to analyze the parties' arguments. NSK's Brief at 12–13. Indeed NSK claims that under *Dillinger*, the agency in a full review is required to "engage in an analysis that is at least somewhat more searching" than in an expedited review, and that "pursuant to its 'fact-gathering' obligation in a full sunset review, Commerce may solicit more information as necessary." *Id*; NSK's Brief at 11–12 (citing *Dillinger*, 26 CIT at 305).

Commerce argues that it did not act contrary to its statutory mandate when it based its determination on information submitted by the parties in the record because, although it may obtain additional information in full sunset reviews, it is not required to do so. Defendant's Response at 30.

The statute and subsequent interpretations are silent on the issue of whether Commerce is required to actively solicit information from the parties in a full sunset review. The question for the court is whether it was reasonable for Commerce to rely solely on the information submitted by the parties in making its determination. Based on Commerce's statutory mandate to compare pre-order volumes to post-order volumes, Commerce reasonably relied on the export statistics provided by Plaintiffs concerning the volume and value of ball bearings from Japan prior to the imposition of the order in 1989 and throughout the period of review. *See* Decision Memo, Attachment 4, Japanese MOF Trade Statistics. NSK argues that the regulations do not imply that the responses provided by the parties will "form the entire basis on which the agency will decide that review." NSK's Reply at 2. However, the regulations also do not direct the type of investigation that Commerce is required to perform, but instead defer to the discretion of the agency to ensure that the appropriate information is obtained. *See* 19 C.F.R. § 351.218(d)(3)(ii)-(iv). NSK contends that the statutory mandate that permits Commerce to conduct an expedited review "without further investigation" in the absence of a response to the notice of initiation (or inadequate responses) "presupposes that full reviews will involve further investigation." NSK's Reply at 2. This logic is unsupported by the statute.

The statute does not expressly direct that a full investigation shall involve fielding information beyond the parties' substantive responses to the notice of initiation. In addition, the SAA provides a

distinction between a "full-fledged review" involving fact gathering, and an "expedited review" based on facts available. The SAA explains the distinction as follows:

> If parties provide no or inadequate information in response to a notice of initiation, it is reasonable to conclude that they would not provide adequate information if the agencies conducted a full-fledged review. However, when there is sufficient willingness to participate and adequate indication that parties will submit information requested throughout the proceeding, the agencies will conduct a full review.

SAA at 879–80; *see also Dillinger*, 26 CIT at 305.

The parties also argue the merits of *Dillinger*, in which this court held that Commerce violated its legal obligation to conduct a full review "because it failed to consider adequately evidence on the record, or to seek additional evidence necessary to make its determination." *Dillinger*, 26 CIT at 305; *see* NSK's Brief at 12; NSK's Reply at 3; Defendant's Response at 30. In this case Commerce did consider the evidence on the record and acted within its discretion in determining the adequacy of the data in informing its final determination. The court in *Dillinger* held that the parties "may submit information in their response to Commerce's notice of initiation of review," but did not hold that the parties were required to submit such information or that Commerce is foreclosed from relying on such information, once submitted. *Id*; 26 CIT at 304. Indeed, NSK were also not barred from submitting additional information to Commerce during the investigation, had Plaintiffs deemed it necessary.

The agency's role is to weigh the evidence. Plaintiffs correctly assert that Commerce may issue questionnaires and solicit additional information from the respondents during a full investigation. Plaintiffs, however, do not demonstrate that Commerce is legally required to do so. Here, this court must determine whether Commerce's interpretation of the statute, that it was not required to seek additional information to make its determination, was reasonable. There was no express Congressional intent that Commerce engage in a fact-finding process that goes beyond the parties' substantive responses. *See Chevron*, 467 U.S. at 842–43. Furthermore, in accordance with the regulations promulgated for fact-gathering in sunset reviews, the SAA and prevailing case law, Commerce is not required to issue questionnaires when conducting a full investigation. *See, e.g., Antidumping Duties; Countervailing Duties; Final Rule*, 62 Fed. Reg. 27,296, 27,324 (May 19, 1997).[6] Accordingly Commerce acted well within the bounds of its discretion when it determined that it did not

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[6] "[I]t may not be necessary to issue questionnaires in every sunset review. Accordingly, we have revised § 351.221(c)(5) by adding a new paragraph (iii) which permits the Secretary to refrain from issuing the questionnaires called for by § 351.221(b)(2). Of course, the

require additional fact-gathering in order to adequately make a determination based on the information provided by the parties.

B
Commerce Did Not Err in Choosing to Report a More Recently Calculated Dumping Margin to the ITC as the Magnitude of the Margin Likely to Prevail

Timken contends that Commerce should have reported the margins from the original investigation to the ITC and that the Department's decision to report more recently calculated dumping margins for the Japanese respondents was contrary to law. The Timken Company's Rule 56.2 Motion for Judgment Upon the Agency Record and Memorandum of Points and Authorities ("Timken's Brief") at 2. Timken argues that the more recently calculated margins do not comport with the Department's mandate to consider pre- and post-order import volumes in determining foreign companies' likely behavior absent the discipline of an order. *Id.* at 24–25. While Timken recognizes the Department's practice of using more recently calculated margins for pre-order volumes, it contends that Commerce has adopted this approach primarily in cases where it also made market share comparisons. *Id.* at 25–26. Timken submits that Commerce ignored available evidence pertaining to pre-order imports and market share in favor of using the margins calculated more recently during the period of review. *Id.* at 3, 26 (citing *Tapered Roller Bearings from the People's Republic of China; Final Results of Full Sunset Review*, 65 Fed. Reg. 11,550 (March 3, 2000) ("*Tapered Roller Bearings*").

Timken also contends that Commerce previously has held that any margin calculated under the discipline of an order cannot be used to compare pre- and post order volumes because that margin "cannot logically reflect import volumes or pricing practices likely to exist if the order were revoked." *Id.* at 26 (citing *Pure Magnesium from Canada; Final Results of Full Sunset Review*, 65 Fed. Reg. 41,436 (July 5, 2005) ("*Magnesium*")). Timken contends that the Japanese respondents' exports were significantly below pre-order volumes and that Commerce "failed to follow the SAA's instructions of looking at the 'relationship between dumping margins, or the absence of margins, and the volume of imports of the subject merchandise, comparing the periods before and after the issuance of an order.' " Timken's Brief at 28 (citing SAA at 889–890).

Timken furthermore asserts that Commerce's characterization that respondents' dumping margins were declining, were not supported by substantial evidence. *Id.* at 37. Timken argues that the fig-

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Secretary would retain the discretion to issue questionnaires in sunset reviews in appropriate situations." 62 Fed. Reg. at 27,324.

ures do not support Commerce's conclusion, but instead that the margins fluctuated and that there was no pattern of decline. *Id.*

Defendant argues that Commerce's reporting of the magnitude of the margin likely to prevail from later reviews was supported by substantial evidence and was in accordance with law. Defendant's Response at 34. Commerce asserts that it properly analyzed import volumes and that Timken "conflate the criteria for determining likelihood with the separate determination of the margin likely to prevail." *Id.* at 36. Commerce also contends that there is no requirement that it analyze import volumes in the same manner for purposes of its magnitude determination and that its analysis of the respondents' relative market share, based on percentage exports, was supported by substantial evidence. *Id.* at 39, 41. Commerce contends that it is not precluded, by either the statute or the SAA, from analyzing market share in terms of relative share of exports, and that Timken's reliance on *Tapered Roller Bearings* is misplaced because Commerce in that case relied on "[c]ompany-specific export values as reported by domestic and respondent interested parties rather than relative United States market share." *Id.* at 42–43. As a result, Commerce argues that its decision to report margins from an earlier review, as opposed to the margin calculated in the original investigation, was supported by substantial evidence and in accordance with law. *Id.*

JTEKT and NSK oppose Timken's claim that the margins in the original investigation would be a better gauge of the margins likely to prevail if the order was revoked. Memorandum of JTEKT Corp. and Koyo Corp. of U.S.A. in Response to Timken U.S. Corp.'s Motion for Judgment on the Agency Record ("JTEKT's Response") at 2–4; Memorandum in Opposition to the Timken Company's Rule 56.2 Motion for Judgment Upon the Agency Record ("NSK's Response") at 11. JTEKT argues that the margins calculated in the 2003–2004 administrative review are a better measure of the margins likely to prevail if the antidumping order were revoked as opposed to the margins originally calculated for its predecessor, Koyo, fifteen years ago. JTEKT's Response at 4. JTEKT contend that Timken obfuscates the legal and factual elements the Department must consider in making its determination and that Commerce, in fact, has broad discretion to determine the margins likely to prevail if the order was revoked. *Id.* In response to Timken's argument that the Department did not apply the correct standard, JTEKT notes that:

> . . . the statutory and SAA provisions cited by Timken in support of its argument pertain not to the evidence to be considered by the Department in determining the margin likely to prevail, but rather the distinct, and more fundamental, determination of whether dumping is likely to continue or recur if the order were revoked.

Id. at 7. JTEKT notes that if the Department has identified that dumping margins have decreased over the life of the order and imports have remained steady over the same time period, then it is appropriate for the Department to use more recently calculated margins. *Id.* at 9–10.

Timken correctly states that the conventional use of pre-order volume figures is appropriate because it is "the only calculated rate that reflects the behavior of exporters . . . without the discipline of an order . . . ." Timken's Brief at 25 (citing SAA at 890). However, though the governing statute directs that Commerce must provide to the ITC the margin that is likely to prevail if the order was revoked, 19 U.S.C § 1675a(c)(3), the SAA states that this rate will "normally" be the rate calculated in the original investigation. SAA at 890. The inclusion of the term "normally" implies that circumstances may arise where the margins calculated in the original investigation may not be the most appropriate margins to report to the ITC. In fact, the SAA provides that "*[i]n certain instances, a more recently calculated rate may be appropriate*. For example, if dumping margins have declined over the life of an order and imports have remained steady or increased, Commerce may conclude that exporters are likely to continue dumping at the lower rates found in a more recent review." *Id.* at 890–891 (emphasis added).

Timken's reliance on *Magnesium* for the proposition that pre-order volumes must be used in lieu of more recent margins is misplaced. *Magnesium* is distinguishable because the respondent in that case argued that because it was a new producer the pre-order import volumes Commerce identified did not reflect normal commercial behavior, and that a later year would better reflect pre-order imports. 65 Fed. Reg. at 41,437. Commerce concluded that the later year did not adequately reflect pre-order volumes because the order was already in effect at that time. *Id.* Thus, the finding in *Magnesium* does not invalidate Commerce's decision in this case to report more recent dumping margins to the ITC based on its finding that dumping margins declined over the life of the order and that imports remained stable, as contemplated by the SAA. *See* SAA at 890–891.

Contrary to Timken's contentions, Commerce explicitly stated in its *Final Determination* that it had analyzed all Japanese respondents' submissions reporting relative market share, which indicated that imports had remained steady or increased for the life of the order. Decision Memorandum at 9–10. In fact, based on the information that the interested parties submitted, the Department concluded that import volumes were increasing as measured by market share. *See* Defendant's Response at 36. Timken's contention that Commerce ignored the evidence submitted is not substantiated by the evidence in the record.

There is no requirement that Commerce analyze margins in the same manner that it analyzes import volumes for purposes of its magnitude determination. Commerce based its conclusion that the respondents' margins decreased since the issuance of the order on its examination of the past five reviews, and for the life of the order. Decision Memo at 2, 9–10. Commerce concluded that these margins were lower than those calculated in the original investigation and that when compared, the dumping margins decreased for the life of the order. *Id.* at 9. In fact, Commerce concluded that NSK's dumping margin ranged from *de minimis* levels to 18.88%, while its margin in the original investigation was 42.99%, and that Koyo's (JTEKT) margins over the past 15 reviews were between 4.98% and 18.6% compared with a pre-order margin of 73.55%. *Id.* at 9. Commerce concluded that each respondent's market share "remained steady or increased during the sunset review period." *Id.* at 9. Timken's argument focuses on year-to-year variations and does not take into account that each respondent's margin declined overall. Accordingly, Commerce's analysis is sustained.

1
Commerce is not Required to Address All Arguments Advanced by the Respondents in a Sunset Review

Timken asserts that Commerce has a statutory obligation pursuant to § 1677f(i)(3) to address all arguments raised by respondents and that by not addressing its weight-based statistics argument, Commerce contravened the statute. Timken's Brief at 38. With respect to the weight-based statistics, Timken argues that Japanese imports by weight declined during the period of review. *Id.* at 39–40. Timken asserts that it had argued in favor of using weight-based statistics and cautioned the use of aggregate U.S. import statistics contending that such numbers may be distorted due to their organization by HTS [Harmonized Tariff Schedules] categories. *Id.* at 39.

The Defendant denies that it is required to address all arguments advanced by parties to a sunset review, but says that pursuant to prevailing law it shall address issues material to making its determination. Defendant's Response at 38.

Pursuant to statute Commerce is required to provide an explanation of the basis of its decision and address the relevant arguments made by interested parties. 19 U.S.C. § 1677f(i)(3). However, "[e]xisting law does not require that an agency make an explicit response made by every party, but instead requires that issues material to the agency's determination be discussed so that the path of the agency may reasonably be discerned by the reviewing court." SAA at 892 (internal citations omitted). Here, Commerce examined the import and export statistics provided by the respondents and used weight-based data where available. *See, e.g.*, Defendant's Response at 39 (citing *Preliminary Results* at cmt. 1). Commerce used the most company-

specific data available because the respondents provided information regarding their import volumes on a per-unit basis. *Id.* As a result Commerce did not act contrary to law when it did not address all of Timken's arguments in its *Final Results*.

V
CONCLUSION

For the foregoing reasons, Commerce's determination in *Ball Bearings and Parts Thereof from Japan and Singapore; Five-Year Sunset Reviews of Antidumping Duty Orders; Final Results*, 71 Fed. Reg. 26,321 (May 4, 2006), *as amended by*, 71 Fed. Reg. 30,378 (May 26, 2006) is AFFIRMED; and Plaintiffs' NSK, JTEKT and Timken's Motions for Judgment Upon the Agency Record are DENIED.

NMB SINGAPORE LTD., et al., Plaintiffs, v. UNITED STATES, Defendant, and THE TIMKEN COMPANY, Defendant-Intervenor.

Before: WALLACH, Judge
Consol. Court No.: 06–00182

ORDER AND JUDGMENT

This case having come before the court upon the Motion of Plaintiffs JTEKT Corporation and Koyo Corporation of U.S.A. for Judgment on the Agency Record; Motion for Judgment on the Agency Record submitted by Plaintiffs NSK Corporation and NSK Ltd.; and The Timken Company's Rule 56.2 Motion for Judgment Upon the Agency Record (collectively "Plaintiffs' Motions"); the court having reviewed all papers and pleadings on file herein, having heard oral argument by each party, and after due deliberation, having reached a decision herein; it is hereby

ORDERED ADJUDGED AND DECREED that Plaintiffs' Motions are DENIED; and it is further

ORDERED ADJUDGED AND DECREED that the decision of the U.S. Department of Commerce ("Commerce") in *Ball Bearings and Parts Thereof from Japan and Singapore; Five-Year Sunset Reviews of Antidumping Duty Orders; Final Results*, 71 Fed. Reg. 26,321 (May 4, 2006), as amended by *Ball Bearings and Parts Thereof from Japan; Five-year Sunset Review of Antidumping Duty Order; Amended Final Results*, 71 Fed. Reg. 30,378 (May 26, 2006), is hereby AFFIRMED; and it is further

ORDERED that all parties shall review the court's Opinion in this matter and notify the court in writing on or before Friday, December 7, 2007, whether any information contained in the Opinion is confidential, identify any such information, and request its deletion from the public version of the Opinion to be issued thereafter. The parties

shall suggest alternative language for any portions they wish deleted. If a party determines that no information needs to be deleted, that party shall so notify the court in writing on or before December 7, 2007.

Slip Op. 07–176

NSK CORPORATION, *et al.*, Plaintiffs, and FAG ITALIA SpA, *et al.*, Plaintiff-Intervenors, v. UNITED STATES, Defendant, and THE TIMKEN COMPANY, Defendant-Intervenor.

Before: Judith M. Barzilay, Judge.
Consol. Court No. 06–00334

[Motion for preliminary injunction granted.]

December 10, 2007

OPINION

Crowell & Moring, LLP, (*Matthew P. Jaffe*), *Robert A. Lipstein*, *Alexander H. Schaefer*, and *Sobia Haque*; *Sidley Austin, LLP*, *Neil R. Ellis* and *Jill Caiazzo* for Plaintiffs.

Grunfeld Desiderio Lebowitz Silverman & Klestadt, LLP, (*Max F. Schutzman*), *Adam M. Dambrov*, and *William F. Marshall*; *Steptoe & Johnson, LLP*, *Herbert C. Shelley*, *Alice A. Kipel*, and *Susan R. Gihring* for Plaintiff-Intervenors.

Jeffrey S. Bucholtz, Assistant Attorney General; (*Mark B. Rees*), *David A.J. Goldfine*, *James M. Lyons*, and *Neal J. Reynolds*, Office of the General Counsel, United States International Trade Commission.

Stewart and Stewart, (*Eric P. Salonen*), *Geert De Prest*, *Elizabeth A. Argenti*, and *Terence P. Stewart* for Defendant-Intervenor.

BARZILAY, Judge: Plaintiffs NSK Corporation, NSK Ltd., and NSK Europe Ltd. (collectively, "NSK"), move this court for a preliminary injunction to: (1) enjoin U.S. Customs and Border Protection ("Customs") from liquidating entries of ball bearings (and parts thereof) imported during the eighteenth period of review ("POR") (May 1, 2006 through April 30, 2007); and (2) order the U.S. Department of Commerce ("Commerce") to instruct Customs to suspend liquidation of said entries pending judicial review of the underlying litigation. *See* USCIT Rule 65. Defendant-Intervenor Timken Company ("Timken"), is the only party that opposes Plaintiff's motion. Defendant United States (the "Government"), takes no position in this matter. Mot. TRO & Prelim. Inj. The court has jurisdiction over this case pursuant to 28 U.S.C. § 1581(c), and may review Plaintiffs' motion for a preliminary injunction pursuant to 19 U.S.C. § 1516a(c)(2). The court finds that Plaintiffs would be irreparably

harmed and have a sufficient likelihood of success on the merits, and therefore grants their motion for a preliminary injunction.

BACKGROUND

Since 1989, NSK[1] has imported and produced ball bearings that are subject to an antidumping order. *See Antidumping Duty Orders: Ball Bearings, Cylindrical Roller Bearings, and Spherical Plain Bearings and Parts Thereof From the Federal Republic of Germany, France, Italy, Japan, Romania, Singapore, Sweden, Thailand, and the United Kingdom*, 54 Fed. Reg. 20,900–911 (Dep't Commerce May 15, 1989) ("AD Order"); *Continuation of Antidumping Duty Orders: Certain Bearings From France, Germany, Italy, Japan, Singapore, the United Kingdom, and the People's Republic of China*, 65 Fed. Reg. 42,665 (Dep't Commerce July 11, 2000). On June 1, 2005, the International Trade Commission ("ITC") automatically initiated a second five-year sunset review of the *AD Order* pursuant to section 751(c) of the Tariff Act of 1930, as amended by 19 U.S.C. § 1675(c), covering the same class of ball bearings that NSK Corporation imports from its sister companies in Japan and the United Kingdom.[2] *See Certain Bearings From China, France, Germany, Italy, Japan, Singapore, and the United Kingdom*, 70 Fed. Reg. 31,531 (ITC June 1, 2005); *see also* § 1675(c). After finding sufficient participation among interested parties, the ITC commenced a full sunset review in accordance with 19 U.S.C. § 1675(c)(5). *See Certain Bearings From China, France, Germany, Italy, Japan, Singapore, and the United Kingdom*, 70 Fed. Reg. 54,568 (ITC Sept. 15, 2005). Approximately one year later, the ITC concluded that revocation of the *AD Order* would likely lead to a continuation or reoccurrence of material injury to the domestic industry. *See Certain Bearings From China, France, Germany, Italy, Japan, Singapore, and the United Kingdom: Investigation Nos. 731–TA–344, 391–A, 392–A and C, 393–A, 394–A, 396, and 399–A (Second Review)*, 71 Fed. Reg. 51,850 (ITC Aug. 31, 2006) ("*Final Results*")

In the underlying litigation, NSK challenges the Final Results of the second sunset review pursuant to section 516A(a)(2)(B)(iii) of the Tariff Act of 1930, as amended, 19 U S.C. § 1516a(a)(2)(B)(iii). Compl. 3–7. As an interested party from the domestic industry, Timken did not initiate an administrative review for entries made during the eighteenth POR. *See* 19 U.S.C. §§ 1516(a)(2) & 1677(9);

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[1] NSK Corporation is a U.S. corporation that produces ball bearings domestically and imports ball bearings from its sister companies NSK Ltd., a Japanese corporation, and NSK Europe Ltd., a British corporation. NSK Ltd. is a party to the above captioned case, while NSK Europe Ltd. is a party to Court No. 06–0036, which has been consolidated with this case pursuant to USCIT Rule 42(a).

[2] For a concise legal history and explanation of sunset reviews, see *NMB Sing. Ltd. v. United States*, 24 CIT 1239, 1240–41, 120 F. Supp. 2d 1134, 1137–38 (2000) ("*NMB*").

see also § 1675(a). NSK Ltd. and NSK Europe Ltd., however, requested an administrative review of the subject entries, but subsequently withdrew their request, thereby causing Commerce to partially rescind its review. *See Ball Bearings and Parts Thereof from France, Germany, Italy, Japan, and the United Kingdom: Notice of Partial Rescission of Antidumping Duty Administrative Reviews*, 72 Fed. Reg. 64,577 (Dep't Commerce Nov. 16, 2007). Since the administrative review was terminated, NSK's entries remain subject to the *AD Order* and would normally be liquidated at the "rate established in the completed review covering the most recent prior period or, if no review has been completed, the cash deposit rate applicable at the time merchandise was entered." 19 C.F.R. § 351.212(a) & (c); *see also NMB*, 24 CIT at 1240, 1241–42, 120 F. Supp. 2d at 1136, 1138. Accordingly, NSK has filed this application for a preliminary injunction to suspend liquidation of said entries pending judicial review of its challenge to the second sunset review.

DISCUSSION

To obtain a preliminary injunction prior to trial, the movant must demonstrate (1) that the movant is likely to succeed on the merits at trial; (2) that it will suffer irreparable harm if preliminary relief is not granted; (3) that the balance of the hardships tips in the movant's favor; and (4) that a preliminary injunction will not be contrary to the public interest. *See FMC Corp. v. United States*, 3 F.3d 424, 427 (Fed. Cir. 1993). "No one factor, taken individually, is necessarily dispositive," *Id.*, but if the movant "makes a strong showing of irreparable injury it faces a lesser burden in proving likelihood of success on the merits, and *vice versa*." *Sandoz Chems. Corp. v. United States*, 17 CIT 1061, 1063 (1993) (not reported in F. Supp.) (citing *Am. Air Parcel Forwarding Co. v. United States*, 1 CIT 293, 300, 515 F. Supp. 47, 53 (1981)). "As a basic proposition, the matter lies largely within the sound discretion of the [court]." *FMC Corp.*, 3 F.3d at 427 (citations omitted).

A. *Irreparable Harm*

NSK claims that they will suffer irreparable harm if the subject entries are liquidated prior to the final disposition of this case. Specifically, NSK argues that if the court does not issue a preliminary injunction, their entries for the eighteenth POR will be assessed antidumping duties by operation of law. Pl. Br. 4; *see* 19 C.F.R. § 351.212(a) & (c). Moreover, NSK contends that if their motion is denied, this court cannot provide a meaningful remedy in the underlying litigation because a favorable judgment would result in prospective relief only and therefore have no effect on entries that have already been liquidated. Pl. Br. 4. In opposition to Plaintiff's motion, Timken argues that a claim challenging the final results of a sunset review carries a different evidentiary burden, with respect to satisfy-

ing the element of irreparable harm, than similar claims involving administrative reviews. Timken relies on *Altx, Inc. v. United States*, 26 CIT 735, 211 F. Supp. 2d 1378 (2002) ("*Altx*"), for the proposition that liquidation of actual entries constitutes some harm, but does not amount to irreparable harm, nor does it preclude the court from providing a meaningful remedy since a claimant's prospective entries may benefit from a favorable judgment. Def.-Int. Br. 3–5; *see Altx*, 26 CIT at 737, 211 F. Supp. 2d at 1380–81; *Neenah Foundry Co. v. United States*, 24 CIT 33, 39–40, 86 F. Supp. 2d 1308, 1314 (2000) ("*Neenah*"). This argument lacks merit.

The issue of irreparable harm in the context of a sunset review has been addressed in past cases and there is no question that NSK will suffer such harm if the subject entries are liquidated prior to the final disposition of this case. *See NMB*, 24 CIT at 1243–44, 120 F. Supp. 2d at 1139–40; *see also Zenith Radio Corp. v. United States*, 710 F.2d 806, 810 (1983). As the Federal Circuit has observed, "the antidumping laws do not contain a provision permitting the reliquidation of entries or the recovery of wrongfully assessed antidumping duties in the event a foreign manufacturer or exporter successfully challenges an affirmative antidumping determination." *NMB*, 24 CIT at 1243, 120 F. Supp. 2d at 1139 (citing *Zenith Radio Corp.*, 710 F.2d at 810); *see* 19 U.S.C. § 1516a(c)(1). Here, NSK faces the same dilemma challenging a five-year sunset review determination as it would in an annual administrative review. The subject entries in this case fall within a discrete time period and "because the antidumping order remains in effect, and because the liquidation of entries is not suspended during the pendency of the Plantiffs' legal challenge, the Plaintiffs are faced with potential irreparable harm *similar to that faced by parties challenging an administrative review determination* in the absence of injunctive relief." *NMB*, 24 CIT at 1244, 120 F. Supp. 2d at 1140 (emphasis added). Although sunset reviews cover a broader period of time, the dispositive factor is whether NSK can obtain meaningful relief if they prevail in the underlying litigation absent a preliminary injunction to enjoin liquidation of past entries that are subject to the *AD Order*. In *NMB*, the court explained that,

> if [Customs] liquidates the subject entries prior to the completion of final judicial review and the antidumping order is subsequently revoked, the [p]laintiffs would be without recourse to recover the wrongfully paid antidumping duties. For judicial review to be meaningful, it must be capable of providing a party with effective relief and the ability to enforce its rights. Absent a preliminary injunction suspending liquidation, judicial review could not provide the [p]laintiffs with meaningful relief. Any judicial remedy would be fruitless.

Id. This is precisely the type of harm NSK could suffer if the subject entries are liquidated prior to resolution of the underlying litigation.

Timken's reliance on *Altx* is misplaced, as that case was brought by members of the domestic industry to challenge an injury determination. *See Altx*, 26 CIT at 736, 211 F. Supp. 2d at 1379; *see also Neenah*, 24 CIT at 38–40, 86 F. Supp. 2d at 1313–15 ; *FMC Corp.*, 3 F.3d at 425–26. Unlike cases in which past entries are at issue, "a negative injury determination affects liquidation of all future entries, not just those made within a specific time period." *Sandoz Chems. Corp.*, 17 CIT at 1063 (citation omitted). As a result, "liquidation of entries alone does not constitute irreparable harm in a challenge brought by a domestic producer to a negative injury or a less-than-fair value determination." *Trent Tube Div., Crucible Materials Corp. v. United States*, 14 CIT 587, 588, 744 F. Supp. 1177, 1179 (1990). Although the domestic producer may "suffer harm through continued liquidation of [the importer's] entries, this potential harm is not irreparable because [the domestic producer] will still have the possibility of prospective relief in regard to future entries . . . if they are successful on the merits of their case." *FMC Corp.*, 3 F.3d at 430 (quoting *FMC Corp. v. United States*, 16 CIT 378, 381, 792 F. Supp. 1285, 1288 (1992)). To demonstrate irreparable harm in the context of an injury determination, the domestic producer may not rely on liquidation alone, but must present "additional evidence of immediate irreparable harm in order to prevail on their motion." *Id.*

Based on Plaintiffs' complaint and moving papers, they are primarily concerned with past entries and their ability to obtain relief if Customs is permitted to liquidate their imports. *See Neenah*, 24 CIT at 39 & n.5, 86 F. Supp. 2d at 1314. Further, there is no mention of future injury in Plaintiffs' motion that might modify the evidentiary requirements necessary to establish irreparable harm. *See Trent Tube Div.*, 14 CIT at 588, 744 F. Supp. at 1179. Therefore, Plaintiffs have properly demonstrated that they will suffer irreparable harm if their motion is denied.

B. *Likelihood of Success on the Merits*

As previously mentioned, "although this requirement is important, it is not determinative and must be balanced against the comparative injuries of the parties." *NMB*, 24 CIT at 1244, 120 F. Supp. 2d at 1140. This "balancing involves an inverse relationship between the level of hardship the moving party will suffer if the preliminary injunction is denied and the standard that must be met to demonstrate a likelihood of success on the merits." *Id.* at 1245. Where it is "clear that the moving party will suffer substantially greater harm by the denial of the preliminary injunction than the non-moving party would by its grant, it will ordinarily be sufficient that the movant has raised '*serious, substantial, difficult and doubtful*' questions that

are the proper subject of litigation." *Id.* (quoting *PPG Indus. v. United States*, 11 CIT 5, 8 (1987) (not reported in F. Supp.)) (emphasis added).

Plaintiffs challenge the final results of the second sunset review in which the ITC concluded that revocation of the *AD Order* covering certain ball bearings would likely lead to a reoccurrence of material injury to the domestic industry. As Plaintiffs will suffer far greater harm than that suffered by Defendants if their motion is denied, they need only present questions that are serious, substantial, difficult, and doubtful to establish a likelihood of success on the merits. In Plaintiffs' complaint and motion for judgment on the agency record, they set forth several claims that question whether the ITC applied the proper legal standards in making its determination. Claims of this nature are routinely considered by this Court and present serious and substantial legal questions. Although limited to five pages, Timken has not raised a specific legal issue in its brief that compels the court to seriously question the merits of Plaintiffs' claim to the same degree as was necessary in *Corus Staal BV v. United States*, 31 CIT ___ , 493 F. Supp. 2d 1276 (2007). Therefore, NSK has established a sufficient likelihood of success based on the lesser burden outlined above.

C. *Balance of Hardships & Public Interest*

With regard to elements (3) and (4), the court believes it unnecessary to explore these issues in great detail because the balance of hardships and public interest clearly favor Plaintiffs. If the court denies Plaintiffs' motion, they "would suffer the potential unrecoverable loss of all antidumping duties paid on the liquidated entries and the negation of their statutory right to meaningful judicial review." *NMB*, 24 CIT at 1244, 120 F. Supp. 2d at 1140. The Government, however, takes no position in this matter and therefore does not suffer any hardship for purposes of this analysis. Again considering page limitations, Timken has not submitted evidence that it will suffer undue hardship if the preliminary injunction is granted. Similarly, "preserving [NSK's] right to meaningful judicial review" serves the public interest and does not undermine other policies of equal or greater weight. *Id.* at 1245, 120 F. Supp. 2d at 1141. Consequently, neither of these two elements operate as barrier to granting the preliminary injunction.

CONCLUSION

For the foregoing reasons, the court is convinced that Plaintiffs have properly established the necessary criteria to obtain a preliminary injunction. Accordingly, Plaintiffs' motion is **GRANTED**.

Slip Op. 07 – 177

MIGUEL A. DELGADO, Plaintiff, v. UNITED STATES, Defendant.

Before: **MUSGRAVE, Senior Judge**
Court No. 06–00030

[Plaintiff's motion for judgment on the record denied. The Secretary's decision is remanded to the Department of Homeland Security for further consideration.]

Dated: December 11, 2007

The Mooney Law Firm (*Neil B. Mooney*) for the plaintiff.

Jeffrey S. Bucholtz, Assistant Attorney General; *Barbara S. Williams*, Attorney In Charge, International Trade Field Office, Commercial Litigation Branch, United States Department of Justice (*Marcella Powell*); *Ilena Pattie*, Office of the Associate Chief Counsel, United States Customs and Border Protection, of counsel, for the defendant.

MEMORANDUM OPINION AND ORDER

Before the court is a Motion for Judgment on the Agency Record pursuant to USCIT Rule 56.1, wherein plaintiff Michael A. Delgado challenges a decision by the Secretary of the U.S. Department of Homeland Security[1] ("DHS" or "the Secretary") to revoke his customs broker's license ("License"). This matter was previously before the court on May 11, 2007, at which point the court remanded the matter to DHS with instructions that a proper notification letter be provided to Mr. Delgado. *See Delgado v. United States*, 31 CIT ___ , 491 F.Supp.1252 (2007). In response to that remand order, the Government has issued to Mr. Delgado a revised notification letter purporting to conform to the requirements of 19 U.S.C. § 1641 and the matter is again before the Court. The court has jurisdiction over this case under Section 641(e) of the Tariff Act of 1930, 19 U.S.C. § 1641(e)(1) and 28 U.S.C. § 1581(g) (granting the Court of International Trade exclusive jurisdiction of any civil action to review the revocation of a Customs broker's License by the Secretary of DHS). For the reasons set forth below, the court will again remand the matter to DHS for further consideration consistent with this opinion.

I. Background

The facts in this case were extensively summarized in *Delgado*, and need not be fully repeated here. Mr. Delgado received his customs brokerage license in September 1989, and opened a customs brokerage firm known as Lancer International in 1990. *See* Tran-

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[1] Until January 2003, revocation decisions were made by the Secretary of the Treasury. After the reorganization of the former United States Customs Service, revocation decisions are now made by the Secretary of Homeland Security. 6 U.S.C. § 203 (2004).

script of Proceedings ("Tr.") at 161. On August 24, 2000, a federal grand jury in the Southern District of Florida indicted Mr. Delgado on several felony charges stemming from his alleged involvement in a scheme to introduce liquor into United States commerce without the payment of excise taxes. *See Indictment, United States v. Deepak Kumar, et al.*, Ct. No. 00–0682 (S. D. Fla., Aug. 2000), R. at 173. The indictment charged Mr. Delgado with a total of twenty-nine violations: Fourteen violations of 26 U.S.C. § 5601(a)(11) ("knowingly receiv[ing] distilled spirits knowing and having reasonable grounds to believe that any tax due on such spirits had not been paid,"); fourteen violations of 26 U.S.C. § 5601(a)(12) ("knowingly removing, other than authorized by law, distilled spirits on which the tax had not been paid, from the place of storage and from an instrument of transportation"); and one count of conspiracy to commit offenses against the United States in connection with the above violations (18 U.S.C. § 371). *Id.*

Mr. Delgado was convicted by a jury on twenty-eight of the twenty-nine counts in the indictment. *See Judgment, United States v. Miguel Delgado*, Ct. No. 00–0682, (S. Dist Fla., Sept. 6, 2001) ("*Judgment*") R. at 165. The Judgment of the U.S. District Court for the Southern District of Florida ("District Court") was issued without particularized findings or a written opinion, and the jury's verdict was conveyed by a general verdict. Hence, although the conspiracy charge contained seven allegations of "overt acts" committed in furtherance of the conspiracy, the jury did not indicate which of the alleged acts were found to have been committed, or by whom. *See Indictment*, R. at 177–79. At no point in that proceeding was Delgado or any of his alleged co-conspirators accused, indicted, or convicted of violating any law or regulation enforced by Customs. Delgado was sentenced to twenty-seven months in prison and ordered to pay restitution. *Judgment*, R. at 168–69, 171.

Delgado timely appealed the decision to the U.S. Court of Appeals for the 11th Circuit ("11th Circuit"), where he alleged, *inter alia*, that the government had not presented sufficient evidence to prove that he committed the substantive acts in the indictment or that he was part of a conspiracy.[3] *See* 11th Cir. Appellate Br. at 10–11, 2002 WL 32144608; *United States v. Delgado, et al*, 321 F.3d 1338, 1346 (11th Cir. 2003) ("*Delgado II*"). Upon review, the 11th Circuit found that the evidence presented, "when viewed in a light most favorable to the government," was sufficient to support the jury's verdict and affirmed the District Court's decision. *Id.*

After his release, Mr. Delgado was permitted to continue working in the customs field with the knowledge and oversight of the District

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[3] Delgado also argued that it was "factually impossible for him to commit the crimes with which he was charged." The 11th Circuit dismissed the argument as an "untenable" sufficiency of the evidence claim. *U.S. v. Delgado*, 321 F.3d 1338, 1346 (2003).

Court. R. at 113. In January 2003, Mr. Delgado filed with the agency now known as U.S. Customs and Border Protection ("CBP" or "Customs") his "Customs Broker Triennial Status Report," as required by 19 C.F.R. § 111.30(d). One of the questions in the Triennial Status Report inquired as to whether the broker had "engaged in any conduct that could constitute grounds for suspension or revocation under Title 111.53? [*sic*] (i.e. convicted of a felony)." R. at 272. Mr. Delgado checked the "yes" response to this question, but noted that he was appealing the decision. *Id.* Further, sometime during mid-2003, "concerns" were raised with CBP in regard to Mr. Delgado's continuing active involvement in the customs field, and an investigation ensued. *See* R. at 240, 241.

In March 2004, CBP notified Mr. Delgado that he was being charged with several violations of Customs regulations, any one of which constituted grounds for revocation of his Brokers License. Specifically, the notice stated that Mr. Delgado was being charged with violating (1) 19 C.F.R. §§ 111.53(c) and 111.32 (violating Customs law or regulation by filing false documentation); (2) 19 C.F.R. § 111.53(b) (having been convicted of a felony either involving importation or exportation of merchandise or "arising out of" customs business); and (3) 19 C.F.R. § 111.53(d) (aiding and abetting violation of Customs law)). *See Notice and Statement of Charges*, R. at 153–54.

After several rounds of briefing on the matter, Mr. Delgado was afforded a formal hearing before an Administrative Law Judge ("ALJ") on May 18, 2004. *See generally*, Tr., Vols. I & II. On December 17, 2004 the ALJ issued a decision recommending license revocation. *Recommended Decision* ("*Rec. Dec.*") R. at 34. This recommendation was reviewed by the Secretary, and a decision revoking Delgado's license was issued to Mr. Delgado on December 3, 2005 in the form of a formal notification letter. *See* Compl. at Ex. A ("Notification Letter").

Delgado filed a timely appeal to this court. Upon initial review of that decision, the court found that, because the Secretary's Notification Letter Decision had provided neither findings of fact nor reasoning on which the decision was based, the decision failed to meet the statutory requirements set forth in 19 U.S.C § 1641. *Delgado*, 491 F. Supp. at 1260. The court remanded the matter to DHS with instructions, *inter alia*, to issue to Mr. Delgado a new decision properly setting forth the findings of fact and reasoning used therein. *Id.*

In response to the court's remand, DHS (through Customs) issued to Mr. Delgado, and filed with the court, a revised Notification Letter on June 20, 2007. The revised Notification Letter states that "the Secretary's decision was based solely on the record," and that "the findings of fact and reasons for the decision" are set forth in two DHS action memos, copies of which are included with the letter. *Re-*

vised Notification Letter at 1. The government asserts that the revised Notification Letter complies with the statutory notification requirements.

Before the court, the plaintiff now contends that the revised Notification Letter is "insufficient," but presents little argument to support that assertion. Instead, the plaintiff alleges several substantive errors both in the ALJ's Recommended Decision as well as in the Secretary's revised Notification Letter. Specifically, he asserts that the Secretary's decision is contrary to law because it is based in part on "banned dicta, erroneous chronology and other wildly mistaken 'facts' as described in the [11th Circuit] Appellate opinion." Pl.'s Resp. to June 20, 2007 Revised Revocation Letter at 2. Mr. Delgado presents a similar argument as to the ALJ's decision, contending that he was wrongfully precluded from litigating relevant facts at the Administrative Hearing because the ALJ improperly applied the doctrine of collateral estoppel to dicta contained in the 11th Circuit's opinion. Mem. in Support of Pl.'s Rule 56 Mot. at 5–6. Mr. Delgado contends further that, *inter alia*, the ALJ erroneously concluded (1) that he had violated a customs statute or regulation by making false or misleading statements, and (2) he had been convicted of a felony that involved the "importation" or "exportation" of merchandise and that arose out of the "conduct of his customs business." *Id.* at 7, 9–11.

In response to the defendants arguments, the government asserts that the defendant "greatly overstates the Secretary's reliance on the appellate decision," and that the argument is predicated "on a single sentence in the 'Background' section of the Memorandum to Elaine Dezenski." Def.'s Mem. Addressing Pl.'s Resp. to June 20, 2007 Revised Revocation Letter at 2. As to Delgado's collateral estoppel arguments, the Government contends that the ALJ's application of collateral estoppel to the Appellate court's recitation of facts was not improper, and that the decision was supported by substantial evidence of record. *Id.* at 4.

II. Discussion

A. Procedural Issues

1. Adequacy of the Revised Notification Letter

Title 28 of United States Code, sections 2640(a)(5) and (d), provide that this Court reviews decisions by the Secretary to revoke broker licenses pursuant to the scope of review set forth in 5 U.S.C. § 706 (2000). *See Delgado*, 491 F.Supp. at 1258; *Shiepe v. United States*, 23 CIT 66, 72, 36 F. Supp. 2d, 402, 408 (1999). Section 706, provides, *inter alia*, that the Court "shall hold unlawful and set aside" any agency action, findings, and conclusions found to be "unsupported by substantial evidence," or "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law[.]" 5 U.S.C.

§§ 706(2)(A), (E); *see Barnhart v. United States Treasury Dep't*, 9 CIT 287, 290–91, 613 F. Supp. 370, 373–74 (1985).

Further, 19 U.S.C. § 1641(d)(2)(B) provides that the Secretary, upon rendering a decision to revoke a broker's license, must issue "a written decision, based solely on the record, setting forth the findings of fact and the reasons for the decision." 19 U.S.C. § 1641(d)(2)(B) (2000). The agency's decision must be set forth so that "the rationale is both discernible and defensible[,]" *i.e.*, such that the Court may "assure itself" that the agency's decision was "rational and based on consideration of relevant factors." *Barnhart*, 9 CIT at 291, 613 F. Supp. at 374.

The purpose of requiring specific findings and conclusions is not simply, as the government asserts, to provide parties with a reasoned explanation for those decisions, but also to furnish a basis for effective judicial review. The Supreme Court has discussed this requirement on many occasions, noting:

> If the administrative action is to be tested by the basis upon which it purports to rest, that basis must be set forth with such clarity as to be understandable. It will not do for a court to be compelled to guess at the theory underlying the agency's action; nor can a court be expected to chisel that which must be precise from what the agency has left vague and indecisive. In other words, "[w]e must know what a decision means before the duty becomes ours to say whether it is right or wrong."

Securities and Exchange Commission v. Chenery Corp., 332 U.S. 194, 196–97 (1947); *see also Bell v. United States*, 17 CIT 1220, 1227–28, 839 F.Supp. 874, 880 (1993).

An agency need not set forth separate findings if it specifically adopts the opinion of the ALJ. *Armstrong v. Commodity Futures Trading Com'n*, 12 F.3d 401, 403–04 (3rd Cir. 1993) (holding that "[a]n administrative agency need not provide an independent statement if it specifically adopts an ALJ's opinion that sets forth adequate findings and reasoning."). However, "a summary affirmance of all or part of an ALJ's opinion must leave no guesswork regarding what the agency has adopted." *Id.* at 404.

In this case, the revised Notification Letter does not specifically adopt the ALJ's opinion. Instead, the letter states that the "Secretary's decision was based solely on the record," and the findings of fact and reasons for the decision are to be found in (1) A DHS Action Memo dated August 2, 2005, for Commissioner Robert C. Bonner, from Acting Assistant Secretary Elaine Dezenski ("First Memorandum"), and (2) A DHS Action Memo dated August 2, 2005, for Acting Assistant Secretary Elaine Dezenski, from Beverly Cenname ("Second Memorandum"). *Revised Notification Letter*. Because the Secretary adopted only the findings of fact and reasoning contained in the DHS memos, the court's analysis must begin with those memos.

a. First Memorandum

The memorandum from Acting Assistant Secretary Elaine Dezenski to Secretary Robert C. Bonner states that

> CBP filed these charges as a result of Mr. Delgado being convicted on 28 felony counts involving the importation and exportation of liquor, arising out of the conduct of his Customs business. CBP also found revocation to be appropriate based on evidence that Mr. Delgado knowingly violated Customs regulations, and filed false Customs forms.

First Mem. at 1. The memorandum notes further that the ALJ "found that evidence in the record supports revocation," and that "[c]onsidering all of the facts presented in the ALJ decision, and reviewing the underlying testimony and record of subsequent good conduct, we affirm CBP's revocation of Mr. Delgado's license." *Id.* at 1–2.

The First Memorandum provides no real explanation for the Secretary's decision. The first paragraph explains CBP's position and why it filed the charges, but provides no insight as to the Secretary's findings or reasons for affirming CBP's conclusion. Although memorandum then states that the Secretary "considered all of the facts presented in the ALJ decision," and reviewed "the underlying testimony and record of subsequent good conduct," the memo provides no indication as to which of the "facts presented" the Secretary found to be dispositive or why.

b. Second Memorandum

In the memorandum from Beverly Cenname to Elaine Dezenski, the court is able to discern the following findings and conclusions. First, the memo states that the Secretary's decision "relies on the [ALJ's] holding that a preponderance of the evidence . . . supports the CBP license revocation as a matter of law." Second, the Memorandum states that Mr. Delgado

> was found guilty by a federal jury on 28 felony counts that involved importation or exportation of liquor that arose out of the conduct of his Customs business. Criminal conduct relied upon by CBP to revoke Mr. Delgado's license is primarily set forth in findings of the 11th Circuit in [*Delgado II*].

Second Mem. at 2. Following this statement, the memorandum then provides a factual synopsis of findings that is essentially a quote from the decision of the 11th Circuit. *See id., Delgado II*, 321 F.3d at 1340. Finally, the memorandum states that

> the ALJ found the evidence to show that Mr. Delgado prepared documents and Customs forms in connection with importation and exportation of liquor, exportation of which never occurred.

> While Mr. Delgado was convicted of a criminal alcohol diversion scheme, and not for any specific violation of Customs laws or regulations, the scheme would not have worked without the services of a Customs broker.

Second Mem. at 2–3. In summary, the memo indicates that the decision to revoke Delgado's license (1) "relied" on the ALJ's holding, as well as the ALJ's finding that Mr. Delgado "prepared documents in connection with importation and exportation of liquor, exportation of which never occurred"; (2) concluded that the alcohol diversion scheme would not have worked without the services of a Customs broker; and (3) found that, based on criminal conduct set forth in the 11th Circuit's opinion, Mr. Delgado's crimes involved importation or exportation of liquor that arose out of the conduct of his Customs business.

To the extent that the Secretary based the decision on the "facts" set forth in the 11th Circuit opinion or on the ALJ's determination of facts based on the 11th Circuit opinion, the court cannot affirm the Secretary's decision for the reasons set forth in Section 2, below. As to the somewhat cryptic statement that the Secretary's decision "relies on the ALJ's holding," that statement seems to indicate that the Secretary did not adopt the entirety of the ALJ's decision or the reasoning contained therein, although the exact meaning of such "reliance" is not clear. In any event, the memorandum falls considerably short of the requirement that the decision "leave no guesswork" as to the Secretary's reasoning or the extent to which the ALJ's reasoning was adopted. Without further explanation, the court is unable to conclude that the findings and conclusions contained in either (or both) memorandum provide a "discernable and defensible" rationale for the Secretary's decision.

2. Collateral Estoppel

Although a remand is warranted based on the adoption/inadequate reasoning issue alone, the court will proceed to review the ALJ's decision in order to prevent an immediate return of the matter to this court. In this case, the Recommended Decision purports to apply the doctrine of collateral estoppel (also known as "issue preclusion") to the issues discussed in several passages from the 11th Circuit's opinion in *Delgado II*. For the reasons set forth below, the court finds that the ALJ's use of collateral estoppel was not in accordance with law.

Courts have uniformly approved of the use of collateral estoppel in agency decisions but warn that an agency's use of the doctrine "must follow procedures similar to those established for its use in judicial proceedings." *Chisholm v. Defense Logistics Agency*, 656 F.2d 42, 50 (3d Cir. 1981). Briefly stated, four conditions must be satisfied before a party can use collateral estoppel to prevent an opponent from

relitigating an issue or fact that has already been decided in a prior litigation: (1) the issue or fact is "identical to one decided in the first action," (2) the issue or fact was "actually litigated in the first action," (3) resolution of the issue or fact was "essential to a final judgment in the first action," and (4) the plaintiff had a "full and fair opportunity to litigate the particular issue" or fact in the first action. *A.B. Dick Co. v. Burroughs Corp.*, 713 F.2d 700, 702 (Fed. Cir. 1983); *see also Montana v. United States*, 440 U.S. 165 (1979).

"Accordingly, the first step in resolving a claim of collateral estoppel is to determine which facts were necessarily decided in the first trial." *United States v. Brackett*, 113 F.3d 1396, 1398 (5th Cir. 1997) (citation and internal quotes omitted); *A.B. Dick*, 713 F.2d at 700. However, when a jury issues a general verdict with no findings of fact, the task of determining what matters were actually adjudicated in the antecedent case may be quite difficult. A general verdict "does not indicate which of the means charged in the indictment were found to have been used in effectuating the conspiracy[;] . . . since all of the acts charged need not be proved for conviction, such a verdict does not establish that defendants used all of the means charged or any particular one." *Emich Motors Corp. v. General Motors Corp.*, 340 U.S. 558, 569 (1951) (internal citation omitted).

Under these conditions, "what was decided by the criminal judgment must be determined by the trial judge in the [antecedent] suit, upon an examination of the record, including the pleadings, the evidence submitted, the instructions under which the jury arrived at its verdict, and any opinions of the courts." *Id.*

In this case, the Recommended Decision purports to apply the doctrine of collateral estoppel to several different "facts" related to Delgado's criminal conviction, which was conveyed by a general verdict. However, in doing so, the ALJ did not consult the pleadings, record, or jury instructions associated with the District Court trial in order to determine what matters were actually adjudicated. *See Rec. Dec.* ¶ 9, R. at 20. Instead, the prior action from which the "facts" were taken is the 11th Circuit's appellate opinion in *Delgado II*: Paragraph 10 of the Recommended Decision contains sections entitled "Synopsis of Scheme" and "Collateral Estoppel Facts," which quote large blocks of text from the 11th Circuit's opinion, stating (in relevant part) that:

> **Synopsis of Scheme**
>
> [t]he Government's evidence showed that Kumar ordered 15 shipments of liquor in Missouri and directed it be sent to Delgado's bonded warehouse in Miami. Delgado then shipped the liquor to Honduras, but it only remained there until he could bring it back to his Miami warehouse. Once the liquor arrived in Miami, Delgado prepared paperwork indicating that it was re-exported to South America. In most instances, a ship-

> ping company owned by Jose Bermudez [fn. omitted] was the designated shipper. Bermudez, however, did not ship the liquor to South America. Instead, his non-bonded trucking company delivered the liquor to transport companies owned by unindicted co-conspirator William Coleman. Coleman's companies transported the alcohol by rail to Buffalo.
>
> **Collateral Estoppel Facts**
>
> Fifteen[4] shipments were purchased by Kumar's Isle Trading Company, and shipped to Delgado's care at either Sula or H.C.S. in Honduras. Delgado then "sold" the liquor back to Kumar and re-shipped it to Miami for Kumar. A bonded trucking company transferred the liquor from the ship to Delgado's bonded warehouse. It was kept at Delgado's bonded warehouse and designated for export to Venezuela or Guatemala. Except for one occasion, none of the liquor was actually shipped to either of those countries. If this was a record-keeping error, a still more serious irregularity became apparent when the Government discovered that liquor shipments 1–6 (whose bills of lading had been prepared by Delgado's company) falsely described the shipments as "foodstuffs" even though other shipping and warehouse records reported that the shipments contained 1,700-plus cartons of whiskey, vodka, and rum.
>
> For shipments 7–14, Kumar arranged for Delgado to transport liquor back from Honduras to Miami. A Customs Form 7512 was filed for each of the shipments, accurately identifying the contents as liquor. Nevertheless, Customs agents became suspicious of these shipments because they were brought back to Miami so soon after they were shipped to Honduras. Upon investigation, the Customs Department discovered that shipment number 10's bill of lading was like shipments 1–6, falsely identified as "foodstuffs."

Rec. Dec. at ¶ 10, R. at 21 (quoting *Delgado II*, 321 F.3d at 1340–41). In the following paragraph, the ALJ stated that "[t]he findings by the Court of Appeals will not be disturbed or collaterally attacked." *Rec. Dec.* ¶ 11, R. at 22. Additionally, paragraph 46 states that

> [t]he Court of Appeals considered Mr. Delgado's conviction *de novo*,[5] and concluded that the evidence supports the following:

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[4] The original opinion is preceded as follows: "Based on Inspector Schieferdecker's review of the bills of lading for the 15 shipments, he was able to determine the path each shipment took. The [fifteen] shipments were purchased by Kumar's . . ." 321 F.3d at 1341.

[5] The ALJ's abbreviated characterization of the 11th Circuit's standard of review as simply "*de novo*" is somewhat misleading. More accurately described, "[t]he Court of Appeals uses a *de novo* standard of review when deciding whether there is sufficient evidence to

> Delgado jockeyed Kumar's liquor from port to port, knowingly misidentified shipments as foodstuffs, filed export forms even though he knew the liquor was never really going to be exported, and held the liquor in his warehouse until it could be diverted into commerce.

Rec. Dec. ¶ 46, R. at 30. Finally, paragraph 59 of the Recommended Decision states:

> [T]here is a question of knowledge of the falsity of documents. Mr. Delgado claims that he was unaware of the falsity of the documents while conducting his Customs business. He also made the same argument to the Court of Appeals and it was rejected.[6] The Court of Appeals held:
>
> > [T]he Government proved that [Respondent] . . . knowingly misidentified shipments as "foodstuffs," filed export forms even though he knew the liquor was never really going to be exported . . . .]
>
> Technically, Mr. Delgado should be collaterally estopped from even arguing in this hearing that he did not knowingly file false documents with the Agency.

Rec. Dec. ¶ 59, R. at 34 (citations omitted).

On the face of the decision, the court must conclude that the ALJ's use of collateral estoppel was not in accordance with law, for two related reasons. First, it must be recalled that the issue actually decided by the 11th Circuit was whether the evidence presented, when "viewed in a light most favorable to the government," was sufficient to support the jury's verdict.[7] *Delgado II*, 321 F.3d at 1344. Hence, any "findings" discussed by the 11th Circuit as to whether or not the government had *proved each factual allegation* contained in each count charged in the indictment were *not essential* to the 11th Circuit's ultimate holding and cannot be given collateral estoppel effect. *See A.B. Dick*, 713 F.2d at 702. A reviewing court "cannot examine the underlying testimony and draw from it factual inferences that were not made by the district court." *United States v. Township of*

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support a jury's verdict." *Delgado II*, 321 F.3d at 1344.

[6] In reviewing the 11th Circuit's opinion, as well as Delgado's appellate brief, the court is unable to find any indication that Delgado made this argument to the Court of Appeals.

[7] The 11th Circuit has explained the standard of review for evaluating a sufficiency of the evidence claim on several occasions, noting that, when evaluating such a claim, "we must view the evidence in the light most favorable to the government, drawing all reasonable inferences in favor of the jury's verdict." *United States v. Church*, 955 F.2d 688, 693 (11th Cir. 1992), *cert. denied*, 506 U.S. 881 (1992). Moreover, "[t]he evidence need not be inconsistent with every reasonable hypothesis except guilt, and the jury is free to choose between or among the reasonable conclusions to be drawn from the evidence presented at trial." *United States v. Hernandez*, 896 F.2d 513, 517 (11th Cir. 1990) (citation and quotation marks omitted), *cert. denied*, 498 U.S. 858 (1990).

Brighton, 153 F.3d 307, 332 (6th Cir. 1998) (Dowd, J., dissenting); *Pullman-Standard v. Swint*, 456 U.S. 273, 291–92 (1982) (holding that "factfinding is the basic responsibility of district courts, rather than appellate courts, and . . . the Court of Appeals should not have resolved in the first instance this factual dispute which had not been considered by the District Court." (internal quotes and citation omitted)); *Matter of Cassidy*, 892 F.2d 637, 640 (7th Cir. 1990) (holding that "[t]he Court of Appeals exists to review judgments, and consideration of issues outside the scope of the judgment below must necessarily be dicta."). To deem the prefatory summary of facts laid out by the 11th Circuit as "findings" ignores the fundamental principle that a court of appeals may not make findings of fact. *Pullman Standard*, 456 U.S. at 291–92. Although the language of the 11th Circuit opinion is admittedly couched in the language of factfinding, the prohibition on appellate factfinding dictates that such statements must be seen only as a summation of the evidence presented (viewed in a light most favorable to the government), and nothing more.

Second, although a trial judge does indeed have "broad discretion" to decide whether or not offensive collateral estoppel may be applied, that discretion does not include the option to bypass the fundamental determination as to whether collateral estoppel may be applied in the first place. In this case, it appears that the ALJ's analysis focused only on the "broad discretion" afforded trial court judges discussed in *Parklane Hosiery v. Shore*, 439 U.S. 322 (1979) (holding that because use of offensive collateral estoppel carried great potential for unfairness, trial judges should consider additional questions of fairness before allowing its use). *Rec. Dec.* at n. 4, R. at 19. Although the ALJ considered the fairness issues addressed in *Parklane*, nowhere does the record indicate that the ALJ considered whether the four basic conditions required for the use of collateral estoppel were present, such as whether the facts were "actually litigated in the first action," or whether resolution of the issue or fact was "essential to a final judgment" in that action.[8] *A.B. Dick*, 713 F.2d at 700. Accordingly, the court finds that the ALJ's application of collateral estoppel was not in accordance with law.

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[8] The "broad discretion" discussed in *Parklane* referred only to the *additional* considerations that should be afforded to defendants when the courts consider allowing the use of offensive collateral estoppel. That is, the factors discussed in *Parklane* are additional questions that a trial judge should ask even after it has been established that collateral estoppel *may* be applied pursuant to the four factors described in *A.B. Dick*. *See Parklane*, 439 U.S. at 331 (holding that "in cases where a plaintiff could have easily joined in the earlier action or where . . . the application of offensive estoppel would be unfair to a defendant, a trial judge should not allow the use of offensive collateral estoppel.")

3. Collateral Estoppel - Prejudicial Error

The Administrative Procedure Act requires that upon judicial review of an agency decision, "due account shall be taken of the rule of prejudicial error." 5 U.S.C. § 706; *see Intercargo Ins. Co. v. United States*, 83 F.3d 391, 394 (Fed. Cir. 1996) (holding that "[i]t is well settled that principles of harmless error apply to the review of agency proceedings."); *Parkdale Intern., Ltd. v. United States*, 31 CIT ___ , 508 F.Supp.2d 1338 (2007). In this case, the court finds that, although the ALJ's use of collateral estoppel was in error, the evidence of record indicates that, except for the matter discussed in Part B.3, below, that error was nonprejudicial.

The plaintiff argues that the "Synopsis of Scheme" and "Collateral Estoppel Facts" contain patent inaccuracies, specifically regarding Delgado's involvement in the shipment of the liquor to Honduras. The plaintiff contends that "[a] customs officer testified that Delgado had nothing to do with the shipping to Honduras of the U.S. liquor that wound up, months later, in Lancer's warehouse." This allegation may well be correct; however, nothing in the ALJ's decision indicates that the issue of whether Delgado was involved in shipping the liquor to Honduras was in any way relevant to his determination of license revocation.

Furthermore, Mr. Delgado was not "estopped" from presenting evidence on that issue. The hearing transcript contains testimony as to Mr. Delgado's lack of involvement in the shipment to Honduras, as well as several pages of testimony as to alleged inaccuracies on the bills of lading. *See* Tr. at 161–173. Moreover, although the ALJ's decision appears to state that collateral estoppel would apply to the "facts" noted in paragraphs 46 and 59 (concerning Delgado's knowledge as to the falsity of documents), again, it appears that the ALJ permitted Mr. Delgado to present evidence on those issues. The ALJ 's statement that "Mr. Delgado should be collaterally estopped from even arguing . . . that he did not knowingly file false documents," belies the fact that the ALJ did allow, and did consider, testimony on the issue of whether Mr. Delgado knew that the documents were false. *See* Tr. at 130. Indeed, the ALJ noted that

> The Presiding Judge has discretion to consider and weigh relevant testimony. The record shows that the "foodstuffs" misdesignation occurred only as to one shipment, the mistake was made by a low-level Lancer employee, and the mistake was corrected. Direct evidence is lacking of Mr. Delgado himself preparing and filing false forms.

Rec. Dec. ¶ 59, R. at 34. Accordingly, as to these issues, the court finds that the ALJ's erroneous application of collateral estoppel was either nonprejudicial or remedied by the ALJ's subsequent consideration of evidence.

B. Merits

Custom's charged Mr. Delgado with violations of 19 C.F.R. §§ 111.53(b), 111.53(c), and 111.53(d). Regulation 111.53 provides, in pertinent part:

> § 111.53 Grounds for suspension or revocation of license or permit.
>
> The appropriate Customs officer may initiate proceedings for the suspension, for a specific period of time, or revocation of the license or permit of any broker for any of the following reasons:
>
> (a) The broker has made or caused to be made in any application for any license or permit under this part, or report filed with Customs, any statement which was, at the time and in light of the circumstances under which it was made, false or misleading with respect to any material fact, or has omitted to state in any application or report any material fact which was required;
>
> (b) The broker has been convicted, at any time after the filing of an application for a license under § 111.12, of any felony or misdemeanor which:
>
> (1) Involved the importation or exportation of merchandise;
>
> (2) Arose out of the conduct of customs business; or
>
> (3) Involved larceny, theft, robbery, extortion, forgery, counterfeiting, fraudulent concealment, embezzlement, fraudulent conversion, or misappropriation of funds;
>
> (c) The broker has violated any provision of any law enforced by Customs or the rules or regulations issued under any provision of any law enforced by Customs;
>
> (d) The broker has counseled, commanded, induced, procured, or knowingly aided or abetted the violations by any other person of any provision of any law enforced by Customs or the rules or regulations issued under any provision of any law enforced by Customs[.]
>
> * * *

19 C.F.R. § 111.53 (2007). In this case, the ALJ found that revocation was proper because substantial evidence of record showed that the felony for which Delgado had been convicted "involved the importation or exportation of merchandise" and "arose out of the conduct of his customs business." Further, the ALJ also found that revocation was proper because substantial evidence of record supported a finding that Delgado had violated a law or regulation enforced by Customs by filing documents that he knew to be false. The court will discuss these findings in turn.

1. Violation of 19 C.F.R. § 111.53(b)(1)

Delgado argues that the ALJ's determination that he was in violation of 19 C.F.R. § 111.53(b)(1) is in error because "[n]either 'importation' nor 'exportation' was an element of the crimes for which he was convicted." Mem. in Support of Pl.'s Rule 56 Mot. at 9. Delgado further argues that "[a]s a matter of law, the goods were neither exported nor imported. . . ." *Id.* at 11.

The court finds these arguments to be without merit. First, as Customs points out, the regulation does not require that the elements of the underlying felony or misdemeanor include the importation or exportation of merchandise: the regulation simply requires that the felony or misdemeanor "involve" the importation or exportation of merchandise. *See* Mem. in Support of Def.'s Resp. at 14–15; 19 C.F.R. § 111.53(b). Pursuant to the language of the governing statute, the determination as to what "involved the importation or exportation of merchandise" rests with the agency. *See* 19 U.S.C. § 1641(d)(1)(B) (providing that action may be taken when broker has been convicted of a felony "*which the Secretary finds* . . . involved the importation and exportation of merchandise.") (emphasis added).

As to Delgado's second argument, although it may be true that—technically speaking—the liquor itself was not imported or exported,[9] substantial evidence of record supports a finding that the tax avoidance scheme "involved" the importation and exportation of liquor. Testimony at the Administrative Hearing by Senior Inspector Cox and Special Agent O' Keefe indicated that the liquor was moved from place to place using the means and instrumentalities of importation and exportation, some of which were under Delgado's direct control. Further, the testimony of both agents also indicated that the alcohol diversion scheme was facilitated by the appearance that the liquor would be exported because of documents prepared by Delgado. Tr. at 146, 285. Accordingly, the court finds that the ALJ's determination in this regard is supported by substantial evidence of record.

2. Violation of 19 C.F.R. § 111.53(b)(2)

The ALJ also found that Customs decision was proper because the felony for which Delgado had been convicted "arose" out of the conduct of customs business. *See* Rec. Dec. ¶¶ 53–54, R. at 32. Pursuant to 19 C.F.R. § 111.1, "Customs business" is defined (in relevant part) as

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[9] *See, e.g.*, 19 C.F.R. § 101.1 (defining the word "exportation"); *Swan & Finch v. United States*, 190 U.S. 143, 145 (1902) (citing 17 Op. Attys Gen. 535) (definition of "exportation"); *United States v. Nat'l Sugar Refining Co.*, 39 CCPA 96, 100 (1951) (citing *Swan*, 190 U.S. at 145).

> those activities involving transactions with Customs concerning the entry and admissibility of merchandise, its classification and valuation, the payment of duties, taxes, or other charges assessed or collected by Customs on merchandise by reason of its importation, and the refund, rebate, or drawback of those duties, taxes, or other charges. "Customs business" also includes the preparation, and activities relating to the preparation, of documents in any format and the electronic transmission of documents and parts of documents intended to be filed with Customs in furtherance of any other customs business activity, whether or not signed or filed by the preparer.

19 C.F.R. § 111.1 (2007).

The court finds that the ALJ's determination is supported by substantial evidence of record. Customs agent Joseph Cox and ATF agent Kevin O'Keefe, who were involved in the original investigation and had testified at the jury trial, testified at the Administrative Hearing (with no reliance on the appellate opinion) that Delgado's customs business was used in the alcohol diversion scheme. Agent O'Keefe testified that although Delgado may not have been directly involved, his customs operation was "the pivot, the turning point, of the alcohol from outside the country back in to continue the scheme." Tr. at 270. Agent Cox testified that Mr. Delgado was designated as the "contact person" for shipments to Honduras; that Lancer had prepared bills of lading for those shipments, several of which indicated "foodstuffs" instead of liquor; that after the liquor arrived back in the United States the liquor was moved to "Lancer's container freight station" and that two of the shipments were then moved to Lancer's bonded warehouse at Miami; that Lancer prepared Customs form 7512 for the export of the shipments and arranged for a portion of the transportation, but that the shipments were never exported. Tr. at 118–32.

Delgado argues, *inter alia*, that even if it were determined that the felony arose out of conduct of customs business, the ALJ's decision would still be in error–because it was not he, but Lancer USA, that "undertook all customs business." Mem. in Support of Pl.'s Rule 56 Mot. at 11. Mr. Delgado alleges that Lancer "had its own distinct Customs broker's license and almost twenty employees utilizing it," and argues that "[w]hether, in 2001 or before, he could have been accused of improper supervision and control is now moot." *Id.* Delgado points out that "Lancer was never accused by Customs of any wrongdoing," and that "even if Lancer had been accused, it would be improper to impute the conduct of a corporation to an employee without some evidence of knowledge on the latter's part." *Id.*

The court is unable to agree with Mr. Delgado's arguments. Although Delgado describes himself as a mere "employee" of Lancer, his own testimony indicates that he was the owner and president of Lancer USA, and 50% owner of Lancer Honduras. As the owner of

the customs business, Delgado was responsible for the "responsible supervision and control" of his business during the period of the conspiracy. *See* 19 U.S.C. § 1641(b)(4); 19 C.F.R. § 111.1; *see also Shiepe v. United States*, 23 CIT 66, 36 F.Supp.2d. (1999). Mr. Delgado does not explain how the issue of "reasonable supervision" is "now moot."

Moreover, Mr. Delgado appears to forget that it was he, not Lancer, that was convicted of the felony in question. Whether Mr. Delgado was acting under Lancer's Customs brokerage license or his own license when he committed the felonies in question would not appear to be relevant to the ALJ's determination; the relevant question is only whether any of those felonies "arose out of the conduct of customs business."

3. Violation of 19 C.F.R. § 111.53(c)

Finally, the ALJ determined that license revocation was proper because evidence of record showed that Delgado had filed with Customs documents that he knew to be false. Pursuant to regulation 111.53(c), a broker's license may be revoked if it is shown that the broker "violated any provision of any law enforced by Customs or the rules or regulations issued under any provision of law enforced by Customs." 19 C.F.R. § 111.53(c). In this case, the regulation that Mr. Delgado is alleged to have violated is 19 C.F.R. § 111.32, which states

§ 111.32 False information.

> A broker must not file or procure or assist in the filing of any claim, or of any document, affidavit, or other papers, known by such broker to be false. In addition, a broker must not knowingly give, or solicit or procure the giving of, any false or misleading information or testimony in any matter pending before the [Department of Homeland Security] or any representative of the [Department of Homeland Security.]

19 C.F.R. § 111.32 (2007).

The court cannot agree that substantial evidence of record supports the ALJ's determination that Mr. Delgado filed, or caused to be filed, documents that he knew to be false. Mr. Delgado testified that a single Customs Form 7512 had mistakenly labeled the shipments as "foodstuffs" as opposed to liquor, and that the mistake was corrected. Although evidence also shows that Delgado filed other 7512 forms designating the liquor for export, no evidence was offered to show that Mr. Delgado knew that the liquor would never be exported. *In toto*, there appears to be little evidence beyond mere suspicion that Delgado actually knew that any document involved in this matter contained incorrect or false information.

As support for his finding that the record contained "evidence that Mr. Delgado prepared and filed documents known to be false, or that

employees of Lancer prepared and filed," the ALJ cited to certain "findings" contained in the 11th Circuit's opinion and to several passages in the hearing transcript. However, in reviewing the appellate opinion, the court notes that the only "finding" regarding Delgado's knowledge of false documents is not a reference to evidence, but a statement by the 11th Circuit that Delgado "knowingly misidentified shipments as 'foodstuffs,' [and] filed export forms even though he knew the liquor was never really going to be exported." *Delgado II*, 321 F.3d at 1346. Although a summary of evidence in the 11th Circuit's opinion could properly be weighed against other evidence of record, the quoted statement is not a summary of evidence presented but a conclusion drawn from such evidence that must be seen only as dictum. *See Pullman Standard*, 456 U.S. at 291–92 (holding that appellate court "should not have resolved in the first instance this factual dispute which had not been considered by the District Court.").

Further, most of the supporting testimony to which the ALJ refers was made by individuals stating that their knowledge of the facts was not based on direct experience, but on information learned from having read the 11th Circuit's opinion. *See* Tr. at 92–93, 119. Only the testimony of Agent Kevin O'Keefe reflects first hand knowledge independent of the 11th Circuit opinion. Agent O'Keefe testified that at least six bills of lading had been "incorrectly" labeled as foodstuffs "then changed back to alcoholic beverages when it was under the care of Mr. Delgado's company." Tr. at 254. Although this statement may be accurate, as evidence it is problematic for at least two reasons. First, Mr. Delgado has not been charged with "falsity" as to a bill of lading, and it appears unlikely that a bill of lading qualifies as a "filed" document pursuant to regulation 111.32. Second, although O'Keefe's statements indicate that Delgado corrected the bills of lading, they do not indicate who drafted the bills of lading or whether that drafting was intentionally (or actually) incorrect.

Finally, the court is unable to reconcile the ALJ's conclusion with his other findings regarding the extent of Mr. Delgado's knowledge of the scheme generally. *Rec. Dec.* ¶ 63, R. at 35. In paragraph 59 the ALJ states that

> The record shows that the "foodstuffs" misdesignation occurred only as to one shipment, the mistake was made by a low-level Lancer employee, and that the mistake was corrected. Direct evidence is lacking of Mr. Delgado himself preparing and filing false forms.

Rec. Dec. ¶ 59, R. at 34. The ALJ also found that "there is not substantial evidence showing that Mr. Delgado actually knew that he was being used in a tax avoidance scheme, or that he actually knew that liquor . . . was destined for 'organized crime' in Canada." *Rec. Dec.* ¶ 48, R. at 31. In light of all these factors, the court must conclude that ALJ's finding that Delgado violated 19 C.F.R. § 111.32 is

not supported by substantial evidence of record and cannot be sustained.

III. Conclusion

Because the Secretary's decision to revoke Mr. Delgado's license did not contain adequate findings of fact or reasoning upon which the decision was based, and failed to specify what parts of the ALJ's opinion were being adopted, the court must remand the matter to DHS for reconsideration. Further, because, after our review, "the record" is no longer the same as that on which the Secretary based the decision, it is necessary for the court to remand the matter to the Secretary for reconsideration given the charges that remain after our review. *See Boynton v. United States*, Slip. Op. 07–146 (Oct. 2, 2007). On remand, Customs will, consistent with this opinion, issue to Mr. Delgado, and file with the Court, a decision properly setting forth specific findings of fact and the reasoning upon which the decision is based.

Remand results are ordered by January 11, 2008. Plaintiff may file any objections to the remand results by January 25, 2008. The government's reply, if any, must be filed by February 8, 2008. All filings shall not exceed five pages in length.

SO ORDERED

Slip Op. 07 – 178

UNITED STATES, Plaintiff, v. NATIONAL SEMICONDUCTOR CORPORATION, Defendant.

Before: MUSGRAVE, Senior Judge
Court No. 03–00223

[On remand from appellate court, judgment, of a monetary penalty in the amount of $250,840.21 plus prejudgment interest, entered for the government.]

Decided: December 12, 2007

Jeffrey S. Bucholtz, Acting Assistant Attorney General; *David M. Cohen*, Director, *Patricia M. McCarthy*, Assistant Director, Civil Division, Commercial Litigation Branch, United States Department of Justice (*Stephen C. Tosini*), and Office of the Chief Counsel, U.S. Customs and Border Protection (*Martha Toy Wong*), of counsel, for the plaintiff.

Whiteley & Cooper (*Robert Scott Whiteley* and *Craig A. Mitchell*), for the defendant.

OPINION

Familiarity with salient facts and prior decisions on this matter is here presumed. The appellate opinion ruled that this court "erred in

reaching beyond the penalty provision of 19 U.S.C. § 1592(c)(4) to award compensatory interest under 19 U.S.C. § 1505(c)" and therefore vacated the judgment with remand "to determine (i) the appropriate penalty due under section 1592(c)(4) in the absence of a compensatory interest award and (ii) whether prejudgment interest may be awarded on that penalty." *United States v. National Semiconductor Corp.*, 496 F.3d 1354, 1355 (Fed. Cir. 2007). In the wake thereof, this court advised the parties to brief their interpretations of the appellate decision and on proceeding at this stage.

I

The court begins its analysis of the *Complex Machine Works*[1] *factors from a clean slate. See United States v. Menard Inc.*, 17 CIT 1229, 1230 (1993). Of the fourteen factors already considered, the only one directly displaced by the appellate decision was whether the party sought to be protected by the statute is elsewhere adequately compensated for the harm. This court had previously found that consideration of that factor deserved the heaviest weighting in light of the possibility of full time-value compensation pursuant to section 1505(c).

The defendant argues that properly giving more weight to deterrence than compensation pursuant to a *de novo Complex Machine Works* analysis must place the defendant in the lowest range of potential penalties. The government argues that altogether ignoring the factor of whether it has been adequately compensated for the harm done does not follow from the appellate decision. It maintains that an interest-only penalty is a form of mitigation in its own right and there is no need to reduce the penalty due to NSC's compliance efforts. Due the appellate decision, the court agrees that the government is not adequately compensated for the harm elsewhere, and therefore this factor does not support mitigation.

One facet of this civil interest-only penalty is a form of compensation, akin to liquidated damages. *Cf. One Lot Emerald Cut Stones and One Ring v. United States*, 409 U.S. 232 (1972) (describing monetary penalty of 19 U.S.C. § 1497 as a form of liquidated damages). The court had previously considered the *Complex Machine Works* factor of deterrence in light of the fact that "deterrence" was commensurate with the court's finding that the government was, or could be, at the time, adequately compensated by other means. Because of such other compensation, the court was previously "unpersuaded that a 'maximum' civil penalty, in addition to payment of interest compensating the government, would further the policy of deterrence behind the imposition of customs penalties." *United States v. National Semiconductor Corp.*, Slip Op. 06–90 at 13 (CIT

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[1] *United States v. Complex Machine Works Co.*, 23 CIT 942, 83 F.Supp.2d 1307 (1999).

June 16, 2007). Unquestionably, however, an aim of monetary penalties is to deter. *See*, *e.g.*, *Friends of the Earth, Inc. v. Laidlaw Environmental Services (TOC), Inc.*, 528 U.S. 167 (2000); *Beatrice Foods Co. v. New England Printing and Lithographing Co.*, 899 F.2d 1171 (Fed. Cir. 1990). In this instance, since the government is no longer to be adequately compensated by other means, and the "penalty" here merely amounts to the amount of interest on the underpaid amount of the merchandise processing fees from the date of liquidation, a monetary penalty of less than the full amount authorized by law would not serve the policy of deterrence but would rather leave what amounts to, in effect, the interest earned on an "unauthorized loan" (the underpaid MPFs) in the hands of the defendant and encourage non-compliance. Further, as the court previously agreed, the interest-only penalty for a voluntary disclosure is a form of mitigation in its own right and already takes into account a defendant's good-faith attempt to comply with its legal obligations. Slip Op. 06–90 at 5.

The defendant nonetheless argues that for the court to accede to the government's demand for the full interest penalty allowable by statute, the court would be punishing negligence at the same level as one who committed a violation with actual knowledge of or reckless disregard for one's obligations under the statute. The defendant argues that it would be legal error for the court to "conflate" merely negligent and grossly negligent violations "interchangeably." This argument is absurd and directly contradicts the statute's plain language. *See* 19 U.S.C. § 1592(c)(4)(B). In essence, the defendant argues for a ruling that would effectively preclude the maximum punishment permitted by law for the voluntary disclosure of a negligent violation of section 1592(a).

In addition, the defendant also argues against any "application" of the recent decision *United States v. Ford Motor Co.*, 463 F.3d 1267 (Fed. Cir. 2007) on the ground that the case did not involve a voluntary disclosure. In this regard, the defendant argues that the "appellate court held that the trial court's decision to impose the maximum penalty was, under these circumstances [in *Ford*], within its discretion." *Cf.* Def.'s Resp. to Pl.'s Comments on the Court's Order ("DRPC") at 5. If the inference from the argument is that because these are not those circumstances, this court has no discretion but must mitigate any "maximum" voluntary disclosure interest-only penalty, the inference must be rejected.

As observed in *Ford*, it is hard to imagine a situation in which a defendant could not "find refuge in at least one potentially mitigating factor," 463 F.3d at 1286, and it is the totality of the *Complex Machine Works* factors that determine whether mitigation is appropriate. Although there are some factors here which may be regarded as favoring mitigation, the court concludes that on balance the *Complex Machine Works* factors considered as a whole counsel against mitiga-

tion. Thus, and in accordance with the appellate decision, judgment will be awarded to the government in the form of a monetary penalty against the defendant in the amount of $250,840.21.

II

The government also seeks prejudgment interest on the amount of the monetary penalty. The defendant opposes award of prejudgment interest, noting that it has only been awarded in the past in connection with 19 U.S.C. § 1592(d) demands for unpaid duties and/or for liquidated damages. DRPC at 8 (referencing *United States v. Yuchius Morality Co., Ltd.*, 26 CIT 1224 (2002); *United States v. Jac Natori Co.. Ltd.*, 22 CIT 1101 (1998); *United States v. Reul*, 14 CIT 661 (1999); *United States v. Bealey*, 14 CIT 670 (1990); *United States v. American Motorists Ins. Co.*, 11 CIT 944, 680 F.Supp. 1569 (1987); *United States v. Imperial Food Imports*, 11 CIT 254, 660 F.Supp. 958 (1987); *United States v. Goodman*, 6 CIT 132, 572 F.Supp. 1284 (1983)). That may be so, but the argument does not preclude a first-impression award of pre-judgement interest in an action grounded solely upon 19 U.S.C. § 1592(c)(4).

The award of prejudgment interest is within the court's discretion. *See*, *e.g.*, *United States v. Reul*, 959 F.2d 1572 (1992). A caveat is that prejudgment interest may not be awarded on damages that are considered punitive. *E.g.*, *id.* at 1578; *United States v. Imperial Food Imports*, 834 F.2d 1013 (Fed. Cir. 1987); *Underwater Devices v. Morrison-Knudsen Co.*, 717 F.2d 1380, 1389 (Fed. Cir. 1983) (purpose of prejudgment interest to make party whole, not penalize).

In this instance, as noted, the monetary penalty is not designed to be punitive, it is a compensatory form of liquidated damages. *See* 24 *Williston on Contracts* § 65:3 (4th ed.). *Cf. One Lot Emerald Cut Stones and One Ring v. United States, supra*, 409 U.S. 232 (considering monetary penalty of 19 U.S.C. § 1497); *Reul*, 959 F.2d at 1578; *American Motorists*, 11 CIT at 947, 680 F.Supp. at 1572 (liquidated damages are not penalties but are compensatory in nature).

The defendant argues that prejudgment interest cannot be awarded where the amount of damages is uncertain, and it argues that in this matter the damages were uncertain because the interest-only penalty is awarded based upon a sliding scale that necessarily awaited the exercise of the court's discretion. The argument is without merit, however. To the extent contract law has any application on the point – and the court is not persuaded that it does – it may be true, generally speaking, that "damages are not recoverable for loss beyond an amount that the evidence permits to be established with reasonable certainty," Restatement (Second) of Contracts § 352 (1981), but in this instance the amount claimed by the government was certain. As with any damage claim, the defendant had the right to dispute both the government's claim and the amount in a court of law, but the fact that the amount is disputed until all is said

and done does not make the ultimate amount awarded uncertain. Otherwise, the award of prejudgment interest would never be appropriate in any dispute; the bar "merely excludes those elements of loss that cannot be proved with reasonable certainty." *Id*. The amount owed in this instance was readily ascertainable.

The purpose of prejudgment interest is to put the prevailing party in as nearly a good position as it would have been had there not been a duty breached. *Underwater Devices*, *supra*, 717 F.2d at 1389. "Prejudgment interest serves to compensate for the loss of the use of money due as damages from the time the claim accrues until judgment is entered, thereby achieving full compensation for the injury those damages are intended to address." *Princess Cruises, Inc. v. United States*, 397 F.3d 1358, 1367 (Fed. Cir. 2005) (internal quotations and attribution omitted). It "is an element of complete compensation." *West Virginia v. United States*, 479 U.S. 305, 310 (1987).

In this instance, the injury that element is intended to address arose from the defendant's violation of 19 U.S.C. § 1592(a). The government argues that "award" of prejudgment interest is appropriate because it demonstrated at trial that the defendant in effect paid the principal amount owed but remains indebted to the extent that the government has, to date, remained deprived of the time-value of the funds demanded in its 1592(c)(4) notice to the defendant. Pl.'s Response to Court's Order at 10 (referencing, *inter alia, Ins. Co. of N. Am. v. United States*, 951 F.2d 1244, 1247 (Fed. Cir. 1991) (awarding prejudgment interest to government because surety "in effect, took for itself a loan on funds due the [g]overnment" after the latter demanded payment) & *United States v. Imperial Food Imports, supra* 834 F.2d at 1060 (nonpayment of estimated duties "would amount to an interest-free loan of the money owing to the [g]overnment from the due dates for payment until recovery" and that "as a matter of equity and fairness, the United States should be compensated for the loss of the use of the money due")). The court agrees, noting that prejudgment interest in this matter would amount to an award of interest on the interest. *Cf.* 19 C.F.R. § 24.3a(b)(4)(C)(ii) ("[i]f duties, taxes, fees, and interest are not paid in full within the applicable period specified in [19 C.F.R. §] 24.3(e), any unpaid balance shall be considered delinquent and shall bear interest until the full balance is paid"). Prejudgment interest shall therefore be included in the judgment, to be assessed from the date of Customs' penalty demand notices to the defendant. *Cf. United States v. Monza Automobili*, 12 CIT 239, 241, 683 F.Supp. 818, 820 (1988) (observing that the date of Custom's payment demand fixed the certainty of liquidated damages and noting the inappropriateness award of prejudgment interest prior to such date).

UNITED STATES, Plaintiff, v. NATIONAL SEMICONDUCTOR CORPORATION, Defendant.

Before: MUSGRAVE, Senior Judge
Court No. 03–00223

JUDGMENT

The appellate court having vacated this Court's previous judgment, and this action having been remanded and again duly submitted for decision, and the Court, after due deliberation, having rendered a decision herein; now, therefore, in conformity with said decision, it is

ORDERED that judgment in the amount of a monetary penalty of $250,840.21, pursuant to 19 U.S.C. § 1592(c)(4), be, and it hereby is, awarded against the defendant and in favor of the United States; and it is further

ORDERED that prejudgment interest be, and it hereby is, awarded against the defendant and in favor of the United States from the date of the penalty notices to the defendant, stated in the Complaint to have been February 15, 2001.