Slip Op. 09–27

NAKORNTHAI STRIP MILL PUBLIC COMPANY LIMITED, Plaintiff, v. UNITED STATES, Defendant, and UNITED STATES STEEL CORPORATION, Defendant–Intervenor.

Before: Pogue, Judge
Court No. 07–00180

PUBLIC VERSION

[Commerce's second remand determination sustained.]

Dated: April 7, 2009

Hughes, Hubbard & Reed LLP (*Kenneth J. Pierce*, *Robert L. LaFrankie*, *Victor S. Mroczka*) for the Plaintiff.

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Skadden, Arps, Slate, Meagher & Flom LLP (*Robert E. Lighthizer, John J. Mangan, Jeffrey D. Gerrish, Luke A. Meisner*) for the Defendant-Intervenor.

OPINION

Pogue, Judge: Plaintiff Nakornthai Strip Mill Public Co., Ltd. ("Nakornthai"),[1] Defendant United States (the "government") and Defendant-Intervenor U.S. Steel Corp. ("U.S. Steel") are before the court a third time following a second court-directed U.S. Department of Commerce ("Commerce") remand determination in this matter. *See Final Results of Redetermination Pursuant to Second Remand*, A–549–817, ADR 11/1/2004–10/31/2005 (Feb. 6, 2009) ("*Second Re-*

[1] Nakornthai is now known as G J Steel Public Co. Ltd. For consistency, as the court has in its previous opinions, the court will continue to refer to the company under its former name.

mand Results"). In response to Commerce's *Second Remand Results*, Nakornthai again challenges Commerce's choice of the invoice date, rather than contract date, as the date of sale for the calculation of Nakornthai's antidumping duties.

Because Commerce's ultimate conclusion — that Nakornthai has not established that the material terms of its contract were established on a date other than invoice date — is based both on a reasonable legal interpretation of the applicable regulation and sufficient factual findings supported by substantial evidence, the court affirms Commerce's *Second Remand Results*.

BACKGROUND

As a producer of hot-rolled carbon steel flat products ("hot-rolled steel") in Thailand, Nakornthai is subject to an antidumping order on its imports of hot-rolled steel into the United States. *See Certain Hot-Rolled Carbon Steel Flat Products from Thailand*, 66 Fed. Reg. 59,562 (Dep't Commerce Nov. 29, 2001) (notice of antidumping duty order) ("*Antidumping Duty Order*"). From 2001 to 2007, as a result of the *Antidumping Duty Order*, Nakornthai paid the separate "all others" duty rate of 3.86 percent on its imports. *See id.* at 59,563.

In May 2007, following Commerce's publication of the opportunity to request an administrative review of the *Antidumping Duty Order, see Antidumping or Countervailing Duty Order, Finding, or Suspended Investigation*, 70 Fed. Reg. 65,883 (Dep't Commerce Nov. 1, 2005) (notice of opportunity to request administrative review), U.S. Steel and Nucor Corp. ("Nucor") requested review for the period of November 1, 2004 through October 31, 2005. Commerce granted this request, *see Initiation of Antidumping and Countervailing Duty Administrative Reviews and Request for Revocation in Part*, 70 Fed. Reg. 76,024 (Dep't Commerce Dec. 22, 2005), and, after publishing preliminary results of its review, and inviting comments thereon by Nakornthai, U.S. Steel and Nucor, revised the *Antidumping Duty Order* to calculate a Nakornthai–specific dumping margin for the period of review (and a resulting antidumping duty cash deposit rate for the next review period) of 8.23 percent.[2] *See Certain Hot-Rolled Carbon Steel Flat Products from Thailand*, 72 Fed. Reg. 27,802, 27,803 (Dep't Commerce May 17, 2007) (final results and partial rescission of antidumping duty administrative review) ("*Final Results*"); *Issues & Decision Memorandum*, A–549–817, ADR 11/01/04–10/31/05 (May 7, 2007), *available at* http://ia.ita.doc.gov/frn/summary/THAILAND/E7-9526-1.pdf ("*Decision Memorandum*"); *Proprietary Arguments from the Issues and Decision Memorandum for the Final*

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[2] More thorough descriptions of the facts can be found in this court's previous opinions in this matter. *See Nakornthai Strip Mill Pub. Co. v. United States*, 587 F. Supp. 2d 1303 (CIT 2008) ("*Nakornthai II*"); *Nakornthai Strip Mill Pub. Co. v. United States*, 558 F. Supp. 2d 1319 (CIT 2008) ("*Nakornthai I*"). Familiarity with these two opinions is presumed.

Results of Certain Hot-Rolled Carbon Steel Flat Products from Thailand, A–549–817, ADR 11/01/04–10/31/05 (May 7, 2007) ("*Proprietary Memorandum*").

During the period of review, according to Nakornthai's responses to Commerce's questionnaires, Nakornthai made one U.S. sale of hot-rolled steel pursuant to a contract with a U.S. wholesaler (the "original contract"). The original contract specified certain terms, including both a total "quantity tolerance" and "per item tolerance level" of products to be shipped.[3] After the original contract was signed, Nakornthai and its wholesaler executed three changes in the contract: elimination of the line item quantity tolerance level, changes to payment terms[4] and amendments to delivery dates.[5] Nonetheless, Nakornthai claimed, and continues to claim, that these changes are immaterial and did not affect the uniform net unit price or the total quantity agreed to be purchased.

At a certain point, Nakornthai issued commercial invoices to the wholesaler. The final invoice quantity, though changed slightly from the total quantity specified in the original contract, remained within the total quantity tolerance provided for in the original contract. In fact, the contract amendment affected less that 0.1% of the total quantity of goods sold and shipped under the contract, and each of the individual line item quantities shipped were also within the original stated tolerance levels, except for one single line item. The quantity shipped of the single, changed line item was 14.5% more than the upper end of the original line item tolerance level and more than 25% above the specific line item quantity for that product.

Faced with this record, Commerce made a "date of sale" determination pursuant to its regulations:

> In identifying the date of sale of the subject merchandise or foreign like product, the Secretary normally will use the date of

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[3] The contract provided for the sale of a specific quantity,[ ] MT, of hot-rolled steel products at a uniform unit net price of [ ]. ("MT" connotes metric tons.) The contract further provided for both an overall "quantity tolerance" of +/–a specific percentage [ ] for the total quantity, and a specific individual line item tolerance, or "per item tolerance level," of +/– a specific percentage [ ]. ("Quantity tolerance" refers to acceptable range of quantities to be purchased, expressed as a number, plus or minus (+/–) a specified percentage.) The individual line items referred to specific products, identified by size, quality and thickness.

[4] The original contract's payment terms were changed from total payment against a specified shipping receipt to payment of a specified percentage [ ] against a different shipping receipt [ ] and the remaining [ ] payment against another [ ] receipt. In addition, Nakornthai originally reported a particular date, [ ], as the payment date. However, the record shows that Nakornthai received payment on different dates, with [ ].

[5] The delivery date amendments involved changes to the letter of credit expiry date and last shipment date on the letter of credit. Nakornthai changed the expiration date from [ ] to [ ]. Nakornthai also changed the last shipment date from [ ] to [ ].

> invoice, as recorded in the exporter or producer's records kept in the ordinary course of business. However, the Secretary may use a date other than the date of invoice if the Secretary is satisfied that a different date better reflects the date on which the exporter or producer establishes the material terms of sale.

19 C.F.R. § 351.401(i).[6]

Applying its regulation in Nakornthai's case, despite the limited nature of the quantity changes, Commerce concluded that the elimination of the line item tolerance levels demonstrated that the contract's material terms were not settled until the invoice date. According to Commerce, the elimination of the line item quantity tolerance level materially changed the original contract, because the elimination, at least potentially, allowed Nakornthai to make quantity changes affecting "product mix" and "resulting in [ ] products being shipped." *Proprietary Memorandum* 14. Given this finding, Commerce did not address the materiality of the changes to payment and delivery terms, as it deemed these issues "moot." *Id.*

In response, and in accordance with 19 U.S.C §§ 1516a(a)(2)(i)(I), 1516a(a)(2)(B)(iii) and 28 U.S.C. § 1581(c), Nakornthai filed this action, to contest Commerce's determinations in calculating Nakornthai's specific antidumping duty rate. Specifically, as is relevant here, Nakornthai claimed that Commerce erred by using the invoice date, instead of the contract date, as the date of sale to determine its weighted average dumping margin for the period covered by the administrative review and the assessment rate going forward.[7] Nakornthai argued to Commerce and argues before the court that Commerce should adhere to its "long-standing practice" of using the contract date as the date of sale, because, according to Nakornthai, the record reveals that the contract date "better reflects the date on which the exporter or producer establishe[d] the material terms of sale."

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[6] Commerce has explained its use of the presumption in support of the use of invoice date: "in many industries, even though a buyer and seller may initially agree on terms of sale, those terms remain negotiable and are not finally established until the sale is invoiced." *Antidumping Duties; Countervailing Duties*, 62 Fed. Reg. 27,296, 27,349 (Dep't Commerce May 19, 1997) (final rule). Thus, the party challenging this presumption bears the burden to prove that a different date "better reflects" the parties establishment of material contract terms and "must submit information that supports the use of [the] different date." *Id.*; *see also Allied Tube & Conduit Corp. v. United States*, 25 CIT 23, 25, 132 F. Supp. 2d 1087, 1090 (2001).

[7] Commerce's use of date of invoice instead of contract date affects the calculation of Nakornthai's dumping margin. *See* 19 C.F.R. § 351.401(a). As noted in *Nakornthai I*, "[t]he identification of a 'date of sale' for U.S. price may affect [Commerce's] comparison with sales in the foreign or 'home' market, for example, if exchange rates are changing during the period of review." *Nakornthai I*, 558 F. Supp. 2d at 1321 n.1.

I. Nakornthai I

In Nakornthai I, the court affirmed Commerce's initial legal interpretation, holding that Commerce's identification of line item quantities as a "material term of sale" of Nakornthai's contract was based on the agency's reasonable interpretation of its own regulation. *Nakornthai I*, 558 F. Supp. 2d at 1327. In addition, the court refused to consider alternative dates of sale, other than contract date, as Nakornthai had failed to exhaust its administrative remedies on this issue. *Id.* at 1329–30.

However, the court held that Commerce's factual findings on the finality of the terms of sale were incomplete, and remanded the issue back to the agency for reconsideration. *Id.* at 1328–29. Noting that Commerce, in applying it's date-of-sale regulation, "weighs the evidence presented and regularly determines the significance of any changes to the terms of sales involved", *id.* at 1327, the court stated that "Commerce did not discuss or make a finding with regard to this [i.e., Nakornthai's] evidence [as to the quantities of goods actually ordered and delivered], either on its own or when considered in light of the elimination of the tolerance levels in the contract." *Id.* at 1328. Therefore, the court could not determine whether the variation in quantities for one line item was sufficiently significant, e.g., either to affect "product mix" in a significant way or to alter the dumping margin, to meet the regulatory standard that the terms of the contract not be essentially "established." *Id.* As such, the court remanded the case back to Commerce to make a factual finding "with regard to the significance of Nakornthai's evidence" and whether "the date the terms of the contract were essentially 'established' [at the date of contract] in light of the evidence submitted." *Id.* at 1328–29.

II. Nakornthai II

On remand, Commerce reconsidered its original determination, but again chose to use the date of invoice rather than the date of contract as the date of sale. *See Final Results of Redetermination Pursuant to Remand*, A–549–817, ADR 11/1/2004—10/31/2005 (July 28, 2008) ("*First Remand Results*"). Commerce distinguished Nakornthai's case from prior instances where Commerce found changes to contractual terms of sale insignificant, and thus used the contract date for date of sale. *Id.* 3–4 (discussing *Certain Cut-to-Length Carbon Steel Plate from Romania*, 72 Fed. Reg. 6,522 (Dep't Commerce Feb. 12, 2007)(notice of final results of antidumping duty administrative review and final partial rescission) and accompanying Issues and Decision Memorandum, A–485–803, ADR 08/01/2004–07/31/2005 (Feb. 2, 2007), *available at* http://ia.ita.doc.gov/frn/summary/ROMANIA/E7–2216–1.pdf ("*Romanian Plate*"); *Circular Welded Non-Alloy Steel Pipe from the Republic of Korea*, 63 Fed. Reg. 32,833 (Dep't Commerce June 16, 1998) (final results of antidumping duty administrative review)). In addition, Commerce refused to address

Nakornthai's proposed alternative dates of sale. *Id.* 11–12. The court sustained these two determinations. *Nakornthai II*, 587 F. Supp. 2d at 1308–09, 1311–12.

However, Commerce seemingly ignored the court's specific instructions regarding analysis of Nakornthai's particular evidence, declaring that the change to the specific quantity shipped "is not [ ] relevant" and concluding that the "relevant change" was the elimination of the tolerance levels from the original contract. *First Remand Results* 5. Rather, Commerce merely restated its prior hypothetically-based reasoning previously rejected by the court,[8] and therefore the court remanded again as to Commerce's factual findings on date of sale. *Nakornthai II*, 587 F. Supp. 2d at 1309. The court instructed Commerce to, on remand:

> determine [in accordance with its standard practice], and explain its rationale, as to whether the evidence presented by Nakornthai of the change in the quantity shipped was actually of any significance, and whether, in context, this change materially affected the date that the terms of the contract were essentially established.

Id. at 1311.

III. Commerce's Second Remand Results

Pursuant to the court's second remand, Commerce once again re–examined its date of sale analysis. *See Second Remand Results* 1, 3. Commerce first determined "that the change in aggregate quantity shipped [by Nakornthai] is not, on its own, significant and does not, by itself, materially affect the date that the terms of contract were essentially established." *Id.* 3. Commerce explained that, according to its practice, differences between aggregate quantity contracted for and shipped, as long as these differences fall within the overall quantity tolerance, do not constitute changes to material contractual terms. *Id.* 5–6 (citing *Romanian Plate*; *Certain Large Diameter Carbon and Alloy Seamless Standard, Line and Pressure Pipe From Mexico*, 65 Fed. Reg. 39,358 (Dep't Commerce June 26, 2000) (notice of final determination of sales at less than fair value)).[9]

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[8] "Commerce determined that the mere removal of the [line item] quantity tolerance from the contract was significant because it 'provided [Nakornthai] with the flexibility to affect the product mix and, in turn, the overall dumping margin,' because 'the product mix . . . is used for matching purposes and the overall margin calculation.' Commerce then set forth a hypothetical example demonstrating how the tolerance removal 'could conceivably' permit Nakornthai to alter product combinations in an effort to impact the overall dumping margin. While Commerce did state that 'it is reasonable to characterize the quantity change as significant,' the agency did not provide a reasoned explanation on this issue, and immediately reiterated that this analysis '[was] not the basis' for its determination." *Nakornthai II*, 587 F. Supp. 2d at 1309 (citations omitted).

[9] Because this determination is inconsistent with Commerce's consideration of line item

But Commerce continued:

> [However,] when the change in aggregate quantity is considered in the context of ongoing amendments to material contract terms subsequent to [Nakornthai's] original contract date, including the elimination of the line item quantity tolerance from [Nakornthai's] original contract and subsequent amendments to payment and delivery terms, record evidence demonstrates a continuum of change to material contract terms that fails to overcome [Commerce's] regulatory presumption that invoice date is the appropriate date of sale.

Id. 3–4. In other words, Commerce determined that "the context in which [the within-tolerance change] occurred demonstrates that the terms of [Nakornthai's] U.S. sales contract were not set in the original contract." *Id.* 7.

This "context" as considered by Commerce has several elements. First, Commerce noted that, unlike the record in *Romanian Plate*, "the record in this case lacks any similar evidence [of the parties' conclusion of a final agreement regarding terms of sale] supporting [Nakornthai's] proposal that [Commerce] rely upon the contract date." *Id.* 5.[10] Second, Commerce identified a "series of changes to the material terms of sale" including (1) the elimination of the line item quantity tolerance, as well as (2) changes to payment terms and (3) amendments to delivery terms, that demonstrate that Nakornthai and its U.S. customer "did not share an agreement on final contract terms until the invoice date." *Id.* 7.

With respect to the elimination of the line item quantity tolerance level, Commerce stated that this "by itself" was material to its date of sale analysis because "it shows that parties did not share an agreement on the final terms of sale on the original contract date." *Id.* 13. Commerce also found that this change was "commercially significant" because Nakornthai's original contract

> stated that a certain quantity of each item would be shipped, and that a [line item] quantity beyond [ ]% of the [line item] quantity tolerance would constitute a breach of contract. Therefore, the final sale quantity . . . would have resulted in a breach of contract had the original contract not been subsequently amended. Amending the original contract to allow for a final

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quantity levels, discussed *supra*, the court expresses no view on the reasonableness of this asserted "standard practice."

[10] The *Romanian Plate* respondent's evidence included "thespecific language of the order acknowledgment — language that Commerce deemed to definitively state 'that there can thereafter be no changes in the terms of sale' — as well as affidavits from U.S. customers 'declaring that the order acknowledgments are understood as the parties' final agreement on quantities and prices ordered.' " *Nakornthai II*, 587 F. Supp. 2d at 1307 (quoting *Romanian Plate* 7).

> shipment that would have constituted a breach of the original contract is a "significant" amendment for commercial purposes.

Id. (citation omitted).

Similarly, Commerce also concluded that, "as a factual matter, the amendments to payment and delivery terms demonstrate that the parties did not share an agreement concerning these material terms at the time of their original contract." *Id.* 8. Commerce determined that the fact that the payment and delivery terms, considered "material" in Commerce's practice, were subject to amendment "is sufficient to demonstrate their materiality. . . ." *Id.* 13. But Commerce further noted that "the record demonstrates that [the amendments to payment and delivery terms] impacted [sic] the sales transactions at issue." *Id.* 14. More particularly, the payment term change allowed Nakornthai to receive a certain percentage of its payment at an earlier point in time[11] than specified in the original contract, and the changes to the letter of credit's expiration and last shipment dates[12] gave Nakornthai [ ] additional days to ship the subject merchandise to its customer and still be entitled to full payment. *Id.* Accordingly, these changes affected "the credit calculation for [Nakornthai's] U.S. sales used to derive [its] weighted-average dumping margin." *Id.*[13]

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[11] Commerce relied upon Nakornthai's reported payment date of [ ] in determining Nakornthai's "credit expense calculation." *Def.'s Resp. to Pl.'s Comments Regarding the Second Remand Determination* ("*Def.'s Resp.*") 12. The credit expense "is the interest expense incurred (or interest revenue foregone) between shipment of merchandise to a customer and receipt of payment from the customer." *Rebuttal to Pl.'s Comments on the Dep't of Comm.'s Second Remand Results* 16.

[12] Nakornthai reported, and Commerce relied upon, shipment dates [ ] in determining Nakornthai's "credit expense calculation." Moreover, Nakornthai provided certain specified [ ] receipts that show that its shipments were commenced and completed on certain dates, from [ ] to [ ]. Thus, according to Commerce, "[ ] of Nakornthai's shipments to the United States were conducted in accordance with the shipment terms present upon invoice date." *Def.'s Resp.* 12.

[13] According to Commerce:

> The credit expense calculation functions as an adjustment in Commerce's determination of an antidumping margin that is aimed at valuing, in part, the opportunity costs involved with the timing of the transactions at issue. Commerce's Antidumping Manual explains that the most common adjustment for differences in circumstances of sale is for differences in credit costs, and that this adjustment is necessary because there "is usually a period of time between the shipment of merchandise to a customer and payment for the merchandise." The manual further states that this adjustment is required "to account for the opportunity cost associated with the loss of the use of monies involved," and that in "all instances where the respondent provides shipment and payment dates, we use this information to calculate the actual number of days credit is outstanding."
>
> In this case, Nakornthai reported its credit expenses to Commerce using the following formula:
>
> > CREDITU {credit expenses} = GRSUPRU {gross unit price} × U.S. dollar interest rate × ((PAYDATEU {payment date} - SHIPDATU {shipment date})/365)
>
> Therefore, by definition, the shipment date or the payment date . . . reported by

Finally, Commerce again refused to consider any alternate dates proposed by Nakornthai and limited its date of sale analysis to the contract and invoice dates. *Id.* 15. Accordingly, Commerce reaffirmed its conclusion to use invoice date. *Id.*

STANDARD OF REVIEW

As in reviewing earlier Commerce determinations in this case, the court reviews remand determinations for compliance with the court's remand order. *See NMB Sing. Ltd. v. United States*, 28 CIT 1252, 1259–60, 341 F. Supp. 2d 1327, 1333–34 (2004); *Olympia Indus., Inc. v. United States*, 23 CIT 80, 82, 36 F. Supp. 2d 414, 416 (1999). Moreover, again, the agency's legal determinations on remand must be in accordance with law and its factual findings must be supported by substantial evidence. 19 U.S.C. § 1516a(b)(1)(B); *see Huaiyin Foreign Trade Corp. v. United States*, 322 F.3d 1369, 1374 (Fed. Cir. 2003); *AG der Dillinger Hüttenwerke v. United States*, 28 CIT 94, 95, 310 F. Supp. 2d 1347, 1349 (2004). "Substantial evidence is 'such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.' " *Huaiyin Foreign Trade Corp.*, 322 F.3d at 1374 (citations omitted).

DISCUSSION

Commerce's *Second Remand Results* comply with the court's remand orders in *Nakornthai I* and *Nakornthai II*. At the same time, the court cannot affirm Commerce's conclusion that the elimination of a line item quantity tolerance level from the contract constituted a significant change that materially affected Nakornthai's contract. Nonetheless, based on Commerce's further analysis of the significance of the particular evidence presented in this case, the court otherwise deems Commerce's factual findings in its *Second Remand Results* to be supported by substantial evidence and its interpretation of its own regulation to be in accordance with law.

Nakornthai affects the credit calculation. Because Nakornthai's own reported shipment and payment dates, as well as the shipments and payments between Nakornthai and its United States customer, conform with the contract terms present at the time of the invoice date, Commerce's calculation of Nakornthai's credit expenses reflects Nakornthai's adherence to material contract terms present at the time of the invoice date and not the terms present in the original contract.

Def.'s Resp. 13–14 (quoting *Import Administration Antidumping Manual*, Ch. 8, 22–23, *available at* http://ia.ita.doc.gov/admanual/index.html (last visited Mar. 19, 2009)) (citations omitted). Commerce did not provide a specific calculation of this effect on the dumping margin, as "Commerce does not, as a matter of practice, calculate unofficial antidumping margins to demonstrate the difference between the actual antidumping margin and alternative margins that might result from different factual scenarios." *Def.'s Resp.* 14.

I. The Court Cannot Affirm Commerce's Conclusion Regarding Nakornthai's Elimination of the Line Item Quantity Tolerance Level

Despite Commerce's conclusion, based on its established practice, that differences in line item quantities, so long as the overall quantity is within the overall quantity tolerance level, are not significant, Commerce nonetheless concluded that the elimination of the line item tolerance from the contract was "material" in this case. Previously, in *Nakornthai I* and *Nakornthai II*, the court rejected Commerce's proffered hypothetical reasoning that this contractual change potentially allowed Nakornthai to manipulate the "product mix." Now, as explained in its *Second Remand Results*, Commerce presents a different rationale. Commerce reasons that, "[a]s a factual matter, the elimination of the line item quantity tolerance demonstrates that the parties did not share an agreement concerning quantity, a material contract term, at the time of their original contract." *Second Remand Results* 7. Commerce based its conclusion upon the court's previous holding that Commerce can reasonably consider the change to a line item quantity tolerance a "material" contract term, *see Nakornthai I*, 558 F. Supp. 2d at 1327, and upon the fact that the shipped quantity of the line item was 14.5% more than the upper end of the original tolerance level and more than 25% above the specific line item quantity for that product. *Second Remand Results* 7.

Nakornthai argues that Commerce, in employing "flawed" reasoning, has not followed the court's remand instructions with regard to its analysis of the elimination of the line item quantity tolerance level. *Pl.'s Comments on the Dep't of Comm.'s Second Remand Results Pursuant to Slip Op. 08–128* ("*Pl.'s Comments*") 1. More specifically, Nakornthai charges that Commerce once again relied on speculation and hypotheticals, as there was no actual breach of contract. *Id.* 5–6. Nakornthai also attacks Commerce's conclusions, that the amendment demonstrates that the contract was subject to change, as "absurd and illogical." *Id.* 9.

Nakornthai's position, though somewhat overstated, has merit. Commerce has once again attempted to make a factual finding of "potential" significance regarding the line item contractual quantity change, while at the same time making a factual finding that the change in quantities, in total, are not significant. Because of this inconsistency, Commerce has, with regard to this issue, again failed to provide a non-arbitrary, reasoned basis for its conclusion. Commerce argues that the elimination of the line item tolerance level, because that tolerance level is, as a legal matter, a material contract term, in and of itself materially alters the contract. But, as Nakornthai points out, this determination is directly contrary to the court's instructions in *Nakornthai I. See Nakornthai I*, 558 F. Supp. 2d at 1328 ("Commerce argues that the fact that the quantity tolerance

level was changed, in whatever amount, demonstrates that the contract's material terms were subject to change and therefore not finally settled until the invoice date. The problem with this argument is that it begs the question of whether any such changes were insignificant.").

Nor, as the court has also previously instructed, can Commerce use speculative or hypothetical reasoning to support its conclusions. *See Nakornthai II*, 587 F. Supp. 2d at 1310 ("Commerce's use of hypotheticals, generalizations . . . and conditional language suggesting possible distortions in antidumping calculations offer conjecture rather than a reasoned explanation founded on substantial evidence." (quoting *Hynix Semiconductor, Inc. v. United States*, 27 CIT 1719, 1722, 295 F. Supp. 2d 1365, 1369 (2003), *rev'd in part*, 424 F.3d 1363, 1370 (Fed. Cir. 2005))). Thus, Commerce's hypothetical scenario, indicating that Nakornthai — had it and its U.S. customer not amended the contract — would have breached the contract when delivering its particular quantity of the relevant line item, is of limited persuasiveness. Because it is Commerce's practice to disregard changes that are not significant, *see Nakornthai II*, 587 F. Supp. 2d at 1309, Commerce cannot simultaneously rely on contractual changes that it has found insignificant to claim that such changes demonstrate that a contract's terms are not established.

Moreover, Commerce's argument is circular. Commerce contends that, because the contract was amended, the amendment was "commercially significant." Had the line item quantity shipped fallen within the original line item quantity tolerance, i.e., had the amount shipped been consistent with the original contractual terms, Nakornthai would have had no need to amend the contract in the first place. Nonetheless, an amendment is not commercially significant simply because it changes a contractual term, even if that term is material.

Because Commerce, in making its date of sale determination, must, in accordance with its own regulation, make a factual determination with regard to whether the material terms were not set until invoice, and because Commerce's own practice in making such a determination is to disregard changes that are insignificant, the record must contain evidence sufficient to support the finding that the change to the material terms represented in the contract was significant. Commerce still has not done so here with regard to the line item quantity tolerance level and, thus, Commerce has not demonstrated to the court that its determination of significance of the elimination of the line item quantity tolerance level is supported by substantial evidence.

II. Commerce Nonetheless Provides Substantial Evidence to Support Its Decision

However, the court finds other reasons to sustain Commerce's *Second Remand Results*. As a general matter, Commerce maintained that evidence, other than differences between contracted-for and shipped quantities, demonstrates that Nakornthai's contract was subject to change. Commerce noted that Nakornthai has not provided evidence, such as that presented in *Romanian Plate*, that would warrant deviation from its presumption of using invoice date as date of sale. *Second Remand Results* 5. In addition, Commerce noted that it regularly considers payment and delivery terms as material terms of sale, *id.* 7 (citing *SeAH Steel Corp. v. United States*, 25 CIT 133, 134 (2001)), and concluded that Nakornthai's amendments to payment and delivery terms "demonstrate that the parties did not share an agreement concerning these material terms at the time of their original contract." *Id.* 8.

Nakornthai first takes issue with Commerce's statement that payment and delivery terms are generally considered by Commerce as "material," citing *Certain Hot-Rolled Carbon Steel Flat Products from Thailand*, 66 Fed. Reg. 49,622 (Dep't Commerce Sept. 28, 2001) (notice of final determination of sales at less than fair value). Commerce responds that its date of sale practice has "evolved," and that it "now considers, among other contractual terms, delivery and payment terms as material terms of sale." *Def.'s Resp.* 10.

The court accepts Commerce's reasonable interpretation of its regulatory practice and notes that this interpretation is supported by recent Commerce decisions. *See, e.g.*, *Issues & Decision Memorandum for Stainless Steel Sheet and Strip in Coils from Taiwan* (final results of the fourth antidumping administrative review), A–583–831, AD/CVD 7/1/02–6/30/03 15 (Feb. 7, 2005), *available at* http://ia.ita.doc.gov/frn/summary/taiwan/E5–631–1.pdf ("The Department has interpreted 'material terms of sale' to include price, quantity, and payment terms . . . ."); *Certain Cold-Rolled Flat-Rolled Carbon-Quality Steel Products from Brazil*, 65 Fed. Reg. 5,554, 5,575 (Dep't Commerce 2000) (final determination) (payment terms); *Issues & Decision Memorandum for Cold-Rolled Flat-Rolled Carbon Quality Steel Products from Turkey*, A–489–808, POI 1998–99 Date of Sale cmt. 1 (Mar. 21, 2000), *available at* http://ia.ita.doc.gov/frn/summary/turkey/00–6992–1.txt (payment terms). Therefore, the court finds Commerce's legal conclusion that payment and delivery terms are "material" to be in accordance with law.

Second, according to Nakornthai, Commerce failed to make a significance finding for the payment term change or the delivery term change. Nakornthai charges that Commerce's analysis on these terms' affect on Nakornthai's credit calculation is also "purely conjectural," as

> [n]owhere does Commerce explain exactly how this is so, or how such minor changes to secondary terms of sale are otherwise "significant" to any aspect of the actual dumping calculation. In fact, Commerce never determines whether [Nakornthai] used additional days or received payment any earlier, nor has Commerce analyzed whether there was any actual impact on its dumping calculation. Not surprisingly, Commerce provides no citation to the record on its claim because there was no impact on the margin.

Pl.'s Comments 7. For the same reasons stated above with regard to the quantity tolerance level, the court cannot affirm Commerce's finding that merely because these material contractual terms were amended, such amendments in and of themselves demonstrate that the contract was subject to change.

Despite this deficiency, Commerce also made the requisite factual findings of significance with regard to the change in payment and delivery terms. Commerce's decision has sufficiently demonstrated to the court that the payment and delivery terms affected the sales transaction in a significant way, that is, that these changes significantly affected the terms of Nakornthai's contract. Moreover, this demonstration is supported by substantial evidence. For example, the payment term change allowed Nakornthai to receive a significant portion, [ ], of its payment at an earlier point in time than specified in the original contract, and the changes to the letter of credit's expiration and last shipment dates gave Nakornthai [ ] additional days to ship the subject merchandise to its customer while still being entitled to full payment. *Id.* Indeed, "[ ] of Nakornthai's shipments to the United States were conducted in accordance with the shipment terms present upon invoice date." *Supra* note 12. In turn, these amendments changed the credit expense calculation used to compute Nakornthai's dumping margin for the period of review.[14]

Based on Commerce's findings and reasoned analysis regarding the delivery and payment terms of Nakornthai's contract, the court concludes that Commerce's conclusion in the *Second Remand Results* — that Nakornthai has not established that the material contract terms were established on a date other than invoice date — is based on a reasonable interpretation of the "date-of-sale" regulation and on sufficient factual findings that are supported by substantial evidence.

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[14] Note that the court here makes only a substantial evidence determination. The court does not conclude that an affect on the dumping margin is a necessary condition for a finding of significance. Nor does the court conclude that an affect on the dumping margin is necessarily sufficient for a finding of significance. Rather, the court concludes that the agency's finding of significance here is based on a reasonable interpretation of the record evidence.

CONCLUSION

Therefore, upon consideration of the pending motions before the court, in accordance with this opinion, it is hereby:

ORDERED that the Department of Commerce's second remand determination is sustained. Judgement will be entered accordingly.

Slip Op. 09–28

FORMER EMPLOYEES OF HUTCHINSON TECHNOLOGY, INC., Plaintiff, v. UNITED STATES, Defendant.

Before: Gregory W. Carman, Judge
Court No. 07–00335
PUBLIC VERSION

[*Plaintiff's motion for judgment on the agency record is denied; decision of the Department of Labor is affirmed.*]

April 9, 2009

Edmund Maciorowski, P.C. (*Edmund Maciorowski*), for Plaintiff.

Michael F. Hertz, Acting Assistant Attorney General; *Jeanne E. Davidson*, Director; *Patricia M. McCarthy*, Assistant Director, Commercial Litigation Branch, Civil Division, United States Department of Justice (*David M. Hibey*); and *Stephen L. Jones*, Office of the Solicitor, United States Department of Labor, of counsel, for Defendant.

OPINION

CARMAN, JUDGE: This case is before this Court pursuant to Plaintiff's Motion for Judgment on the Agency Record (USCIT R. 56.1). Based on the following analysis, the Court denies Plaintiff's motion and sustains the decision of the Department of Labor.

BACKGROUND

Hutchinson Technology, Inc., is a manufacturer of suspension assemblies for disk drives. (Admin. Record ("AR") at 7.) The Plaintiff, Former Employees of Hutchinson Technology, Inc. was separated from Hutchinson Technology, Inc. ("Hutchinson") during the week of June 4, 2007. (Pl.'s Mot. for Summ. J. on the Agency Record ("Pl.'s Mot.") 3.) Plaintiff submitted an application for Trade Adjustment Assistance ("TAA" or "worker adjustment assistance") and Alternative Trade Adjustment Assistance ("ATAA") on June 21, 2007. (*Id.*) This application was denied on July 10, 2007 (*Id.*) on the grounds that "[t]he subject firm did not shift production abroad, nor does it import suspension assemblies for disk drives." (AR at 19.) After Plaintiff filed this case, Defendant U.S. Department of Labor ("La-

bor") sought, and was granted, a voluntary remand for further investigation of Plaintiff's claim with respect to "additional information regarding the subject firm's customers." (Supp. Admin. Record ("SAR") at 32.) This voluntary remand also resulted in a negative determination on January 18, 2008. (Pl.'s Mot. 4.) Plaintiff now requests that the Court "grant judgment in [its] favor . . . pursuant to 19 U.S.C. § 2395(c) and USCIT R. 56.1." (*Id.*) This Court has jurisdiction over this case pursuant to 28 U.S.C. § 1581(d)(1) (2000).

Standard of Review

The court will sustain the Department of Labor's determination if it is supported by substantial evidence and is otherwise in accordance with law. 19 U.S.C. § 2395(b) (2000); *see also Woodrum v. Donovan*, 5 CIT 191, 193, 564 F.Supp. 826, 828 (1983), *aff'd*, 737 F.2d 1575 (Fed. Cir. 1984). The findings of fact by the Secretary are conclusive if supported by substantial evidence. 19 U.S.C. § 2395(b) (2000). "Substantial evidence is something more than a 'mere scintilla,' and must be enough reasonably to support a conclusion." *Ceramica Regiomontana, S.A. v. United States*, 10 CIT 399, 405, 636 F. Supp. 961, 966 (1986), *aff'd*, 810 F.2d 1137 (Fed. Cir. 1987) (citations omitted). "Additionally, 'the rulings made on the basis of those findings [must] be in accordance with the statute and not be arbitrary and capricious, and for this purpose the law requires a showing of reasoned analysis.' " *Former Employees of Gen. Elec. Corp. v. U.S. Dep't of Labor*, 14 CIT 608, 611 (1990) (*quoting Int'l Union v. Marshall*, 584 F.2d 390, 396 n. 26 (D.C. Cir. 1978)).

Discussion

In order to qualify for worker adjustment assistance as directly-impacted (primary) workers, the Department of Labor must first find that

> (1) a significant number or proportion of the workers in such workers' firm, or an appropriate subdivision of the firm, have become totally or partially separated, or are threatened to become totally or partially separated[.]

19 U.S.C. § 2272(a)(1) (Supp. V 2005). In addition, Labor must find that one of two sets of further criteria are satisfied. The first set of criteria is satisfied if Labor finds that

> (2)(A)(i) the sales or production, or both, of such firm or subdivision have decreased absolutely;
> **(ii) imports of articles like or directly competitive with articles produced by such firm or subdivision have increased; and**

> (iii) the increase in imports described in clause (ii) contributed importantly to such workers' separation or threat of separation and to the decline in the sales or production of such firm or subdivision;

19 U.S.C. § 2272(a)(2)(A) (Supp. V 2005) (emphasis added). In this case, Labor found that there had been no increase of imports of articles like or directly competitive with the article produced by Hutchinson, and therefore denied Plaintiff eligibility under the first set of criteria. (AR at 19 (*see also* SAR at 75–77 (reaching the same conclusion after Labor's voluntary remand)).)

A group of displaced workers may also qualify for primary TAA benefits if Labor finds the second set of criteria is satisfied, namely that

> (B)(i) there has been a **shift in production** by such workers' firm or subdivision to a foreign country of articles like or directly competitive with articles which are produced by such firm or subdivision; and
>
> (ii)(I) the country to which the workers' firm has shifted production of the articles **is a party to a free trade agreement** with the United States;
>
> (II) the country to which the workers' firm has shifted production of the articles **is a beneficiary country under the Andean Trade Preference Act. . . , African Growth and Opportunity Act. . . , or the Caribbean Basin Economic Recovery Act . . .** ; or
>
> (III) there has been or is likely to be an **increase in imports** of articles that are like or directly competitive with articles which are or were produced by such firm or subdivision.

19 U.S.C. § 2272(a)(2)(B) (Supp. V 2005) (emphasis added). In its first determination in this case, Labor found that Hutchinson had not shifted production abroad, and thereby concluded that Plaintiff did not qualify for TAA benefits under this second set of criteria. (AR at 19 (*see also* 19 U.S.C. § 2272(a)(2)(B)(ii)(I), highlighted above.) After voluntary remand, Labor considered whether "sorting" work constituted production. Labor determined that sorting was not production, but even if it was, none of the three additional factors was satisfied. (SAR at 77–78 (*see also* 19 U.S.C. § 2272(a)(2)(B)(ii)(I), (II), and (III), highlighted above.) That is to say, sorting work had not been shifted to a country described in sections (B)(ii)(I) or (II) above, and there was also no evidence of an increase in imports of articles like or directly competitive with those produced by Hutchinson, as indicated in (B)(ii)(III), above.

Plaintiff contends that Labor erred in several respects by denying it the right to TAA and ATAA benefits in this case, and targets the bulk of its arguments along three lines.[1] First, Plaintiff argues that Hutchinson has shifted production abroad. (Pl.'s Mot. 5–8.) Second, Plaintiff argues that there has been an increase of imports of articles like or directly competitive with the articles produced by Hutchinson. (*Id*. 13–20.) Third, Plaintiff raises an argument that it did not make before the agency: that it qualifies as an adversely affected secondary worker pursuant to 19 U.S.C. § 2272(b). (*Id*. 21–23.)

I. *Issue 1: Whether Plaintiff Shifted Production Abroad*

A. Parties' Contentions on Issue 1

The products that Plaintiff had been chiefly engaged in producing while employed at Hutchinson were suspension assemblies for disk drives—a product line known as Argon. (SAR at 29.) Labor determined that the primary cause for Plaintiff's separation from Hutchinson was a decline in exports of Argon to Hutchison's primary customer. (AR at 19.) Consequently, Plaintiff could not qualify for TAA benefits under the second set of criteria described above because production of Argon (or a like or directly competitive product) had not shifted abroad. *See* 19 U.S.C. § 2272(a)(2)(B)(i).

Plaintiff argues that the record reflects that some of the terminated employees "were engaged in the 'sorting' of suspension assemblies at the subject firm's Wisconsin facility prior to the separation," and that such sorting constitutes production. (Pl.'s Mot. 5(*citing* SAR at 47 and 66.).) Plaintiff criticizes Labor for relying "solely on the reports of the subject firm" in determining that sorting did not constitute production. (*Id*. at 8–10.) Plaintiff argues that considering the "unrebutted description of the 'sorting process' " in light of case law establishes that quality control work, such as sorting, is "a clear part of the production process." (*Id*. at 6–7.) Plaintiff then argues that the record is vague about whether or not Hutchinson shifted this alleged "production" to a country with a free trade agreement with the United States, namely, [[ ]]. (*Id*. at 10–12 (*see also* 19 U.S.C. § 2272(a)(B)(ii)(I)).)

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[1] Plaintiff also asserts a sundry of additional arguments, all of which the Court has considered, but none of which militate in favor of issuing a judgment for Plaintiff based on the agency record. Plaintiff argues, *inter alia*, that the questions posed by Labor in the investigation were "broad" and "vague" (Pl.'s Mot. at 12), that Labor demonstrated a "cavalier attitude . . . and prejudices" in its investigation (*id*.), that the Plaintiff is entitled to more lenience because it initially appeared before the Court *pro se in forma pauperis*, (*id.* at 16), that Labor was required to obtain "the description of the assemblies produced by Hutchinson" and to affirmatively determine "what constitutes a like or directly competitive product" (*id*. at 20) and that the value of sales to Hutchinson's major customer "vary wildly throughout the administrative record without explanation" (*id*. at 22).

Defendant responds by arguing that sorting does not constitute production in this instance. (Def.'s Mem. in Opp. to Pl.'s Mot. for J. upon the Agency R. ("Def.'s Resp.") 11–13.) Furthermore, Defendant contends that its investigation was sufficiently thorough, and that there is no record evidence that Hutchinson shifted any production to any other country, much less to a country with a free trade agreement with the United States. (Def.'s Resp. 7–9.)

B. Analysis on Issue 1

On this issue, the Court must decide whether there is substantial evidence on the record to support the Defendant's finding that the sorting performed by Plaintiff is not production, or to support the Defendant's finding that no production had been shifted to a preferred country described in the statute. Setting aside the issue of whether or not sorting constitutes production, this Court finds that there is substantial evidence to support Labor's determination that no production was shifted to "a party to a free trade agreement with the United States" or to "a beneficiary country under the Andean Trade Preference Act, African Growth and Opportunity Act, or the Caribbean Basin Economic Recovery Act." *See* 19 U.S.C. § 2272(a)(2)(B)(ii)(I)–(II) (Supp. V 2005).

First, when asked about its foreign facilities in [[ ]] Hutchinson responded that [[ ]] (SAR at 36.) Acting on Plaintiff's claim that sorting might constitute production and sorting may have been shifted to "Singapore, Thailand, and/or China" (SAR at 29–30), Labor made further inquiries of both Hutchinson and the petitioner Larry Haus. Hutchinson indicated that [[ ]] (SAR at 47.) The petitioner, Larry Haus, indicated in response to Labor's inquiry that he [[ ]] (SAR at 64.) Upon this suggestion, Labor specifically asked Hutchinson in a written questionnaire, and received the answers highlighted below: [[ ]] (SAR at 66 (emphasis added).)

Plaintiff makes much of Hutchinson's answer to question 6, above. Specifically, Plaintiff claims that in this answer, Hutchinson "ignor[ed] a pointed question about whether any [[ ]]" (Pl.'s Mot. 11), and that "details concerning [ ]] asked but not yet answered, are necessary." (Pl.'s Rep. to Def.'s Mem. in Oppo. to Pl.'s Mot. for Summ. J. upon the Agency R. ("Pl.'s Rep.") 8.) This Court does not share Plaintiff's concern about Hutchinson's answer to these questions. Rather, based on the answer to question 6 along with all the other evidence detailed above, this Court holds that there is substantial evidence in support Labor's conclusion that any shifted production did not go to a preferred country within the meaning of the statute. *See* 19 U.S.C. § 2272(a)(2)(B)(ii)(I)–(II) (Supp. V. 2005). Consequently, the Court does not reach the issue of whether or not "sorting" constitutes production.

II. *Issue 2: Whether There has been an Increase in Imports of Articles Like or Directly Competitive with the Domestic Product*

A. Parties' Contentions on Issue 2

1. *Importation of Hard Drives*

Plaintiff also argues that Labor's finding that there had been no increase of imports of articles like or directly competitive with the articles produced by Hutchinson is not in accordance with law. (Pl.'s Mot. 13–20.) This is an element of both sets of criteria for receiving TAA benefits listed in the statute, 19 U.S.C. § 2272(a)(2)(A)(ii) and (B)(ii)(III). See Discussion, *supra* 3–4. Although Plaintiff does not point to an independent increase in imports of suspension assemblies, Plaintiff argues that suspension assemblies have been imported into the United States as components of fully constructed hard drives. (Pl.'s Mot. 13.) To this end, Plaintiff points to a portion of 29 C.F.R. § 90.2, which explains that

> An imported article is *directly competitive with* a domestic article at an earlier or later stage of processing, and a domestic article is *directly competitive with* an imported article at an earlier or later stage of processing, if the importation of the article has an economic effect on producers of the domestic article comparable to the effect of the importation of articles in the same stage of processing as the domestic article.

29 C.F.R. § 90.2 (2006) (italics in original) (hereinafter "Relevant Language"); (*see also* Pl.'s Mot. 13.) Plaintiff contends that imported hard drives "may very well have an economic effect on the producer of the suspension assemblies comparable to the effect of an increase in imported suspension assemblies," and consequently these imported hard drives could be directly competitive with suspension assemblies, and could possibly serve as a basis for Plaintiff to recover TAA/ATAA benefits. (Pl.'s Mot. 13.)

Defendant pointed out in its Notice of Negative Determination on Remand that this court has previously held that when an imported article includes the domestic article as a component, the imported article cannot be considered "directly competitive" with that component. (SAR at 76–77 (*citing UAW, Local 834 v. Donovan*, 8 CIT 13, 17–20, 592 F. Supp. 673, 677–79 (1984)).)

2. *Sales to Hutchinson's Major Customer*

Plaintiff makes an alternative argument with respect to importation of like or directly competitive articles. Challenging Labor's finding that Plaintiff was laid off due to decreased **exports** to Hutchinson's major customer, Plaintiff argues that the record is inconsistent about whether sales to Hutchinson's major customer were **exports** or **domestic sales**. (Pl.'s Mot. 21–23.) Plaintiff argues that

Labor merely "theorize[d] that [the purchases of a competitor's product] are not imported into the U.S." (*Id*. at 21.) Apparently, Plaintiff's theory is that if Hutchinson's sales to its major customer were not exports, but rather domestic sales which the purchaser then shipped overseas, it is possible that when the customer purchased suspension assemblies from Hutchinson's competitor that those products were first imported into the United States before being similarly exported. (*See id*. at 21–23.)

Defendant responds to this argument by pointing out that "Hutchinson never considered [its major customer] a domestic customer," but rather as a foreign customer to which it would export suspension assemblies. (Def.'s Resp. 7 (*citing* SAR at 39.)) Thus, Defendant contends that both of Plaintiff's arguments fail with respect to the importation of like or directly competitive articles.

B. Analysis on Issue 2

1. *Importation of Hard Drives*

The issue for the Court to decide on the first of these two arguments is whether Labor's determination that "increased imports of computer hard drives cannot be the basis for the certification of the subject worker group," because "suspension assemblies are not like or directly competitive with the computer hard drives produced abroad and imported," is based on substantial evidence and is otherwise in accordance with law. (SAR at 76–77 (*see also* 19 U.S.C. § 2272(a)(2)(A)(ii).)) This Court holds that it is.

Plaintiff misapprehends the operation of the Relevant Language of 29 C.F.R. § 90.2. Specifically, Plaintiff rushes the analysis required by this regulation by suggesting that Labor erred when it failed to determine whether the importation of hard drives would have the same economic effect as the importation of suspension assemblies. (See Pl.'s Mot. 13.) What Plaintiff has not addressed are the circumstances that trigger the applicability of the Relevant Language, *i.e.*, when an imported article represents the domestic article at an earlier or later stage of processing.

The Relevant Language from 29 C.F.R. § 90.2 is directly quoted from a definition statute in the Trade Act of 1974, 19 U.S.C. § 2481(5) (2000). This Court has previously explained the origin of the Relevant Language by resort to legislative history. *See W. Conference of Teamsters v. Brock*, 13 CIT 169, 177–78, 709 F. Supp. 1159, 1166–67 (1989) (*citing* H.R. REP. NO. 87–1818, at 24 (1962)). Essentially, the legislative history reveals that Congress determined that a government agency had construed the definition of "directly competitive" too narrowly when that agency decided that a "raw cherry" was not "directly competitive" with a "glace cherry." *See id*. Congress reacted to the agency's decision by enacting a law with the Relevant Language permitting articles in different stages of production (such

as raw cherries and glace cherries)[2] to be considered directly competitive with one another for the purposes of the Trade Act of 1974, when certain economic conditions are met. *See id*. In other words, even if two products do not meet the ordinary definition of "directly competitive," because they are not "substantially equivalent for commercial purposes," they may be *constructively considered* directly competitive for the purposes of the Trade Act of 1974, if the Relevant Language applies. *See* 29 C.F.R. § 90.2.

A plain reading of the Relevant Language from 29 C.F.R. § 90.2 reveals its inapplicability in this case. As this court has previously explained, the Relevant Language is only implicated if the imported product is an earlier or later stage of processing of the domestic product, or vice versa. *See Former Employees of Murray Eng'g, Inc. v. United States*, 29 CIT 648, 651–54, 387 F. Supp. 2d 1229, 1232–35 (2005). Based on Labor's determination that "[s]uspension assemblies are components of computer hard drives, which incorporate multiple components," SAR at 76, it is clear to this Court that an assembled hard drive is not a suspension assembly at a later stage of processing, nor is a suspension assembly a hard drive at an earlier stage of processing.[3] Because of this, Labor was not required to reach the second step in the determination: whether "the importation of the article has an economic effect on producers of the domestic article comparable to the effect of importation of articles in the same stage of processing as the domestic article." 29 C.F.R. § 90.2. Based on the foregoing analysis, the Court holds that Labor's determination regarding the importation of like or directly competitive products is based on substantial evidence and is otherwise in accordance with law.

2. *Sales to Hutchinson's Major Customer*

The Court notes that whether Hutchinson's sales to its major customer "are categorized as foreign sales, or are to be considered do-

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[2] The legislative history to this statute explains, "the term 'earlier or later stage of processing' contemplates that the article *remains substantially the same during such stages of processing, and is not wholly transformed into a different article*. Thus, for example, zinc oxide would be zinc ore in a later stage of processing, since it can be processed directly from zinc ore. For the same reason, a raw cherry would be a glace cherry in an earlier stage of processing, and the same is true of a live lamb and dressed lamb meat. . . . " *Brock*, 13 CIT at 178 (*quoting* H.R. REP. NO. 87–1818, at 24 (1962) (emphasis added)).

[3] The Court notes that when Labor finds that the domestic and imported products do not meet the definition of like or directly competitive, it would still be prudent for Labor to affirmatively assess whether or not the imported and domestic articles represent different stages of processing of essentially the same item. If Labor does not make such a determination, it may face a remand, depending on the circumstances of the case. For instance, the relationship between the imported and domestic articles in *Murray* was close enough that the court remanded that case to decide whether "designs for heavy machinery represent an earlier stage of processing of the products manufactured on such machines." *Former Employees of Murray Eng'g, Inc. v. United States*, 28 CIT 1873, 1878, 358 F. Supp. 2d 1269, 1275 (2004).

mestic sales," is not ultimately dispositive of Plaintiff's claim for TAA/ATAA benefits. (Pl.'s Mot. 22.) The only issue for the Court to resolve with respect to this argument by Plaintiff is whether Labor's conclusion that "no suspension assembly products have been imported into the United States by this customer" is supported by substantial evidence on the record and is otherwise in accordance with law. (SAR at 76.) This Court holds that it is.

There are two pieces of evidence in the administrative record which support Labor's conclusion that when Hutchinson's major customer stopped purchasing suspension assemblies from Hutchinson and started purchasing them from a competitor of Hutchinson, that it did not import these suspension assemblies into the United States. The first piece of evidence is a comment written by a Labor investigator on a Hutchinson Technology Sales Analysis report stating that the major customer "[[ ]] (SAR at 67.) The second piece of evidence in the administrative record supporting this conclusion is a handwritten comment, also written by a Labor investigator on a customer survey of Hutchinson's major customer, pointing to the first piece of evidence. (SAR at 46.) While marginalia comments written by Labor investigators are not as compelling as emails or notes of phone calls with affected parties in a given case, the Court finds that this evidence is more than a "mere scintilla," and therefore constitutes substantial evidence to support Labor's conclusion. *See Ceramica Regiomontana*, 10 CIT at 405, 636 F. Supp. at 966.

III. *Issue 3: Whether Plaintiffs were Adversely Affected Secondary Workers*

A. Parties' Contentions on Issue 3

Plaintiff also argues Labor should have considered whether or not Plaintiff was qualified to receive TAA/ATAA benefits as a group of "adversely affected secondary worker[s]," as defined by 19 U.S.C. § 2272(b). (Pl.'s Mot. at 15–20.) Plaintiff argues that although it did not indicate it was applying for benefits as an adversely affected secondary worker, the mere application for any TAA/ATAA both put Labor on notice that it was challenging the entire "decision of Defendant as noticed in the Federal Register," and that Labor has an obligation to "take the lead in pursuing relevant facts," with respect to certification for secondary adjustment assistance.[4] (*Id*. at 18–19.)

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[4] In its motion, it appears that Plaintiff uses the terms "Alternative Trade Adjustment Assistance" and "secondary adjustment assistance" (or "adversely affected secondary worker") interchangeably. For instance, Plaintiff argues that because the title of the application for TAA benefits includes the term "**Alternative Trade Adjustment Assistance**[, i]t follows that the completion of this application is for primary and **secondary adjustment assistance**." (Pl.'s Mot. 15 (emphasis added).) Later, Plaintiff suggests that Defendant did not determine whether Plaintiff qualified for secondary adjustment assistance because Plaintiff had failed to check a box "to qualify for **alternative trade adjustment**

In response to this argument, Defendant points out that Plaintiff raised this argument for the first time in its response to Labor's negative determination on remand. (Def.'s Resp. 13.) Plaintiff did not indicate it was seeking certification based on 19 U.S.C. § 2272(b) when it filed its initial TAA petition, or during the course of Labor's voluntary remand. (*Id*.) Nevertheless, Defendant points out that it considered the possibility that Plaintiff might qualify for benefits as an adversely affected secondary worker in October 2007. (*Id*.) After learning that one of Hutchinson's customers had been certified for TAA in one of its branches a particular location, Labor investigated whether Hutchinson had been a supplier for this Customer at the particular location but determined that Plaintiff did not meet the requirements for such benefits. (*Id*. 13–14 (*citing* SAR 45).)

B. Analysis on Issue 3

The issue for the Court to resolve in addressing this argument by Plaintiff is whether Labor's decision on Remand is supported by substantial evidence and otherwise in accordance with law, even though that decision did not explicitly address whether Plaintiff qualified for TAA/ATAA benefits as an adversely affected secondary worker pursuant to 19 U.S.C. § 2272(b). This Court holds that it is.

When Plaintiff filed its petition with Labor in this case, Plaintiff did not indicate that it sought certification for TAA/ATAA benefits as an adversely affected secondary worker.[5] While Plaintiff's failure to

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assistance." (*Id*. 16 (emphasis added).) Defendant actually discussed the box-checking in the context of whether or not it could have known that Plaintiff wanted to be considered an **adversely affected secondary worker**. (Def.'s Resp. to Pl.'s Remand Cmts. 9.) Still later, Plaintiff claimed that if Defendant had performed its investigation properly, "it would have easily uncovered ample evidence supporting certification under the **alternative form of trade adjustment assistance**." (Pl.'s Mot. 17 (emphasis added).) The context of this sentence makes clear that Plaintiff actually intended to refer to its qualification as an **adversely affected secondary worker**. (*See id*.)

Alternative trade adjustment assistance ("ATAA") is a program established to provide certain benefits to "older workers" when certain conditions are met. 19 U.S.C. § 2318(a) (Supp. V 2005). The term "adversely affected secondary workers" refers to group of workers that qualifies for Trade Adjustment Assistance benefits as a consequence of having been a "supplier or downstream producer to a firm (or subdivision) that employed a group of workers who received a certification of eligibility under [the primary form of TAA certification found in] subsection (a) of this [statute]." 19 U.S.C. § 2272(b)(2) (Supp. V 2005).

[5] In the Petition for TAA and ATAA filled out by the TAA Coordinator for the state of Wisconsin on behalf of Plaintiff, Section 3 states:

[i]n your opinion, does the worker group work at a firm or subdivision that has: (check appropriate box(es) below)

a) ☐ • Increased imports of like or directly competitive article(s) from a foreign country(s)
☒ • Shifted production of the article(s) to a foreign country(s)
☒ • Customers that have increased imports from a foreign country(s)
b) ☐ Supplied component parts for articles produced by a firm with a currently TAA certified worker group
c) ☐ Assembled or finished articles provided by a firm with a currently TAA certified worker group

indicate that it was requesting such certification in its petition is not necessarily fatal, the fact that Plaintiff failed to raise such a request until after Labor issued its Notice of Negative Determination on Remand, is. (Def.'s Resp. 13 (*see also* Pl.'s Mot. 15–20.).) While there are no minimum pleading requirements, as such, before the agency, Labor must have **some** reason to know that a given group of displaced workers desires to be certified as eligible for TAA/ATAA benefits as adversely affected secondary workers. It appears that Labor was given no such reason in this case until after Plaintiff filed is motion in this case, which makes the fact that Labor investigated this issue of its own initiative all the more commendable. (*See* SAR at 45.) Labor was therefore not required to explicitly address Plaintiff's status as an adversely affected secondary worker in its Notice of Negative Determination on Remand.

CONCLUSION

For the foregoing reasons, Labor's Notice of Negative Determination on Remand is supported by substantial evidence and is otherwise in accordance with law. The decision of the Department of Labor is affirmed. Judgment to be entered accordingly.

Slip Op. 09–29

ALLOY PIPING PRODUCTS, INC., *et al.*, Plaintiffs, v. UNITED STATES, Defendant, and TA CHEN STAINLESS STEEL PIPE CO., LTD., Defendant-Intervenor.

Before: Judith M. Barzilay, Judge
Consol. Court No. 08–00027

[Plaintiffs' Motion for Judgment Upon the Agency Record is denied; Defendant-Intervenor's Motion for Judgment Upon the Agency Record is granted and the case is remanded to Commerce.]

Dated: April 14, 2009

Kelley Drye & Warren, LLP (*Jeffrey S. Beckington*, *David A. Hartquist*) for Plaintiffs.

Michael F. Hertz, Acting Assistant Attorney General; *Jeanne E. Davidson*, Director, *Reginald T. Blades, Jr.*, Assistant Director, Commercial Litigation Branch, Civil Division, U.S. Department of Justice (*Stephen C. Tosini*); *Evangeline D. Keenan*, Attorney,

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(AR at 2.) The petitioner only checked the boxes indicated above. (*Id.*) Subsections (b) and (c) in this portion of the petition correlate with the language of qualifications for adversely affected secondary workers. *See* 19 U.S.C. § 2272(b).

Of Counsel, Office of the Chief Counsel for Import Administration, U.S. Department of Commerce, for Defendant.

Miller & Chevalier Chartered (*Peter J. Koenig*, *David T. Hardin, Jr.*) for Defendant-Intervenor.

OPINION AND ORDER

BARZILAY, JUDGE: The issues in this case concern the final results of the thirteenth administrative review of an antidumping duty order on stainless steel butt-weld pipe fittings from Taiwan during the period of review June 1, 2005 to May 31, 2006.[1] *Notice of Final Results and Final Rescission in Part of Antidumping Duty Administrative Review: Certain Stainless Steel Butt-Weld Pipe Fittings From Taiwan*, 73 Fed. Reg. 1,202 (Dep't Commerce Jan. 7, 2008) ("*Final Results*"); *Issues and Decision Memorandum for the Administrative Review of Certain Stainless Steel Butt-Weld Pipe Fittings from Taiwan; Final Results of Antidumping Duty Administrative Review* (Dep't Commerce Dec. 27, 2007), Public Record Document ("P.R. Doc.") 97 ("*Issues and Decision Memorandum*").[2] The underlying antidumping duty order, in place since 1993, has been the source of an abundance of litigation before the Court.[3] *Amended Final Determination and Antidumping Duty Order: Certain Welded Stainless Steel Butt-Weld Pipe Fittings From Taiwan*, 58 Fed. Reg. 33,250 (Dep't Commerce June 16, 1993). Here, the four Plaintiffs, Alloy Piping Products, Inc., Flowline Division of Markovitz Enterprises, Inc., Gerlin Inc., and Taylor Forge Stainless, Inc. (collectively, the "Plaintiffs") and Defendant-Intervenor Ta Chen Stainless Steel Pipe Co., Ltd. ("Ta Chen") challenge the final results of the thirteenth administrative review pursuant to USCIT R. 56.2.[4] The court must now decide whether the dumping margin calculated by the Department of Commerce ("Commerce") is supported by substantial evidence and in

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[1] Once an antidumping order has been issued, it may be reviewed periodically. *See* 19 U.S.C. § 1675 (2000) (governing the administrative review of determinations). An "administrative review" occurs when an interested party requests that Commerce review the duty applied to the subject merchandise over a particular twelve month period. 19 U.S.C. § 1675(a)(1)(B) (2000).

[2] The *Issues and Decision Memorandum* is also available at http://ia.ita.doc.gov/frn/summary/taiwan/E7–25644–1.pdf.

[3] *See, e.g.*, *Alloy Piping Prods., Inc. v. United States*, Slip Op. 08–30, 2008 WL 743830 (Mar. 13, 2008) (not reported in F. Supp.) ("*Alloy Piping II*"); *Ta Chen Stainless Steel Pipe Co., Ltd. v. United States*, Slip Op. 07–87, 2007 WL 1573920 (May 30, 2007) (not reported in F. Supp.); *Ta Chen Stainless Steel Pipe, Ltd. v. United States*, 30 CIT 376, 427 F. Supp. 2d 1265 (2006) ("*Ta Chen II*"); *Alloy Piping Prods., Inc. v. U nited States*, 28 CIT 1805 (2004) (not reported in F. Supp.) ("*Alloy Piping I*"); *Ta Chen Stainless Steel Pipe, Ltd. v. United States*, 28 CIT 627, 342 F. Supp. 2d 1191 (2004) ("*Ta Chen I*").

[4] Plaintiffs are domestic producers of the subject merchandise, and Ta Chen is a producer and exporter of the same goods from Taiwan. Ta Chen sells some of the subject merchandise to its wholly-owned U.S. subsidiary, Ta Chen International ("TCI"), who in turn sells those goods to unaffiliated U.S. customers. *See Issues and Decision Memorandum* at 1–2.

accordance with law.[5] Specifically, Plaintiffs challenge Commerce's (1) grant of a constructed export price ("CEP") offset adjustment to the Normal Value ("NV") and (2) calculation of the profit adjustment to the CEP.[6] The court affirms Commerce's determination under (1), but finds that the agency did not provide a sufficient explanation that demonstrates it acted with substantial evidence under (2). Accordingly, the issue of the CEP profit adjustment is remanded to Commerce for further proceedings.

I. Background

On July 27, 2006, after receiving petitions from Plaintiffs and from Ta Chen, Commerce announced that it would initiate the thirteenth administrative review of the subject merchandise to update the applicable antidumping duty order. *Initiation of Antidumping and Countervailing Duty Administrative Reviews and Request for Revocation in Part*, 70 Fed. Reg. 42,028, 42,028 (Dep't Commerce July 21, 2005). To ensure that it would accurately determine the NV and CEP when calculating the dumping margin, Commerce requested that Ta Chen provide information regarding its channels of distribution, as well as the selling activities it performed and services it rendered in both its home and U.S. markets.[7] *See Prelimi-*

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[5] The "dumping margin" refers to the amount by which the NV exceeds the export price ("EP") or CEP, expressed in an equation as DM = NV - (EP or CEP). 19 U.S.C. § 1677(35)(A).

[6] The NV is the market price of the subject merchandise in the home market, an appropriate third country market price, or the cost of production of the goods subject to statutorily permitted adjustments. *See* 19 U.S.C. § 1677b(a)(1)(B)(i)–(ii), (a)(4). The EP is the price at which the subject merchandise is sold from the producer or exporter to an unaffiliated purchaser in the U.S. or for exportation to the U.S. *See* 19 U.S.C. § 1677a(a). However, when the foreign producer or exporter is affiliated with the importer of the subject merchandise, a CEP usually is or may be used, which "refers to the price, as adjusted pursuant to section 1677a, at which the subject merchandise is sold in the [U.S.] to a buyer unaffiliated with the producer or exporter." *SNR Roulements v. United States*, 402 F.3d 1358, 1359 (Fed. Cir. 2005). Here, Commerce calculated the price of Ta Chen's sales in the U.S. based on a CEP rather than an EP because "the sale to the first unaffiliated U.S. customer was made by . . . TCI." *Certain Stainless Steel Butt-Weld Pipe Fittings From Taiwan: Preliminary Results of Antidumping Duty Administrative Review and Notice of Intent to Rescind in Part*, 72 Fed. Reg. 35,970, 35,972 (Dep't Commerce Jul. 2, 2007) ("*Preliminary Results*").

[7] *See* Ta Chen Section A Resp. (Sept. 11, 2006), P.R. Doc. 16. Ta Chen reported that the relevant selling activities in the home market during the period of review include maintaining inventory in Taiwan to provide just-in-time or immediate shipments to customers; incurring seller's risk of non-payment by customers; addressing customer complaints as to quality, delivery, or specification; handling freight and delivery arrangements; traveling to and entertaining customers; projecting market needs and conducting new customer research; providing customers with technical assistance; providing packing services; and providing after-sale services, including additional or supplemental documents sought by customers. *See* P.R. Doc. 16 at 12; *Issues and Decision Memorandum* at 38. For sales made to its U.S. affiliate, TCI, Ta Chen reported its selling activities as consisting of "accepting orders, scheduling production, and making arrangements for inland freight to the port, brokerage, containerization and Taiwan customs clearance, including payment of harbor tax."

nary Results, 72 Fed. Reg. at 35,973. Ta Chen responded to these questions from Commerce in its Section A response, and noted that the "Sections B and C Questionnaire Responses [would] provide the data necessary to *calculate* the CEP offset" necessary to reflect different levels of trade ("LOT").[8] P.R. Doc. 16 at 14 (emphasis added). Before Commerce issued the *Preliminary Results*, Ta Chen twice provided additional information on selling activities performed in Taiwan and on its claim for a CEP offset on February 15 and April 6, 2007, respectively. *See* Ta Chen's Response to Commerce's First Supplemental Questionnaire (Feb. 15, 2007), P.R. Doc. 38; Ta Chen's Response to Commerce's Second Supplemental Questionnaire (Apr. 6, 2007), P.R. Doc. 45.

In the *Preliminary Results*, Commerce examined the selling activities that Ta Chen reported for each channel of distribution and organized the home market reported activities into the following four categories: (1) sales process and marketing support; (2) freight and delivery; (3) inventory maintenance and warehousing; and (4) warranty and technical services. *Preliminary Results*, 72 Fed. Reg. at 35,973. Using these four defined selling activities as the framework for its analysis, Commerce found that there were different LOTs in Ta Chen's home and U.S. markets, and that sales were made by Ta Chen in Taiwan at a more advanced LOT than in the U.S. market. *Id.* Specifically, Commerce noted that in the home market "Ta Chen provides significant selling [activities] . . . which it does not for the U.S." *Id.* Because Commerce was unable to quantify a LOT adjustment, it adjusted the NV with a CEP offset. *Id.* Commerce also made an adjustment to the CEP to account for the profit from selling expenses incurred in the U.S. by TCI, stating that "in accordance with [§§ 1677a(d)(3) and 1677a(f)], we deducted [the] CEP profit." *Id.* at 35,972. Ultimately, Commerce determined that the weighted- average dumping margin for the subject merchandise during the period of review was 0.52%. *Id.* at 35,973.

In the *Final Results* and the accompanying *Issues and Decision Memorandum,* Commerce reaffirmed its earlier findings on the adjustments to the NV and CEP. *Final Results*, 73 Fed. Reg. at 1,202; *Issues and Decision Memorandum* at 35–41. Specifically, with thorough explanation and detailed justification, Commerce found that "the LOT is more advanced in the home market than in the United States" and that it would apply a CEP offset to the NV because it was unable to quantify a LOT adjustment. *Issues and Decision*

Id. Additionally, Ta Chen noted that TCI is a "master distributor" that engages in the following selling activities to the first unaffiliated customers in the United States: "all communications with customers, U.S. customs duties, U.S. brokerage, U.S. inland freight, U.S. warehousing, inventory maintenance and assumption of risk of nonpayment." *Id.*

[8] The Section B Questionnaire contained information on Ta Chen's home market sales, whereas the Section C Questionnaire explained its U.S. sales. *See* Ta Chen's Section B and C Resps. (Sept. 26, 2006), P.R. Doc. 18.

Memorandum at 38–39. On the issue of the profit adjustment to the CEP, Commerce affirmed the calculation in the *Preliminary Results* (which excluded Ta Chen's inventory carrying and credit costs from the "total expenses" and "total actual profit" components of the CEP profit calculation) and relied on the Court's decisions in cases that concerned the sixth and seventh administrative reviews of the underlying antidumping duty order. *Issues and Decision Memorandum* at 41 (citing *Ta Chen II*, 30 CIT at 389–90, 427 F. Supp. 2d at 1277; *Alloy Piping I*, 28 CIT at 1811). Accordingly, Commerce instructed U.S. Customs and Border Protection ("Customs") to assess antidumping duties on the subject merchandise that entered the U.S. during the period of review at a rate of 0.52%. *Final Results*, 73 Fed. Reg. at 1,203–04.

II. Subject Matter Jurisdiction & Standard of Review

In an action properly before the Court under 28 U.S.C. § 1581(c),[9] as is the case here, we 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. . . ."[10] § 1516a(b)(1)(B)(i). When reviewing an agency determination, the Court must therefore determine whether "the administrative record contain[s] substantial evidence to support it and [whether it is] a rational decision." *Matsushita Elec. Indus. Co., Ltd. v. United States*, 750 F.2d 927, 933 (Fed. Cir. 1984) ("*Matsushita*"). Accordingly, for an administrative agency to support its factual findings with substantial evidence, a determination must necessarily include an explanation of the standards applied and the analysis leading to its conclusion, thereby demonstrating a rational connection between the facts on the record and the conclusions drawn. *See id.* Finally, an agency's action is in accordance with law when that decision is "constitutional, and not contrary to statute, regulation, precedent, or procedures." *Huvis Corp. v. United States*, 31 CIT ___ , 525 F. Supp. 2d 1370, 1374 (2007).

III. Discussion

"Dumping" is an unfair trade practice whereby goods are sold or will likely be sold at less than fair value. § 1677(34). Commerce, the

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[9] Pursuant to § 1581(c), this Court has exclusive jurisdiction over any civil action commenced under section 516A of the Tariff Act of 1930, codified as amended at 19 U.S.C. § 1516a, which provides for judicial review of a final determination in an administrative review of an antidumping order. *See* § 1516a(a)(2)(B)(iii).

[10] Substantial evidence is "such relevant evidence as a reasonable mind might accept as adequate to support the conclusion," and that there may be two inconsistent conclusions drawn from the evidence "does not prevent an administrative agency's finding from being supported by substantial evidence." *Consolo v. Fed. Mar. Comm'n*, 383 U.S. 607, 619–20 (1966) (quotations & citations omitted).

administrative agency responsible for addressing the issue of dumping, must calculate the dumping margin to assess whether the subject merchandise was, or is likely to be, dumped in the U.S. § 1675(a). The first step for Commerce is to ascertain the value of two elements in the dumping margin equation: (1) the NV and (2) the EP or CEP. § 1675(a)(2)(A). Commerce compares the two values and, if the NV exceeds the EP or CEP, it then instructs Customs to levy antidumping duties on the subject merchandise in the amount of the difference between the two elements.[11] §§ 1675(a)(1), 1677(35)(A)–(B).

When Commerce calculates the dumping margin, certain adjustments may be made to the NV or CEP to ensure an "apples-to-apples" price comparison since the prices used to determine those values occur at different points in the stream of commerce and under different circumstances. *See Ta Chen II*, 30 CIT at 379, 427 F. Supp. 2d at 1268. At issue before the court is the calculation of, and adjustments to, the prices that comprise the NV and CEP in this, the thirteenth administrative review of the antidumping order on the subject merchandise.

A. Constructed Export Price Offset

1. Legal Framework

The NV refers to the price of the subject merchandise in the home market, an appropriate third country market price, or the cost of production of the subject goods. § 1677b(a)(1)(B)(i)–(ii), (a)(4). Commerce may make certain adjustments to the NV to ensure that the NV is established, "to the extent practicable, at the same [LOT] as the [EP] or [CEP]. . . ." § 1677b(a)(1)(B)(i); *see* 1677b(a)(6)–(8). A CEP offset, which is a downward adjustment to the NV, is one of the permitted adjustments that may be made to the NV. § 1677b(a)(7)(B). Three conditions must be satisfied before Commerce may apply a CEP offset to the NV: (1) there must be a difference between the LOT of the home and U.S. markets – *i.e.*, between the NV and the CEP; (2) the NV must be at a more advanced LOT than the CEP; and (3) a LOT adjustment to the NV is not appropriate since the available data does not permit a determination on whether the difference between the home and U.S. markets affects price comparability. *See* 19 C.F.R. § 351.412(f).

LOTs are defined as marketing stages (or their equivalent). *See Alloy Piping II*, 2008 WL 743830, at *8 (citing 19 C.F.R. § 351.412(c)(2)). "Where Commerce calculates [the] NV at a differ-

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[11] A finding by the International Trade Commission ("ITC") that the subject merchandise materially injured or threatens material injury to the domestic industry is a condition precedent to Commerce instructing Customs to apply antidumping duties on the subject merchandise. § 1673d(b)(1).

ent LOT from the LOT of [the] EP or the CEP (whichever applies), it may adjust [the] NV to compensate for the difference." *Id.* (citing § 351.412(b); *see Mittal Steel USA, Inc. v. United States*, Slip Op. 07–117, 2007 WL 2701369, at *7 n.12 (Aug. 1, 2007) (not reported in F. Supp.). Specifically, "Commerce may make a LOT adjustment if it determines that sales in the two markets were not made at the same LOT, and that the difference has an effect on the comparability of prices." *Alloy Piping II*, 2008 WL 743830, at *8 (citing § 351.412(a); § 1677b(a)(7)(A)) (quotations & brackets omitted). The focal point of Commerce's LOT adjustment analysis is on the *selling activities* performed in each market. § 1677b(a)(7)(A)(i)–(ii); § 351.412(c)(2). In other words, a LOT adjustment to the NV is proper only where (1) there exists a difference between the LOT in the home and U.S. markets as a result of different selling activities being performed in each market, and (2) such difference "affect[s] price comparability, based on a pattern of consistent price differences between sales at different [LOTs] in the country in which [the NV] is determined." § 1677b(a)(7)(A); *see Uruguay Round Agreements Act, Statement of Administrative Action*, H.R. Rep. No. 103–316, at 829 (1994), *reprinted in* 1994 U.S.C.C.A.N. 4040, 4167–68 ("SAA"); *Mittal Steel USA, Inc.*, 2007 WL 2701369, at *8.

However, in cases where a LOT adjustment is unavailable, a CEP offset to the NV may be proper. In particular, when (1) "the NV is at a more advanced LOT than the CEP, and [(2)] the available data do[es] not permit a determination on whether the difference affects price comparability," Commerce may make a CEP offset to the NV in the amount of the indirect selling expenses incurred by the foreign producer or exporter in the home market. *Alloy Piping II*, 2008 WL 743830, at *8 (citing § 351.412(f)). In those situations,

> normal value shall be reduced by the amount of indirect selling expenses incurred in the country in which normal value is determined on sales of the foreign like product but not more than the amount of such expenses for which a deduction is made under section 1677a(d)(1)(D) of this title.

§ 1677b(a)(7)(B). When a foreign producer or exporter seeks a downward adjustment to the NV in the form of a CEP offset, it "must demonstrate the appropriateness of such adjustment."[12] *SAA*, H.R. Rep. No. 103–316, at 829, 1994 U.S.C.C.A.N. at 4168.

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[12] "Commerce will require evidence from the foreign producers that the functions performed by the sellers at the same [LOT] in the U.S. and foreign markets are similar, and that different selling activities are *actually performed* at the allegedly different levels of trade." *SAA*, H.R. Rep. No. 103–316, at 829, 1994 U.S.C.C.A.N. at 4168 (emphasis added).

2. Ta Chen's Selling Activities

The core of Plaintiffs' first challenge argues that Ta Chen's Sections A, B and C Responses to Commerce's questionnaires—and specifically its description of its selling activities in the home and U.S. markets—are so "variously and internally inconsistent" that Ta Chen did not clearly demonstrate it was entitled to a CEP offset adjustment to the NV. Plaintiffs' Brief in Support of its Rule 56.2 Mot. ("Pl. Br.") 11–15. In home market sales, Plaintiffs claim that Commerce incorrectly found that inland freight services are one of Ta Chen's selling activities in the home market, even though customers pick up orders from Ta Chen's facility in Taiwan and no expenses were incurred. Pl. Br. 11–12. Another alleged error cited by Plaintiffs is Commerce's determination that packing expenses and just-in-time inventory expenses are selling activities in the home market, even though there was little evidence to support such a finding. Pl. Br. 12. Plaintiffs also argue that Commerce incorrectly considered credit risk and technical services to be selling activities since no interest revenue or travel expenses were incurred during the period of review. Pl. Br. 12–13. In its U.S. sales to TCI, Plaintiffs allege that Ta Chen grossly understated its U.S. selling expenses, and excluded other costs incurred for the subject merchandise to enter the U.S. Pl. Br. 15.

Further, according to Plaintiffs, a quantitative analysis of Ta Chen's selling *expenses* shows that Ta Chen's home market selling functions were less than those provided in sales to TCI in the U.S. market. Pl. Br. 8. Plaintiffs also claim that Commerce's grant of a CEP offset to the NV is not supported by substantial evidence because the U.S. LOT is more advanced than the home market LOT since a greater number of expense fields and amounts correspond to the CEP sales. Pl. Br. 11, 15–31.

The court finds that the record is neither ambiguous nor unclear, and that Plaintiffs' LOT adjustment analysis is legally inaccurate. To be sure, the court commends Plaintiffs' diligent quantitative analysis and recognizes that Commerce should address this kind of detailed information, in the first instance, when determining whether an adjustment to the NV is proper.[13] However, the focus of the LOT adjustment analysis, which may ultimately lead to a CEP offset, is on *selling activities* and not on expenses as the Plaintiffs suggest.[14]

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[13] Defendant avers that because they did not first present this kind of quantitative analysis to Commerce, Plaintiffs have not exhausted their administrative remedies. Def. Br. 11. Because the court addresses and decides in favor of the Defendant considering and rejecting the substance of Plaintiffs' argument, it need not address the exhaustion issue here. However, the parties should know that these sorts of factually intensive, record-based arguments are best decided, and indeed are normally required to be first presented, in the administrative arena.

[14] The term "activities" is the plural form of the word "activity," which refers to "a speci-

§ 1677b(a)(7)(A)(i) (stating that a difference in LOTs is based on the "performance of different *selling activities*" (emphasis added)); § 351.412(c)(2) (noting that "[s]ubstantial differences in *selling activities* are a necessary, but not sufficient, condition for determining that there is a difference in the stage of marketing." (emphasis added)); *SAA*, H.R. Rep. No. 103–316, at 829, 1994 U.S.C.C.A.N. at 4168 (emphasizing that a difference in the LOT means that there "is a difference between the *actual functions* performed by the sellers at the different [LOTs] in the two markets" (emphasis added)); *Antidumping Duties; Countervailing Duties*, 62 Fed. Reg. 27,296, 27,371 (Dep't Commerce May 19, 1997) (explaining that § 1677b(a)(7)(A)(i) provides for LOT adjustments where there is a difference in the LOTs and "the difference involves the performance of different *selling activities*. . . . The [SAA] reinforces this point by explaining that [Commerce] must analyze the *functions* performed by the sellers. . . ." (emphasis added) (quotations omitted)).

If Commerce, or this Court, in reviewing an administrative determination, were to narrow the focus of its LOT analysis to selling expenses, it could act contrary to law and cause misleading results. Expenses do not necessarily translate directly into activities, nor do they capture the intensity of the activities. Moreover, expenses related to several selling activities may fall under a single expense field. Though expenses alone may not accurately represent the number of selling activities associated with each LOT, Commerce may certainly analyze expenses to measure the frequency of various selling activities, and consider this frequency with other information in assigning the level of intensity to the activity. *See, e.g.*, *Slater Steels Corp. v. United States*, 27 CIT 1775, 1780–81, 297 F. Supp. 2d 1351, 1357–58 (2003). In other words, the weighing of both the narrative descriptions of the foreign producer or exporter's sales processes with certain quantifiable information on the reported selling activities in each market is precisely the kind of thorough and diligent analysis that would benefit Commerce, the interested parties and, if need be, this Court.

The record here supports Commerce's determination that a CEP offset to the NV is proper. In the *Issues and Decision Memorandum*, after it established the selling activities in each market,[15] Commerce determined that there is a difference in the LOT between home market and U.S. sales, and that "Ta Chen's home market sales are made at a more advanced LOT than its [CEP] sales to TCI. . . ." *Issues and*

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fied pursuit or action." AMERICAN HERITAGE COLLEGE DICTIONARY 14 (4th ed. 2007). Similarly, a "function" is "the action for which a . . . thing is particularly fitted or employed." *Id.* at 561. In contrast, an "expense" is "[s]omething *spent* to attain a goal or accomplish a purpose." *Id.* at 491 (emphasis added). Accordingly, an expense is something incurred in, and is not itself, an activity or function. *See id.* at 14, 491.

[15] *See supra* note 7.

Decision Memorandum at 37–39. Commerce specifically noted that while Ta Chen's activities related to freight and delivery arrangements are somewhat greater for sales to TCI than in its home market, "the record shows that Ta Chen engages in a *higher level of sales effort* for home market sales than for U.S. sales." *Id.* at 38 (emphasis added). Commerce stated that Ta Chen likely exerted more of an intense effort in home market sales because it "has more home market customers who purchase in smaller volumes than TCI and require more individual contact." *Id.* That Ta Chen assumed credit risk and provided technical services, in addition to offering just-in-time delivery only in the home market, also convinced Commerce that the selling activities were different and at a more advanced level in the home market than in the United States. *See id.* at 38–39. Because Commerce was also unable to quantify the effect of the difference in LOT on prices, it ultimately decided to continue to grant Ta Chen a CEP offset to the NV. *Id.* Thus, Commerce's analysis includes an explanation of the standards it applied, and the analysis that led to its conclusion, demonstrating a rational connection between the facts on the record and the conclusions drawn.

Finally, Plaintiffs argue that the facts in this administrative review are nearly identical to those in the seventh administrative review of the subject merchandise, such that Commerce incorrectly granted Ta Chen the CEP offset to the NV. Pl. Br. 34–37 (discussing generally *Certain Stainless Steel Butt-Weld Pipe Fittings From Taiwan: Final Results of Antidumping Duty Administrative Review*, 66 Fed. Reg. 65,899 (Dep't Commerce Dec. 21, 2001)) ("*Seventh Administrative Review*"). Plaintiffs' reliance on the *Seventh Administrative Review*, however, is misplaced. Even assuming Commerce's determinations at issue are factually identical, as a matter of law a prior administrative determination is not legally binding on other reviews before this court. *See, e.g.*, *Timken U.S. Corp. v. United States*, 434 F.3d 1345, 1352 (Fed. Cir. 2006). Thus, the court is not persuaded by Plaintiffs' suggestion to follow the analysis in the *Seventh Administrative Review* given that Commerce has demonstrated with substantial evidence, and in accordance with law, that a CEP offset is proper under the facts of the present case.

B. Constructed Export Price Profit

1. Legal Framework

The other component of the dumping margin calculation, the CEP, is the price at which the subject merchandise is first sold in the U.S. to a purchaser independent from the foreign producer or exporter. § 1677a(b). To ensure an "apples-to-apples" comparison between home market and U.S. sales, section 1677a authorizes Commerce to make adjustments to the price used to establish the CEP, one of which reduces that value to account for the portion of profit attributable to certain U.S. selling activities. § 1677a(d)(3). The deduction of

the profit amount, called the CEP profit, is intended to bring the CEP "as closely as possible [to] a price corresponding to an export price between non-affiliated exporters and importers." *See SAA*, H.R. Rep. No. 103–316, at 823, 1994 U.S.C.C.A.N. at 4163.

The CEP profit is derived by multiplying the total actual profit for all production and selling activities of the subject merchandise by the applicable percentage, with the applicable percentage determined by dividing the total U.S. expenses by the total expenses, *i.e.*, CEP profit = Total Actual Profit x (Total U.S. Expenses / Total Expenses). §§ 1677a(d)(3), (f). The "total actual profit" multiplier is calculated by "(1) adding the revenue attributable to sales of subject (or like) merchandise in both the U.S. and the home market; (2) deducting from that sum the cost of the merchandise for both markets; and (3) deducting the selling, packing, and distribution expenses for both markets." *Ta Chen II*, 30 CIT at 380, 427 F. Supp. 2d at 1269 (citing § 1677a(f)(2)(D)). The "total expenses" denominator is the sum of "(1) the cost of merchandise for both markets and (2) the selling, packing, and distribution expenses for both markets." *Id.* (citing § 1677a(f)(2)(C)). In both of these components, "*recognized financial expenses* are included in the cost of both the U.S. and the home market merchandise." *Id.* (citing U.S. Department of Commerce Policy Bulletin 97/1, Calculation of Profit for Constructed Export Price Transactions (Sept. 4, 1997); SAA, H.R. Rep. No. 103–316, at 825, 1994 U.S.C.C.A.N. at 4164).[16] Historically, Commerce has read "the statute to require that those two numbers be actual (*i.e., recognized*) amounts," and that they do "not include *imputed* financial expenses. . . ," which are themselves an estimate of actual expenses. *Ta Chen II*, 30 CIT at 381, 427 F. Supp. 2d at 1269. Therefore, to avoid double-counting, Commerce has reasoned that it is proper to exclude imputed costs from the "total actual profit" multiplier and "total expenses" denominator since total actual financial expenses reflect the costs of carrying merchandise in inventory and extending credit. *See Ta Chen II*, 30 CIT at 381, 427 F. Supp. 2d at 1270.

However, in contrast to the two above, the calculation of the last component of the CEP profit equation – "total U.S. expenses" – includes imputed credit and inventory carrying costs. Commerce has explained that "the imputed financial expenses related to selling activities[,] *i.e.*, imputed credit and inventory carrying costs[,] simply represent the opportunity cost of having . . . merchandise sit in inventory prior to sale, and of extending credit after the sale." *Ta Chen*

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[16] "[W]hen calculating both the Total Actual Profit multiplier and the Total Expenses denominator, net financial expenses are calculated from the foreign producer [or] exporter's constructed value ('CV') database in determining the cost of U.S. merchandise, and from the foreign producer [or] exporter's cost of production ('COP') database in determining the cost of home market merchandise." *Ta Chen II*, 30 CIT at 380–81, 427 F. Supp. 2d at 1269 (citing §§ 1677b(e), 1677b(b)(3)) (quotations & brackets omitted).

II, 30 CIT at 381, 427 F. Supp. 2d at 1269–70 (quotations & brackets omitted). Moreover, Commerce has noted that its practice is to use imputed expenses in the "total U.S. expenses" numerator because, "as a practical matter, appropriate [actual] figures do not exist." *Id.*, 30 CIT at 381, 427 F. Supp. 2d at 1270.

This Court and the Federal Circuit have repeatedly upheld this kind of method for calculating CEP profit in the absence of certain conditions. *See Ta Chen II*, 30 CIT at 383, 427 F. Supp. 2d at 1271 (citing *SNR Roulements*, 402 F.3d at 1361; *SNR Rouelements v. United States*, 28 CIT 1284, 1287–88, 341 F. Supp. 2d 1334, 1340 (2004); *Thai Pineapple Canning Indus. Corp., Ltd. v. United States*, 24 CIT 107, 114–15 (2000) (not reported in F. Supp.) ("*Thai Pineapple*")). For instance, in *Thai Pineapple*, the court examined Commerce's remand determination and sustained the CEP profit calculation, as it found that plaintiffs could not point to any great distortion or discrepancy in the methodology used. 24 CIT at 115.

2. Commerce's CEP Profit Calculation

Here, Ta Chen lodges a complaint against Commerce that is eerily familiar to one that it alleged in at least two prior proceedings before the Court – namely, that the agency erred when it excluded imputed inventory carrying and credit costs from the "total actual profit" multiplier and "total expenses" denominator.[17] *Issues and Decision Memorandum* at 40–41. Commerce refused to do so, however, on the basis that (1) Ta Chen's argument had been rejected before and (2) this Court has allegedly found that "imputed expenses [do not] represent some real, previously unaccounted for, expense[ ]." *Id.* at 41 (quotations & citations omitted). Ta Chen argues that this reasoning is insufficient to uphold Commerce's determination since "Commerce failed to explain why the use of only purported actual costs was sufficient based on the record evidence of this particular case. . . ." Defendant-Intervenor's Brief in Support of its Rule 56.2 Mot. ("Def.-Intervenor Br.") 8. Expanding on its contention at the administrative stage, Ta Chen argues that controlling law unequivocally requires that the actual costs used in the "total actual profit" multiplier and "total expenses" denominator must adequately reflect imputed costs.[18] Def.-Intervenor Br. 9–14.

In contrast, Plaintiffs aver that Ta Chen did not exhaust its administrative remedies on the issue of CEP profit and, therefore, the court may not hear this claim. Plaintiffs' Resp. to Def.- Intervenor's

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[17] *Ta Chen II*, 30 CIT at 382, 427 F. Supp. 2d at 1270; *Alloy Piping I*, 28 CIT at 1808–12.

[18] Relatedly, as a result of the alleged controlling law, Ta Chen further claims that (1) Commerce's failure to include imputed costs in this administrative review is unsupported by substantial evidence and contrary to law, (2) Commerce's failure to include imputed costs yields a distorted result, and (3) Commerce's CEP profit calculation is unreasonable since a more accurate methodology exists. Def.-Intervenor Br. 9, 14–27.

56.2 Mot. ("Pl. Resp. Br.") 1–7. Both Defendant and Plaintiffs contend that, irrespective of whether Ta Chen exhausted its administrative remedies, Commerce's CEP profit determination is supported by substantial evidence and in accordance with law since the CEP profit methodology employed by Commerce has repeatedly been approved by the Federal Circuit. Pl. Resp. Br. 7–14; Def. Br. 16–25.

Generally, no party is entitled to judicial relief for an alleged injury "until the prescribed administrative remedy has been exhausted." *Agro Dutch Indus., Ltd. v. United States*, 30 CIT 320, 330 (2006) (not reported in F. Supp.) (quoting *McKart v. United States*, 395 U.S. 185, 193 (1969)). "The exhaustion doctrine requires a party to present its claims to the relevant administrative agency for the agency's consideration before raising these claims to the Court." *Luoyang Bearing Corp. v. United States*, 28 CIT 733, 760, 347 F. Supp. 2d 1326, 1351 (2004) (citing *Unemployment Comp. Comm'n of Alaska v. Aragon*, 329 U.S. 143, 155 (1946) ("A reviewing court usurps the agency's function when it sets aside the administrative determination upon a ground not theretofore presented and deprives the [agency] of an opportunity to consider the matter, make its ruling, and state the reasons for its action.")) ("*Luoyang*").[19] "While a plaintiff cannot circumvent the requirements of the doctrine of exhaustion by merely mentioning a broad issue without raising a particular argument, [a] plaintiff's brief statement of the argument is sufficient if [(1)] it alerts the agency to the argument with reasonable clarity and [(2)] avails the agency with an opportunity to address it." *Id.*, 28 CIT at 761, 347 F. Supp. 2d at 1352 (citations omitted).

Here, Ta Chen challenged the issue of the CEP profit in the underlying administrative review with sufficient specificity so as to provide Commerce with an opportunity to address the claim. In its original brief challenging Commerce's CEP profit methodology, Ta Chen argued:

> Ta Chen's U.S. subsidiary [TCI] incurs enormous inventory carry[ing] and credit costs (from delay in customer payment) as to its U.S. sales. . . . [Commerce] should adjust its calculation of

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[19] The court in *Louyang* went on to note that there is "no absolute requirement of exhaustion in the Court of International Trade in non-classification cases," and that Congress vested the Court with the discretion to determine the circumstances under which it shall require the exhaustion of administrative remedies. *Luoyang*, 28 CIT at 760 n.11, 347 F. Supp. 2d at 1352 n.11 (citation omitted). The Court has recognized exceptions to the exhaustion doctrine in instances where: "(1) requiring it would be futile; (2) a subsequent court decision has interpreted existing law after the administrative determination at issue was published, and the new decision might have materially affected the agency's actions; (3) the question is one of law and does not require further factual development and, therefore, the court does not invade the province of the agency by considering the question; and (4) plaintiffs had no reason to suspect that the agency would refuse to adhere to clearly applicable precedent." *Luoyang*, 28 CIT at 760–61 n.11, 347 F. Supp. 2d at 1352 n.11 (citations omitted).

> Ta Chen's CEP Profit to include such costs. Doing so accurately reflects Ta Chen's true profit and costs.

Pl. Resp. Br. App. 1 at 2. That Ta Chen (1) cited specifically to its inventory carrying and credit costs and (2) asked Commerce to account for those costs shows that it alerted Commerce of its argument with reasonable clarity. Moreover, Commerce acknowledged the issue, first by summarizing Ta Chen's argument (and Plaintiffs' contentions) and subsequently rejecting it in the *Final Results* and accompanying memorandum. *Issues and Decision Memorandum* at 40–41. While Defendant's avoidance of this issue in its brief is telling, it is not dispositive. Def. Br. 16–25. Therefore, the court finds that Ta Chen properly exhausted its administrative remedies and may raise this issue.

Ta Chen, however, misreads what it alleges to be the controlling law on the calculation of the CEP profit. Specifically, Ta Chen mistakes *SNR Roulements* to stand for the proposition that the actual costs used in the "total actual profit" and "total expense" components of the CEP profit equation *must* adequately reflect imputed costs. Def-Intervenor Br. 9–14. That case stands for no such rule; rather, the Federal Circuit merely stated that Commerce must afford interested parties "*an opportunity* to make a showing that their dumping margins were wrongly determined because Commerce's use of actual expenses did not account for U.S. credit and inventory carrying costs in the calculation of total expenses." *SNR Roulements*, 402 F.3d at 1363 (emphasis added). That is, "Commerce may account for credit and inventory carrying costs using imputed expenses in one instance and using actual expenses in the other provided that Commerce affords a respondent who so desires the opportunity to make a showing that the amount of imputed expenses is not accurately reflected or embedded in its actual expenses." *Id.* at 1361. The Federal Circuit further noted that Commerce did not give the petitioner any opportunity to argue that actual costs did not adequately reflect imputed costs. *Id.* at 1363. Because Ta Chen was afforded such an opportunity in the thirteenth administrative review, the court finds *SNR Roulements* inapplicable.

If Commerce supports its determination with substantial evidence and it acts in accordance with law, the Court will uphold the agency's finding. *See* § 1516a(b)(1)(B)(i). Here, however, there is insubstantial evidence to support Commerce's determination that "an adjustment to the [CEP profit] calculation is unwarranted." *Issues and Decision Memorandum* at 41. To justify the *Final Results*, Commerce cites to two instances where the Court has upheld Commerce's CEP profit methodology in prior administrative reviews of the antidumping order on the subject merchandise. *Id.* (citing *Ta Chen II*, 30 CIT 376, 427 F. Supp. 2d 1265; *Alloy Piping I*, 28 CIT 1805). Commerce's justification misses the point. The legal validity of this kind of CEP profit methodology employed by the agency here is not at issue;

rather, Commerce fails to directly address Ta Chen's claim that, in the thirteenth administrative review, the exclusion of imputed costs in the CEP profit calculation renders Ta Chen's actual costs inaccurate.[20] The cited cases do not stand for the proposition that Commerce's CEP profit methodology is unquestionably in accordance with law, but rather state that in the particular administrative reviews at issue—the sixth and seventh administrative reviews—Commerce provided substantial evidence to support its finding that actual costs adequately reflect imputed costs. *See Ta Chen II*, 30 CIT 376, 382–83, 427 F. Supp. 2d at 1270–71; *Alloy Piping I*, 28 CIT at 1811–12. That is, those cases concern different data compiled in different periods of review that have no legal effect on the administrative review here. Simply because the Court has rejected identical claims by Ta Chen in other administrative reviews that involve different sets of data does not suggest that Commerce need not address with rigor the particular claim at issue in the thirteenth administrative review.

The critical distinction between the record here and those of the two cases cited above is that Commerce explained why actual costs adequately reflect imputed costs. *See, e.g., Ta Chen II*, 30 CIT at 382–83, 427 F. Supp. 2d at 1270–71 (noting that the administrative determination "explain[s] how the imputed financial expenses included in the 'Total U.S. Expenses' numerator are a reasonable surrogate for the relevant recognized financial expenses included in both the 'Total Expenses' denominator and the 'Total Actual Profit' multiplier."). In not one of those cases does Commerce, as here, adopt a conclusory statement to justify its finding. Such a statement, without additional justification, hardly includes an explanation of the standards applied and of the analysis that led to Commerce's conclusion, nor does it demonstrate a rational connection between the facts on the record and the conclusions drawn. *See Matsushita*, 750 F.2d at 933.

IV. Conclusion

For the foregoing reasons, the court holds that Commerce acted with substantial evidence and in accordance with law on the issue of the CEP offset to the NV. The court finds that Commerce failed to provide substantial evidence for its findings regarding the CEP profit. Accordingly, it is hereby

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[20] Commerce also suggests that the Court found imputed costs, as a general rule, to be irrelevant in the CEP profit calculation since they do not "represent some real, previously unaccounted for, expense[ ]. . . ." *Issues and Decision Memorandum* at 41 (citing *Alloy Piping I*, 28 CIT at 1811–12) (quotations omitted). Commerce misreads the cited passage, which only found that Commerce adequately accounted for imputed costs in actual costs in the seventh administrative review. *Alloy Piping I*, 28 CIT at 1811.

ORDERED that Plaintiffs' Motion for Judgment Upon the Agency Record is **DENIED**, that Defendant-Intervenor's Motion for Judgment Upon the Agency Record is **GRANTED** and that the case is **REMANDED** to Commerce for further proceedings not inconsistent with this opinion. Specifically, it is

ORDERED that Commerce must provide a more rigorous analysis in its examination of whether imputed costs are adequately reflected in the total actual costs used in the "total actual profit" and "total expenses" components of the CEP profit methodology; it is further

ORDERED that Commerce's determination on the issue of the CEP offset is **SUSTAINED**; and it is further

ORDERED that Commerce shall have until June 16, 2009, to file its remand results with the Court. Plaintiffs and Defendant-Intervenor shall file their responses with the Court no later than July 17, 2009.

Slip Op 09–30

NUCOR CORPORATION, GERDAU AMERISTEEL, INC., and COMMERCIAL METALS COMPANY, Plaintiffs, v. UNITED STATES OF AMERICA, Defendant, and EKINCILER DEMIR ve CELIK SANAYI A.S., EKINCILER DIS TICARET A.S., HABAS SINAI ve TIBBI GAZLAR ISTIHSAL ENDUSTRISI A.S., COLAKOGLU DIS TICARET A.S., COLAKOGLU METALURJI A.S., KAPTAN DEMIR CELIK ENDUSTRISI ve TICARET A.S., KAPTAN METAL DIS TICARET ve NAKLIYAT A.S., DILER DEMIR CELIK ENDUSTRISI ve TICARET A.S., DILER DIS TICARET A.S., TAZICI DEMIR CELIK SANAYI ve TURIZM TICARET A.S., KROMAN CELIK SANAYII A.S., Defendant-Intervenors.

Before: **MUSGRAVE, Senior Judge**
Consol. Court No. 07–00457

[Motion for judgment on an administrative record of antidumping duty review of rebar from Turkey, remanded to International Trade Administration, U.S. Department of Commerce, for further proceedings.]

Dated: April 14, 2009

Wiley Rein LLP (*John R. Shane*, *Alan H. Price*, *Maureen E. Thorson*, and *Lori E. Scheetz*), for Nucor Corporation, Gerdau Ameristeel, Inc., and Commercial Metals Company.

Michael F. Hertz, Acting Assistant Attorney General; *Jeanne E. Davidson*, Director, *Patricia M. McCarthy*, Assistant Director, Civil Division, Commercial Litigation Branch, United States Department of Justice (*Richard P. Schroeder*); Office of the Chief Counsel for Import Administration, United States Department of Commerce (*Scott D. McBride*), of counsel, for The United States of America.

Arnold & Porter (*Michael T. Shor*, *Lawrence A. Schneider*, and *Francis Franze-Nakamura*), for Ekinciler Demir ve Celik Sanayi A.S. and Ekinciler Dis Ticaret A.S.

Law Offices of David L. Simon (*David L. Simon*) for Habas Sinai ve Tibbi Gazlar Istihsal Endustrisi A.S. and Kroman Celik Sanayii A.S.

Arent Fox LLP (*Myles S. Getlan*) for Colakoglu Dis Ticaret A.S., Colakoglu Metalurji A.S., Kaptan Demir Celik Endustrisi ve Ticaret A.S., and Kaptan Metal Dis Ticaret ve Nakliyat A.S.

Hogan and Hartson (*Craig A. Lewis*, *Jonathan T. Stoel* and *Lewis E. Leibowitz*), for Diler Demir Celik Endustrisi ve Ticaret A.S., Diler Dis Ticaret A.S., and Tazici Demir Celik Sanayi ve Turizm Ticaret A.S.

OPINION AND ORDER

MUSGRAVE, Senior Judge: This consolidated matter implicates *Certain Steel Concrete Reinforcing Bars from Turkey; Final Results of Antidumping Duty Administrative Review and New Shipper Review and Determination to Revoke in Part*, 72 Fed. Reg. 62630 (Nov. 6, 2007) ("*Final Results*"), *inter alia* an antidumping duty administrative review covering the period April 1, 2005 through March 31, 2006 ("POR"). Originally, it included three separate actions initiated by the domestic petitioners Nucor Corporation, Gerdau Ameristeel, Inc., and Commercial Metals Company that have since been voluntarily dismissed, and on March 23, 2009, the parties presented oral argument on the remaining matter: the claim of Ekinciler Demir ve Celik Sanyi A.S. and Ekinciler Dis Tacaret A.S. ("Ekinciler"), respondent producer and exporter of Turkish rebar, that the International Trade Administration, U.S. Department of Commerce ("Commerce") erred by imputing depreciation to a specific account Ekinciler maintains on its books and records as a fixed asset, nominally "melt shop modernization," which purportedly consists almost solely of losses on foreign exchange loans due to the devaluation of the Turkish lira in 2000/2001 and that were not incurred for the construction or acquisition of fixed assets.

During the previous administrative review, Commerce also imputed depreciation to the account, and Ekinciler was ultimately unsuccessful in contesting that decision because it had failed to prove as a matter of evidence or law that depreciation could not be imputed to the account based on the administrative record before the court. *Ekinciler Demir ve Celik Sanyi A.S. v. United States*, 32 CIT ___ , Slip Op. 08–34 (Mar. 20, 2008), *aff'd*, No. 08–1371, 2009 WL 279066 (Fed. Cir. Feb. 6, 2009), incorporated herein by such reference. Ekinciler renewed its claim during this subsequent review, but was again rebuffed, for the reasons Commerce explains in its *Issues and Decision Memorandum for the Antidumping Duty Administrative Review and New Shipper Review on Certain Steel Concrete Reinforcing Bars from Turkey—April 1, 2005, through March 31, 2006* (Oct. 31, 2007) ("IDM").

The Court has jurisdiction pursuant to 28 U.S.C. § 1581(c) and 19 U.S.C. § 1516a(a)(2)(B)(iii) to hold unlawful in accordance with 19

U.S.C. § 1516a(b)(1)(B)(i) any administrative determination "unsupported by substantial evidence on the record, or otherwise not in accordance with law[.]"

According to the IDM, Commerce rejected Ekinciler's explanations regarding the nature of the expenses and the supporting documentation it had submitted because "there is no way to link the documents to the 'asset' listed in Ekinciler's financial statement." IDM at 43. Commerce did not, however, find that the account reflected expenses incurred for melt shop modernization or for any other fixed asset. Indeed, as before, Commerce again made no explicit finding as to what the account actually represents. *Cf.* Slip Op. 08–34 at 7. Rather, Commerce reasoned that even if the expenses were of a type that should have been expensed in the year incurred under U.S. generally accepted accounting principles (GAAP) and the international equivalent, international financial reporting standards (IFRS), the fact that Ekinciler did not do so "results in a situation simply not addressed by U.S. GAAP or the IFRS." *Id.* In the end, Commerce concluded

> it is unreasonable for Ekinciler to ignore the expense forever and as a result artificially inflate its balance sheet. In other words, it is unreasonable for Ekinciler to continue to record the asset in its financial statements and indefinitely suspend recording the corresponding depreciation expense associated with the asset. More importantly, we find that Ekinciler's failure to recognize an allocated portion of these capitalized expenses during the POR is contrary to the requirements of section 773(f)(1)(A) of the Act, because Ekinciler's reported costs do not "reasonably reflect the costs associated with the production of the merchandise."

Id. at 44.

And yet, as noted, when Commerce examines costs of production the antidumping statutes require the calculation of only those costs that "reasonably reflect the costs associated with the production and sale of the merchandise." 19 U.S.C. § 1677b(f)(1)(A). *See, e.g.*, *Hornos Electricos de Venez. v. United States*, 27 CIT 1522, 1533, 285 F.Supp.2d 1353, 1364 (2003) ("Commerce's practice is to calculate COP based on actual costs incurred during the POI"); *Micron Tech., Inc. v. United States*, 23 CIT 380, 382 (1999) ("[t]he object of the cost of production exercise is not to capture all past expenses, but rather those expenses that reasonably and accurately reflect a respondent's actual production costs for a period of review"). But here, Commerce did not find or allege from the record that the "melt shop modernization" account reflected costs "associated with the production of merchandise" during the POR or find that it largely consists of other than foreign exchange losses incurred outside the POR that are unrelated to acquisition or construction of fixed assets. *E.g.*, *see gener-*

ally Pl.'s Br. at 5–11, 19–21 (and citations therein). Ekinciler further agrees, with Commerce, that the foreign exchange losses should have been recognized as they were incurred, and it also pressed the point, before Commerce, that maintaining those losses, proved by source documentation, on its books and records as a fixed asset amounts to incorrect accounting treatment. *E.g.*, Pub. R. Doc. 363 (Oct. 3, 2007 Hearing Tr.) at 101; *see* Pl.'s App. E at EK 0052.

Commerce's stated policy is to treat all foreign exchange losses as an expense in the year realized. *See, e.g.*, *Certain Preserved Mushrooms from India: Preliminary Results of Antidumping Administrative Review*, 68 Fed. Reg. 11045, 11048 (Mar. 7, 2003). It has not justifiably explained its departure from such policy in this instance. *See, e.g.*, *Cultivos Miramonte S.A. v. United States*, 21 CIT 1059, 1064–65, 980 F.Supp. 1268, 1274–75 (1997); *Hussey Copper, Ltd. v. United States*, 17 CIT 993, 998, 834 F.Supp. 413, 419 (1993); *Citrosuco Paulista, S.A. v. United States*, 12 CIT 1196, 1209, 704 F.Supp. 1075, 1088 (1988). Its only apparent rationale for imputing depreciation to this account is concern over Ekinciler showing an "inflated" balance sheet. But, as Ekinciler pointedly stated at oral argument, Commerce's mandate does not include acting as the "financial statements police," it includes calculating only those costs that reasonably relate to cost of production during the period of review. 19 U.S.C. § 1677b(f)(1)(A).

Given Ekinciler's uncontroverted evidence on the nature of the melt shop modernization account at the administrative review, the decision to impute depreciation to the account has no basis on the administrative record or in law. *Cf. Pullman-Standard v. Swint*, 456 U.S. 273, 292 (1982) (additional fact finding unnecessary where record permits only one resolution of factual issue); *Richardson v. Suzuki Motor Co.*, 868 F.2d 1226, 1240 (Fed. Cir. 1989) (additional fact finding unnecessary where record is clear). The court considers Commerce's other arguments without merit and hereby remands the matter to Commerce for the purpose of redetermining imputed depreciation without the amount that currently reflects the foreign exchange losses in the melt shop modernization account. Results of remand shall be filed within 30 days hereof.

So ordered.

Slip Op. 09–31

VOLKSWAGEN OF AMERICA, INC., Plaintiff, v. UNITED STATES, Defendant.

Before: Richard W. Goldberg,
Senior Judge
Court No. 96–00132

[Judgment for Plaintiff.]

Dated: April 15, 2009

Law Offices of Thomas J. Kovarcik (*Thomas J. Kovarcik*), for Plaintiff Volkswagen of America, Inc.

Michael F. Hertz, Acting Assistant Attorney General; *Barbara S. Williams*, Attorney in Charge, International Trade Field Office, Commercial Litigation Branch, Civil Division, U.S. Department of Justice.

OPINION

GOLDBERG, Senior Judge: This matter is before the Court following the Federal Circuit's remand in *Volkswagen of America, Inc. v. United States*, 540 F.3d 1324 (Fed. Cir. 2008). The narrow issue left before the court is whether repairs made pursuant to federal emissions recalls establish that these defects existed at the time of importation, and in turn, entitle Volkswagen of America, Inc. ("Volkswagen") to an allowance for the value of these repairs. For the foregoing reasons, we find that Volkswagen is entitled to an allowance for the value of its repairs made in response to federal emissions recalls.

I. *DISCUSSION*

Our decision in *Volkswagen of America, Inc. v. United States* addressed the company's entitlement to reductions in the appraised values of its imported merchandise for repairs made to latent defects under 19 C.F.R. § 158.12, which permits an allowance for damage existing at the time of importation. 31 CIT ___ , 484 F. Supp. 2d 1314 (2007). In this case, we held that Volkswagen's evidence was insufficient to establish that its various repair claims related to defects existing at the time of importation. *Id.* at 1321–22. The Federal Circuit affirmed this decision in-part, and reversed-in-part-finding that Volkswagen was entitled to an allowance for warranty repairs made in response to government-mandated safety recalls. In the Federal Circuit's view, the "very nature of a government mandated safety recall establish[ed] the high likelihood that any defects repaired pursuant to the recall existed at the time of importation." *Volkswagen*, 540 F.3d at 1336. The Federal Circuit further ordered this Court to examine whether "state law recalls and the FTC recall exhibit [this]

same reliability."[1] *Id.* For the foregoing reasons, we find that Volkswagen is entitled to an allowance because the nature of the federal emissions recalls similarly establishes a high likelihood that the defects existed at the time of importation.

In *Volkswagen*, the Federal Circuit based its conclusion that the applicable defects existed at the time of importation on the fact that federal law prohibits the importation of automobiles not in compliance with federal safety standards. 540 F.3d at 1335–36. Federal law similarly prohibits "the importation into the United States, of any new motor vehicle or new motor vehicle engine . . . unless such vehicle or engine is covered by a certificate of conformity [with federal emissions laws]." 42 U.S.C. § 7522(a)(1) (2000). Further, the similarity of federal safety and emissions-based recalls is demonstrated by the fact that the reporting provisions for emissions-based recalls grafts on to the reporting system utilized for safety-recalls - requiring a manufacturer to file a report "in accordance with procedures established by the manufacturer to identify safety related defects that a specific emissions-related defect exists." 40 C.F.R. § 85.1903. The required content of the reports are also very similar. *Compare* 40 C.F.R. § 85.1903, *with* 49 C.F.R. § 573.6.

United States Customs and Border Protection ("Customs"), maintains that repairs made pursuant to a federal emissions recall do not establish that the defects existed at importation. To support its argument, Customs relies on an EPA report on emissions-based recalls and voluntary service repairs. *Compliance & Innovative Strategies Div.*, *Office of Transp. & Air Quality*, *EPA*, Annual Summary of Emissions-Related Recall and Voluntary Service Campaigns Performed on Light-Duty Vehicles and Light-Duty Trucks (2008), http://www.epa.gov/otaq/cert/recall/ 420b08012.pdf. Customs cites a 2007 service action for the New Beetle, GTI, Golf, and Jetta models (EPA # 2814, Manufacturer Recall 2007/04/10), which states that "[a]n incorrect interpretation of information in the electronic parts catalogue directed dealership technicians to install the wrong catalyst on these particular vehicles." *Id.* at 8. In Customs' view, the fact that Volkswagen had to initiate a service action to fix mistakes made by its dealers demonstrates that not all repairs due to federal emissions-based recalls relate to defects existing at the time of importation. This example, however, is misplaced as the service action Customs is citing is not an emissions-based recall, but instead a voluntary service action to fix a repair, which has no bearing on the

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[1] Volkswagen concedes that the only recalls that need to be analyzed on remand are federal emissions recalls for two reasons. First, Volkswagen's FTC "claim" does not reflect a "recall", but rather a "claim" for a warranty repair outside the scope of the Federal Circuit's holding. Second, only California had the right to regulate its automobile emissions at the time of these entries, and thus, "state recalls" or "state law emissions recalls" could refer only to California emissions recalls, and Volkswagen made no allowance claims pursuant to emissions recalls issued by California.

emissions-based recalls at issue in this case. Accordingly, this Court finds that there is a similarly high likelihood that any repairs due to federal emissions recalls relate to defects existing at importation, and in turn, that Volkswagen is entitled to its claimed allowance.

II. *CONCLUSION*

In light of the foregoing, this Court grants final judgment to Volkswagen in favor of its claims for an allowance for repairs made pursuant to federal emissions-based recalls.