Slip Op. 11–13

MCC EUROCHEM, Plaintiff, v. UNITED STATES, Defendant.

Before: Leo M. Gordon, Judge
Court No. 10–00260

[Defendant's partial motion to dismiss granted.]

Dated: February 4, 2011

Squire Sanders & Dempsey, LLP (*Peter J. Koenig*, *Christine J. Sohar Henter*, *Christopher A. Williams*) for Plaintiff MCC Eurochem.

Tony West, Assistant Attorney General, *Jeanne E. Davidson*, Director, *Patricia M. McCarthy*, Assistant Director, Commercial Litigation Branch, Civil Division, U.S. Department of Justice (*David D'Alessandris*, Trial Attorney); and Office of Chief Counsel, Department of Commerce (*Shana Hofstetter*), of counsel, for Defendant United States.

Akin, Gump, Strauss, Hauer & Feld, LLP (*Valerie A. Slater*, *Margaret C. Marsh*) for Defendant-Intervenor Ad Hoc Committee of Domestic Nitrogen Producers.

MEMORANDUM and ORDER

Gordon, Judge:

Introduction

Defendant moves pursuant to USCIT Rule 12(b)(5) to partially dismiss Plaintiff MCC Eurochem's ("Eurochem") complaint challenging the final results of the U.S. Department of Commerce's ("Commerce") administrative review covering solid urea from Russia during the July 1, 2008 through June 30, 2009 period of review. *See Solid Urea from Russia*, 75 Fed. Reg. 51,440 (Dep't of Commerce Aug. 20, 2010) (final results) and accompanying Issues and Decision Memorandum, A-821–801, AR 2008/09 (Aug. 13, 2010), available at http://ia.ita.doc.gov/frn/summary/russia/2010–20750–1.pdf (last visited Feb. 4, 2011). Defendant's motion to dismiss is limited to Count 2 (¶ 11) of Eurochem's complaint, which challenges Commerce's "zeroing" methodology. The court has jurisdiction over this action pursuant to 28 U.S.C. § 1581(c). For the reasons set forth below, the court grants Defendant's motion and dismisses Count 2 (¶ 11) of Plaintiff's complaint.

Discussion

In deciding a USCIT Rule 12(b)(5) motion to dismiss for failure to state a claim upon which relief can be granted, the court assumes all factual allegations to be true and draws all reasonable inferences in the plaintiff's favor. *Gould, Inc. v. United States*, 935 F.2d 1271, 1274 (Fed. Cir. 1991). In Count 2, Eurochem claims that "[t]he Final Results decision to zero was not supported by substantial evidence and not otherwise in accordance with law." Pl. Compl. ¶ 11, ECF No. 6. More specifically, Eurochem claims that Commerce's use of "zeroing" in the subject review constitutes an unreasonable application of the antidumping statute. Eurochem suggests that the legal landscape with respect to "zeroing" has fundamentally changed, which creates a novel legal issue distinguishable from prior decisions that have upheld Commerce's "zeroing" methodology. Pl. Resp. Br. 8, ECF No. 26. In particular, Eurochem argues that Commerce's use of "zeroing" in the current review is unlawful because it occurred *after* the effective date of the United States' change in policy and statutory interpretation regarding "zeroing" in investigations; *after* U.S. courts affirmed Commerce's new statutory interpretation and policy to eliminate "zeroing" in investigations; and *after* the United States' commitment to implement the World Trade Organization's *Japan Zeroing* decision that rejected application of "zeroing" in administrative reviews. Pl. Resp. Br. 7. Eurochem argues that these events carry legal significance and establish the basis for a claim that Commerce's continued application of "zeroing" in administrative reviews, but not in investigations, is inconsistent with 19 U.S.C. § 1677(35). According to Eurochem, the U.S. Court of Appeals for the Federal Circuit has not "previously ruled on the question of whether construing section 1677(35) to have two different meanings in reviews and investigations is reasonable under prong II of *Chevron U.S.A., Inc. v. Natural Res. Def. Council*, 467 U.S. 837 (1984)." Pl. Resp. Br. 8.

Eurochem's arguments are unpersuasive. The Federal Circuit has consistently upheld the reasonableness of Commerce's practice of "zeroing" in administrative reviews. *See Koyo Seiko Co. v. United States*, 551 F.3d 1286 (Fed. Cir. 2008); *SKF USA, Inc. v. United States*, 537 F.3d 1373 (Fed. Cir. 2008); *NSK Ltd. v. United States*, 510 F.3d 1375 (Fed. Cir. 2007); *Corus Staal BV v. United States*, 502 F.3d 1370 (Fed. Cir. 2007); *Timken Co. v. United States*, 354 F.3d 1334 (Fed. Cir. 2004), *cert. denied*, *Koyo Seiko Co. v. United States*, 543 U.S. 976 (2004). The Federal Circuit has further denied petitions for rehearing and rehearing en banc in *Koyo*, *NSK*, and *Timken*.

With regard to the specific challenge presented here, the Federal Circuit and the Court of International Trade have already considered and rejected the same legal argument that Eurochem advances in this case. *See SKF USA, Inc. v. United States*, ___ F.3d ___, 2011 WL 73179 (Fed. Cir. Jan. 7, 2011) ("*SKF*"); *Dongbu Steel Co. v. United States*, 34 CIT ___, 677 F. Supp. 2d 1353 (2010) ("Dongbu"); *Corus Staal BV v. United States*, 32 CIT ___, 593 F. Supp. 2d 1373 (2008), *aff'd without decision*, 370 Fed. Appx. 111 (Fed. Cir. 2010). Eurochem concedes that Count 2 raises the same legal issue addressed in *SKF* and *Dongbu*. Pl. Resp. Br. 4. ("In fact, two cases are currently pending appeal before the Federal Circuit challenging this exact same issue, which we are contesting.").

After briefing in this action was completed, the Federal Circuit issued its decision in *SKF*, which again sustained Commerce's practice of "zeroing" negative dumping margins in administrative reviews. *See SKF*, ___ F.3d at ___, 2011 WL 73179 at *8. As noted above, the appellants in *SKF* raised the same legal argument that Eurochem brings here. Brief for Appellants at *32-*40, *SKF*, 2010 WL 894953; Reply Brief for Appellants at *17-*18, *SKF*, 2010 WL 2416207. The Federal Circuit, however, concluded that Commerce's practice of "zeroing" was reasonable and thereby rejected appellants' claim. *SKF*, ___ F.3d at ___, 2011 WL 73179, at *8. Likewise, in *Dongbu,* the Court of International Trade entertained the very same argument that Eurochem relies on in this action and, after a thorough examination of the issue, the court sustained Commerce's practice of "zeroing." *See Dongbu*, 34 CIT at ___, 677 F. Supp. 2d at 1362–66.

The Federal Circuit's decision in *SKF* constitutes controlling authority, and while *Dongbu* is not binding on the court, it is legally sound and consistent with Federal Circuit precedent. *SKF* and *Dongbu* make clear that Commerce's practice of "zeroing" in administrative reviews remains a reasonable application of the antidumping statute under the second step of *Chevron*.

Conclusion

For these reasons, Eurochem cannot prevail on Count 2 (¶ 11) of its complaint.

Accordingly, it is hereby

ORDERED that Defendant's partial motion to dismiss is granted; and it is further

ORDERED that Count 2 (¶ 11) of Eurochem's complaint is dismissed.

Dated: February 4, 2011
New York, New York

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

Slip Op. 11–14

DORBEST LTD., et al., Plaintiffs, v. UNITED STATES, Defendant.

Before: Pogue, Chief Judge
Consol. Ct. No. 05–00003

[Commerce's remand determination remanded in part.]

Dated: February 9, 2011

Mowry & Grimson PLLC (*Kristin H. Mowry*, *Jeffrey S. Grimson, Jill A. Cramer*, *Susan E. Lehman*, and *Sarah M. Wyss*) for Dorbest Limited *et al*.;

King & Spalding LLP (*Joseph W. Dorn*, *Stephen A. Jones*, *Jeffrey M. Telep*, *J. Michael Taylor*, *Daniel L. Schneiderman*, and *Ashley C. Parrish*) for the American Furniture Manufacturers Committee for Legal Trade, *et al.* ;

Tony West, Assistant Attorney General; *Jeanne E. Davidson*, Director, *Patricia M. McCarthy*, Assistant Director, Commercial Litigation Branch, Civil Division, U.S. Department of Justice (*Stephen C. Tosini*, *Carrie A. Dunsmore*, and *Brian A. Mizoguchi*); *Rachael E. Wenthold*, Senior Attorney, Of Counsel, Office of Chief Counsel for Import Administration, U.S. Department of Commerce, for the United States Department of Commerce; and

Trade Pacific PLLC (*Robert G. Gosselink*) on behalf of Dongguan Lung Dong/Dong He, *et al*.

OPINION AND ORDER

Pogue, Chief Judge:

INTRODUCTION

In prior proceedings in this matter, the Court of Appeals for the Federal Circuit ("CAFC") held that when calculating surrogate labor rates for the valuation of goods from a nonmarket economy ("NME"), the Department of Commerce ("Commerce") must use data from countries that are both economically comparable to the NME and significant producers of comparable merchandise. *Dorbest Ltd. v. United States*, 604 F.3d 1363, 1372–73 (Fed. Cir. 2010)("*Dorbest IV* "). *Dorbest IV* thus required Commerce to redetermine, on remand, the labor rate applicable here. *See Final Results of Redetermination Pursuant to Remand, Dorbest Ltd. v. United States*, (Nov. 10, 2010) ("Remand Results").

In its remand determination, choosing data from the record, Commerce calculated a labor wage rate by averaging industry-specific earnings and/or wages from three countries – India, Indonesia and Pakistan – that it found to be both economically comparable to China and significant producers of wooden bedroom furniture. Based on these calculations, Commerce identified an average wage rate of 0.23 USD/hour and found that using that average wage rate as a surrogate for the cost of labor in the production of Plaintiff/Respondent Dorbest's merchandise, Dorbest has a *de minimis* dumping margin. Remand Results at 17, 42.

Plaintiff/Petitioner American Furniture Manufacturers Committee for Legal Trade ("AFMC") now seeks review of Commerce's data choices in that redetermination on remand.[1] AFMC challenges four of Commerce's specific choices: 1) Commerce's initial selection of two "bookend" countries – the Philippines and Pakistan – to limit its consideration of countries with economies comparable to China, the NME at issue; 2) Commerce's exclusion of data not available during the original investigation; 3) Commerce's use of wage rate data from India alleged to be "capped" or limited to wages of workers making 1600 Rupees ("Rs.") per month or less; and 4) Commerce's calculation of an average surrogate wage rate using only countries for which industry-specific data was available.

After a brief review of the relevant procedural history, the agency's methodology, and the applicable standard of review, the court will explain why it concludes that, given the record as a whole, the first of Commerce's choices must be remanded but the other three data choices were reasonable and therefore must be sustained.

BACKGROUND

Procedural history

This matter arises from Commerce's investigation of whether wooden bedroom furniture from China was being dumped in the United States domestic market during the time period between April 1, 2003 and September 30, 2003. *Wooden Bedroom Furniture from the People's Republic of China*, 68 Fed. Reg. 70,228 (Dep't Commerce Dec. 17, 2003)(Notice of Initiation of Antidumping Investigation). Commerce's final determination in the original investigation was subsequently challenged and remanded three times before it was appealed to the CAFC.

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[1] Dorbest does not challenge Commerce's remand determination. *Dorbest's Comments on Fourth Remand Determination, Dorbest Ltd. v. United States*, (Dec. 2, 2010).

In *Dorbest IV*, the CAFC invalidated Commerce's wage rate calculation regulation.[2] This court then remanded for further proceedings in accordance with the CAFC decision. Specifically, as noted above, the CAFC held that, contrary to Commerce's regulation, the governing statute, 19 U.S.C. § 1677b(c)(4),[3] requires that when calculating surrogate labor wage rates, Commerce shall "to the extent possible," use factors of production from market economies that are both economically comparable to the non-market economy country and significant producers of the subject merchandise. *Dorbest IV*, 604 F.3d at 1372 (citing 19 U.S.C. § 1677b(c)(4)(A)).

After *Dorbest IV*, Commerce acknowledged that the data on the record was insufficient to comply with the court's remand order and re-opened the administrative record to admit new wage data. *Request for Comment Regarding Wage Rate Data*, A-570–890, Remand Redetermination Investigation ("RRI") 4/1/03 - 9/30/03 (Aug. 11, 2010), Remand Admin. R. Pub. Doc. 1. Commerce also invited interested parties to submit comments and new factual information with regards to the sole issue of labor wage valuation. *Id.* at 2. AFMC and Dorbest each submitted comments and wage rate data for Commerce's consideration.

Methodology

Selecting from the record data, Commerce, in its remand determination, specified five steps for calculating labor wage rates ("the 5-step methodology").[4]

First, Commerce created a list of economically comparable surrogate countries based on gross national income ("GNI").[5] In doing so,

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[2] Prior to *Dorbest IV*, Commerce used a regression-based method for calculating wage rates pursuant to 19 C.F.R. § 351.408(c)(3). *See Dorbest IV*, 604 F.3d at 1371.

[3] The statute states that:

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

19 U.S.C. § 1677b(c)(4)(2011).

[4] The 5-step methodology that Commerce applied is described in greater detail at *Analysis Memorandum for the Redetermination Pursuant to Court Remand in the Antidumping Investigation of Wooden Bedroom Furniture from the People's Republic of China: Rui Feng Woodwork Co., Ltd. ("Rui Feng Shenzhen"), and their parent company Dorbest Limited (collectively "Dorbest")*, A-570–890, RRI4/1/03 - 9/30/03 (Oct. 8, 2010), Remand Admin. R. Pub. Doc. 8.

[5] In determining which countries are economically comparable to China, Commerce relies primarily on GNI. Remand Results at 12. Commerce's regulations specify that per capita gross domestic product is to be given weight when selecting surrogate countries to value production factors. 19 C.F.R. § 351.408(b) ("[Commerce] will place primary emphasis on per

Commerce relied on its original surrogate country memorandum,[6] which provided five economically comparable countries for consideration as the primary surrogate country for this investigation.[7] Remand Results at 12; Surrogate country memorandum. The countries on the list in the surrogate country memorandum are India, Pakistan, Indonesia, Sri Lanka and the Philippines. Remand Results at 12. Using, as "bookends," the high and low-income countries from that list, i.e., the Philippines and Pakistan, Commerce then added all countries with World-Bank reported per capita GNIs that fell within the "bookend" range. Remand Results at 12–13. This resulted in a list of 24 countries.

Second, Commerce proceeded to identify which of the 24 listed countries had exports of comparable merchandise between 2001 and 2003. Remand Results at 12. At this step, Commerce identified 13 countries from the list that were both economically comparable to China and significant producers of comparable merchandise.

Third, Commerce identified which of the 13 countries reported wage data between 1997 and 2002. Remand Results at 13. In doing so, Commerce relied on the International Labor Organization ("ILO") wage data from the base year and five years prior. *See* AFMC Br. at 8. After applying this step, six countries remained.

Commerce then added a fourth step to its methodology: It identified which countries reported an industry-specific classification within the ILO wage rate data. Remand Results at 13–14. In doing so, Commerce looked to data that was reported according to the International Standard Industrial Classification of all Economic Activities ("ISIC") code.[8] Remand Results at 14. Each updated ISIC code is known as a revision, and ISIC Revision 3 was the most recent reporting period available at the time of the initial investigation. Remand

capita GDP as the measure of economic comparability"). Nonetheless, Commerce and AFMC both rely on GNI throughout their discussion of which countries are economically comparable to China. *e.g.* Remand Results at 12; *AFMC's Comments on Final Results of Redetermination Pursuant to Remand, Dorbest Ltd. v. United States*, (Dec. 2, 2010) at 22 ("AMFC Br.").

[6] The surrogate country memorandum states that the five countries selected were all comparable to China in terms of per capita GNP and national distribution of labor. *Memorandum from Ron Lorentzen to Robert Bolling, "Request for a List of Surrogate Countries,"* A-570–890, POI 4/1/03 – 9/30/03, Admin. R. Pub. Doc. 260 at 1 (Jan 16, 2004) ("Surrogate country memorandum") ("Per capita GNP is the primary basis for determining economic comparability.").

[7] When calculating an antidumping margin, Commerce selects one country to act as the surrogate country from which it draws data on all factors of production except labor wage rates. This country is known as the primary surrogate country.

[8] For this and the next step, Commerce relied exclusively on the most updated data that would have been available during the original investigation. Remand Results at 13. Commerce used wage data from 1997–2002 and adjusted it to the 2003 period of investigation using the relevant Consumer Price Index. *Id.*

Results at 14 n.46. Commerce, however, chose to use an older revision, ISIC Revision 2, because it contained a sub-classification most specific to the production of wooden bedroom furniture.[9] RemandResults at 15. After applying this step, three countries – India, Indonesia and Pakistan – remained on the list. *Id.*

Finally, Commerce calculated an average wage rate for these three countries by using wage rate data from a three-digit subclassification level, when that sub-classification was available.[10] Remand Results at 16. Commerce used wage rate data from India and Indonesia that was reported at this additional, three-digit sub-classification level. Pakistan, however, did not report data at the three-digit sub-classification level; therefore with regards to wage rate data from Pakistan, Commerce used data which was reported at the two-digit sub-classification level. *Id.* Commerce then calculated a simple average using this data. *See id.*[11]

STANDARD OF REVIEW

The court will sustain a Commerce redetermination on remand "if it complies with the court's remand order, is supported by substantial evidence on the record, and is otherwise in accordance with law." *Jinan Yipin Corp. v. United States*, __ CIT __, 637 F. Supp. 2d 1183, 1185 (2009) (citing 19 U.S.C. § 1516a(b)(1)(B)(i)).

An agency determination is supported by substantial evidence when the record upon which it is based contains such "relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Consol. Edison Co. v. N.L.R.B.*, 305 U.S. 197, 229 (1938). In making this evaluation of the record, the court assesses whether the agency's data choices are reasonable considering the record as a whole. *See Nippon Steel Corp. v. United States*, 458 F.3d 1345, 1351 (Fed. Cir. 2006). At a minimum, in making its data choices, the agency must explain the standards it applied and make a rational connection between the standards and the conclusion. *See Matsushita Elec. Indus. Co. v. United States*, 750 F.2d 927, 933 (Fed. Cir. 1984). A rational connection is a connection that is supported by justification or evidence. *See Bowman Transp., Inc. v. Arkansas-Best Freight Sys., Inc.*, 419 U.S. 281, 285 (1975) (explaining that, even under the nar-

[9] Commerce used industry-specific data from the two-digit sub-classification 33, which is titled, "Manufacture of Wood and Wood Products, Including Furniture." Remand Results at 16.

[10] Here, Commerce used sub-classification 332, which is titled, "Manufacture of Furniture and Fixtures, Except Primarily of Metal." Remand Results at 16.

[11] This is the first time that Commerce has included steps four and five in its methodology. Furthermore, throughout the remand process Commerce has consistently used only data that was available during the time of the original investigation. See, *e.g.*, *Final Results of Redetermination Pursuant to Court Remand, Dorbest, Ltd. v. United States* (May 25, 2007).

rower arbitrary and capricious standard of review, the agency must examine the relevant data and articulate a satisfactory explanation for its action, including a "rational connection between the facts found and the choice made" (quoting *Burlington Truck Lines, Inc. v. United States*, 371 U.S. 156, 168 (1962))).[12]

DISCUSSION

I. Commerce's selection of countries to act as "bookends"

The first issue before the court is Commerce's initial selection of a pair of "bookend" countries to establish a range of GNI with which to identify a list of countries that qualify as economically comparable to China.[13] AFMC contends that this choice is arbitrarily skewed towards countries with a per-capita GNI that is less than that of China.[14]

The high-income "bookend" country selected from the list in Commerce's original surrogate country memorandum was the Philippines, with a GNI of 1,020, and the low-income bookend country was Pakistan with a GNI of 410. [15] Remand Results at 12; AFMC Br. at 23. China's GNI at the time of the original investigation was 1,100.[16] AFMC Br. at 23.

AFMC asserts that the CAFC clearly intended Commerce to use countries with reported GNI's both above and below that of China in order to capture an absolute range of economically comparable

[12] Moreover, a reviewing court should not attempt itself to make up for such deficiencies; "we may not supply a reasoned basis for the agency's action that the agency itself has not given." *Bowman*, 419 U.S. at 285–86 (citing *SEC v. Chenery Corp.*, 332 U.S. 194, 196 (1947)); *Atchison, Topeka & Santa Fe Ry. v. Wichita Bd. of Trade*, 412 U.S. 800, 807 (1973) (plurality) ("[T]he agency must set forth clearly the grounds on which it acted.").

[13] Both AFMC and Commerce agree that there is a strong correlation between wage rates and per capita GNI. *See* Remand Results at 30. In addition, Commerce continues to find, and AFMC agrees, that data from multiple countries constitutes the best available information for the valuing labor input. Remand Results at 10. (The use of multiple countries to calculate the labor wage rate is not an issue that any party contests.) Commerce cites, and AFMC acknowledges, the high variability and inconsistency between wage rates and GNI as the reason for using as many countries as possible when calculating an average wage rate. *See* Remand Results at 11.

[14] Commerce asserts incorrectly that it is too late for AFMC to challenge the selection of surrogate countries because it did not challenge it when the memorandum was initially promulgated. Remand Results at 31. However, because this is the first time that the surrogate country memorandum has been used for this purpose, until now there was no reason for AFMC to challenge the countries listed therein. *See*, *e.g.*, *Dorbest IV* 604 F.3d at 1375 (citing *Mittal Steel Point Lisas, Ltd. v. United States*, 548 F.3d 1375, 1383 (Fed. Cir. 2008)), and *United States v. L.A. Tucker Truck Lines, Inc.*, 344 U.S. 33, 37 (1952)).

[15] All GNI discussed here is in terms of United States dollars.

[16] The other three countries on the original surrogate country memo list all had GNIs lower than China's GNI. These three countries, Sri Lanka, Indonesia, and Pakistan, reported GNIs of 860, 740 and 510 respectively. AFMC Br. at 23.

countries.[17] AFMC Br. at 22, 25. AFMC also points out that the surrogate country memorandum was not drafted for purposes of calculating surrogate wage rates and therefore fails to account for absolute differences in GNI by listing countries both above and below China's GNI. AFMC Br. at 23.[18]

AFMC also contends that Commerce has failed to provide a reasonable explanation for why it used the five countries listed in the surrogate country memorandum, given that their low GNIs would necessarily predetermine an underestimated labor wage rate. AFMC Br. at 23–24. In support of this, AFMC notes that Commerce has already recognized in an earlier proceeding that using only wage rates from countries with high GNIs will likely lead to an overestimated wage rate. AFMC Br. at 24 (citing *Dorbest, Ltd. v. United States*, 547 F. Supp. 2d 1321, 1327 (CIT 2008) ("Dorbest II"). For AFMC, it follows that here, when Commerce selected countries with GNIs lower than China, the data set "pre-ordained an understated wage rate." AFMC Br. at 23.

Commerce contends that it was instructed merely to base its wage value on countries that are economically comparable to China and that neither the statute nor *Dorbest IV* define a set range of GNI to be used when determining economic comparability. Remand Results at 32. Commerce notes that the countries on the surrogate country memo were already determined to be economically comparable to China and that the memo provided a sufficient number of economically comparable countries to act as a starting point. Remand Results at 33.

Commerce's explanation is insufficient. While Commerce has discretion to determine the countries which will act as bookends for its selection, it has not provided a reasoned explanation of its "bookend" choices. In particular, Commerce's remand decision overlooks the explicit statement in the surrogate country memo that the proposed list is non-exhaustive, allowing for the possibility of introducing a more balanced range of countries from which to draw labor wage rate data. Surrogate country memo at 1.

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[17] In *Dorbest IV*, the CAFC noted that:

> Here, there were five market-economy countries with gross national incomes less than that of China and an additional eleven countries with gross national incomes between one and two times that of China. Although we need not resolve which of these countries, or which additional countries, could properly be considered economically comparable to China, some subset of these countries must surely fit the bill.
>
> *Dorbest IV*, 604 F.3d at 1372.

[18] Instead, the surrogate country memorandum was intended as a non-exclusive baseline for determining a principle surrogate country for "factors other than labor." AFMC Br. at 23; Surrogate country memo at 1.

Here, both of the two bookend countries have GNIs that fall below China's, resulting in a range of corresponding wage rates that will likely fall below China's wage rates. Given the high correlation between per capita GNI and wage rates, a correlation that Commerce acknowledges, Commerce's selection appears arbitrarily biased towards the low end of per capita GNI. *See* Remand Results at 35–36 (acknowledging established global relationship between wages and GNI); *also Dorbest II*, 547 F. Supp. 2d at 1327. Certainly Commerce does not have to achieve mathematical perfection in its choice of countries to act as bookends for its initial selection, but Commerce must explain why it selected two countries with GNIs that are lower than China's to use as bookends, and Commerce's explanation must rest "upon principles that are rational, neutral, and in accord with the agency's proper understanding of its authority." *FCC v. Fox Tel. Stations, Inc.* , 129 S. Ct. 1800, 1823 (Kennedy, concurring) (2009); *see*, *e.g.*, *Matsushita Elec. Indus. Co.*, 750 F.2d at 933. Without such an explanation, Commerce's determination is arbitrary because it "fail[s] to consider an important aspect of the problem," and is therefore unreasonable. *SKF USA v. United States*, 2011 WL 73179, *6 (Fed. Cir. Jan.7, 2011)(quoting *Motor Vehicle Mfrs. Ass'n. of U.S., Inc. v. State Farm Mut. Auto Ins. Co.*, 463 U.S. 29, 43(1983)).

Commerce asserts that the CAFC's explicit directive to rely on data from countries that are economically comparable to China will "necessarily result in a truncated dataset." Remand Results at 33. But this argument misses the point. While the CAFC's opinion has precluded the larger data sets that Commerce used in its invalidated regression-based methodology, that opinion did not hold that Commerce was restricted to using only countries with GNIs lower than China's. On the contrary, the CAFC noted that there were at least 16 countries from which Commerce could draw. *Dorbest IV*, 604 F.3d at 1372. While the CAFC explicitly declined to address exactly which countries could properly be considered economically comparable to China, it left open the possibility that countries with GNIs higher than China's could be included in the range. *Id.* Commerce has not provided any adequate explanation as to why these higher-income countries are necessarily excluded from the starting selection of countries.

Finally, Commerce claims that the range of economically comparable countries is not unfair – just because that range is not centered around China's GNI – and points out that there is no statutory requirement that Commerce select the "most comparable country." Remand Results at 33–34. AFMC responds that at a minimum, Commerce should achieve "substantial balance" in its data set by selecting

bookend countries that are roughly equally above and below China's per capita GNI.[19] Commerce replies that focusing on the ranking of each country will create an "illusion of precision." Remand Results at 34. In making this argument, Commerce relies on *Fujian Lianfu Forestry Co., Ltd. v. United States*, 638 F. Supp. 2d 1325, 1348–49 (CIT 2009), which held that India was economically comparable to China despite a wide difference between their respective GNIs (India 620, China 1290).

Fujian Lianfu Forestry is distinguishable, however, because it involved the choice of a single country to act as a primary surrogate country. *See Fujian Lianfu Forestry*, 638 F. Supp. 2d at 1347. Here, Commerce is selecting a range of countries. Moreover, there is no indication here that the methodology applied in *Fujian Lianfu Forestry* to select a primary surrogate country is similar to the methodology for determining surrogate wage rates. *See id.* at 1348–49. On the contrary, in the context of wage rate calculation, Commerce has stated that there is a high correlation between wage rates and GNI. Remand Results at 35–36. Given this statement, Commerce has not explained, beyond conclusory reasoning, how relying on broader GNI rankings of countries could produce an "illusion of precision." *See Amanda Foods (Vietnam), Ltd. v. United States*, 647 F. Supp. 2d 1368, 1377 (CIT 2009) (holding that Commerce must provide more than conclusory reasoning for treating all countries on surrogate country memorandum as identical).

For the above reasons, the court remands this issue to Commerce so that it may 1) explain why it is justified in selecting this particular pair of countries to act as bookends for the selection process, in light of their low GNIs and the high correlation between GNI and wage rates, or 2) otherwise reconsider its determination in accordance with this opinion.

II. Commerce's decision to use data available at the time of the original investigation

AFMC next contends that Commerce's reliance on 2002 GNI data and 2002 ILO wage data does not constitute use of the "best available data" under 19 U.S.C.§ 1677b(c)(1). AFMC Br. at 11.[20] We disagree.

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[19] AFMC also re-raises the argument that Commerce erred in continuing to rely on data from the 2004 WDR Publication rather than a 2010 download of the 2002 per capita GNI data. As discussed *infra*, Commerce's decision to limit the data selected for these remand results to data that was available during the time of the original investigation is reasonable.

[20] In calculating the surrogate wage rate, Commerce is directed by statute to use the "best available information." 19 U.S.C. § 1677b(c)(1). "Best available information" is not defined in the statute; therefore Commerce has significant discretion in making this determination. *See Nation Ford Chem. Co. v. United States*, 166 F.3d 1373, 1377 (Fed. Cir. 1999); *see* also

This court held in *Dorbest, Ltd. v. United States*, 462 F. Supp. 2d 1262 (CIT 2006), that "given that administrative law defines "available" in terms of the underlying investigation, "available" may reasonably mean "available during the investigation." *Dorbest*, 462 F. Supp. 2d at 1299 ("Dorbest I") (citing *Vermont Yankee Nuclear Power Corp. v. Natural Resources Def. Council, Inc.*, 435 U.S. 519, 555 (1978)).

AFMC contends that once an agency has reopened the record, it must consider all evidence properly before it and therefore, the best available information currently consists of the 2003 ILO wage data. AFMC Br. at 16. AFMC's argument, however, disregards the procedural posture of this case. Remand proceedings do not grant the parties the right to a new antidumping investigation from the current date. *See*, *e.g.*, 2 Am. Jur. 2d Administrative Law § 575. Rather, in remand proceedings, an administrative agency must modify its original determination in accordance with the remand order. *See id.*

Here Commerce reopened the record to admit new data because it needed a new type of data to comply with our remand order; that order, however, did not require data from a different time period. *See Request for Comment Regarding Wage Rate Data*, A-570–890, RRI 4/1/03 - 9/30/03 (Aug. 11, 2010), Remand Admin. R. Pub. Doc. 1 at 2. The error in Commerce's original determination arose not from the time period for which the ILO wage data were selected, but rather from the methodology applied to select the data.[21] *See Dorbest IV*, 604 F.3d at 1372–73. Because we are to treat Commerce's calculations on remand as if they were made at the time of the original investigation, it is reasonable for Commerce to consider only data that was available to it during the original investigation, namely, the 2002 ILO wage data. *See Vermont Yankee Nuclear Power Corp.*, 435 U.S. at 554–55 ("[a]dministrative consideration of evidence . . . always creates a gap between the time the record is closed and the time the administrative decision is promulgated") (citation omitted).

Asserting that Commerce's decision is not in accord with the statute, AFMC incorrectly cites *Port of Seattle v. Fed. Energy Regulatory Comm'n*, 499 F.3d 1016, 1035 (9th Cir. 2007). AFMC's reliance misses

Chevron, U.S.A. Inc. v. Natural Resources Defense Council, *Inc.*, 467 U.S. 837, 844 (1984); *Thai Pineapple Pub. Co. v. United States*, 187 F.3d 1362, 1365 (Fed. Cir. 1999) (holding that Commerce's methodologies are presumptively correct). The CAFC held in *Dorbest IV* that the requirement that Commerce use the "best available information" may not be used to demand of Commerce more than is required by the antidumping statute. 604 F.3d at 1373.

[21] AFMC cites to the authorities in *Dorbest I* supporting their argument that "available" information is information before the decision-maker when a determination is made. AFMC Br. at 16. Again, their interpretation fails to account for the procedural posture of this case. These are remand proceedings which necessarily must be treated as the original investigation. *See*, *e.g.*, 2 Am. Jur. 2d Administrative Law § 575.

the point. In *Port of Seattle*, the Ninth Circuit reviewed a decision made by the Federal Energy Regulatory Commission ("FERC") which disregarded evidence added to the record after a preliminary evidentiary proceeding but before FERC rendered its final decision. *Port of Seattle*, 499 F. 3d at 1025. *Port of Seattle* does not involve or address new data that was not available at the time of the original determination or investigation.[22]

In the alternative, AFMC contends that the decision to use only data available during the time of the original investigation is arbitrary and not supported by substantial evidence. AFMC Br. at 17. AFMC makes three arguments in support of this assertion.

First, AFMC contests Commerce's finding that the interests of administrative finality and efficiency overcome an interest in conducting accurate fact finding and that allowing later-discovered evidence sets an undesirable precedent. AFMC Br. at 17–18. AFMC argues that it is not attempting to circumvent the finality of Commerce's determination with new evidence and that Commerce has strayed from its own precedent in choosing not to use the updated data.

The case AFMC relies on to make this argument, *Shakeproof Assembly Components Div. Of Illinois Tool Works, Inc. v. United States*, 30 CIT 1173, Slip Op. 06–129 (Aug. 25, 2006), does not support AFMC's claim. The court in *Shakeproof* upheld Commerce's decision to reject evidence that was not contemporaneous with the period of investigation and noted in dicta that Commerce has traditionally used "valuation information contemporaneous with a period of investigation or review." *Shakeproof*, 30 CIT at 1177. Here the data used by Commerce is contemporaneous with the period of investigation in that it represents the data available at the time of the original investigation. Thus *Shakeproof* is not contrary authority.

Second, AFMC asserts that 2003 ILO wage data was available at the time of the original investigation because this court acknowledged in *Dorbest I* that the 2004 download, which happened to include 2003 data, was materially the same as the data available during the original investigation. AFMC mis-states our finding in *Dorbest I*. In *Dorbest I*, this court discussed the availability of 2002 ILO wage data shortly after the original investigation was completed and found that the 2004 download of that data was materially the

[22] AFMC also asserts that Commerce's decision is not supported by substantial evidence because it has failed to take into account contradictory evidence present on the record. AFMC Br. at 17. Nonetheless, AFMC mis-states the case. The evidence AFMC wishes Commerce to utilize is not contradictory, but rather, different, newer data of the same type being sought by Commerce. While this other data could result in a different margin for Dorbest, such a possibility does not necessarily render the data contradictory to the data Commerce used.

same. *Dorbest I*, 462 F. Supp. 2d at 1299. The availability of the 2003 ILO wage rate data during the original investigation was not before us in *Dorbest I* and therefore AFMC may not rely on *Dorbest I* to establish the existence of the 2003 ILO wage data and its concomitant availability during the original investigation.

Finally, AFMC asserts that Commerce "cherry picked" from the data, using both 2002 and 2003 ILO wage data in its calculations. AFMC Br. at 20. Commerce acknowledged in the remand results that it needed to extract 2002 ILO wage data that had not been retained at the time of the original investigation. In the remand results, Commerce stated that it relied on "a current download of 2001–2003 export data" to determine which countries were significant producers of comparable merchandise. Remand Results at 22. AFMC asserts that there is no reasonable basis for Commerce to conclude that the 2003 ILO wage data was not available during the time of the investigation while at the same time concluding that it was available. AFMC Br. at 21. Commerce responds that, by necessity, certain portions of the data it used were newly extracted, but that it relied upon data that would have been available during the original investigation. *Defendant's Response to AFMC's Remand Comments, Dorbest Ltd. v. United States*, (Dec. 22, 2010) at 14 ("Commerce Reply Br."). Commerce acknowledges that this is not a perfect procedure but the best it can make of the available data sources. Commerce Reply Br. at 15. This is reasonable. Accordingly, Commerce's decision to rely solely on data that would have been available during the original investigation is affirmed.

III. Indian wage rate

The AFMC next contends that Commerce's calculations are unsupported by substantial evidence because they rely in part on Indian wage data that appear to exclude workers making more than Rs.1600 per month, and thus appears "capped" or limited to wages under that amount. AFMC Br. at 37. We disagree.

In support of its claim, AFMC cites the Annual Survey of Industries (ASI), which can be read to indicate that a "cap" limits the Indian wage data to the bottom 2% of wage earners. *Petitioners' Comments Concerning Draft Results of Redetermination Pursuant to Remand in Dorbest Limited v. United States*, A-570–890, RRI 4/1/03 - 9/30/03 (Oct. 22, 2010), Remand Admin. R. Pub. Doc. 13 at 35–37. Commerce, however, declines to use this information because it was not made available until 2006. Remand Results at 40. As discussed *supra*, Commerce's decision to exclude data that would not have been avail-

able at the time of the original investigation is reasonable. *See Dorbest I*, 462 F. Supp. 2d at 1299.

In addition, Commerce further supports its stance by explaining that the ASI data do not represent industry-specific 2002 wages.[23] *See* Remand Results at 40 n. 99. Commerce notes that even though the 2003 ASI report on the record contains a "trends" column which shows a FY 2002 country-wide rate, no source data is on the record for this column, nor does the report include industry-specific data, which is what Commerce used in its calculations. *Id.* Thus Commerce decided that the ASI submission is not an appropriate benchmark because, even if it were available at the time of the original investigation, it does not contain industry-specific 2002 ILO wage data and thus would not be relevant to Commerce's calculations.[24] This determination is reasonable.

IV. Commerce's calculation of the average wage rate

Finally, AFMC challenges Commerce's data choices at the fourth and fifth steps of the wage rate calculation, asserting that Commerce's choices arbitrarily reduced the number of countries from which Commerce could calculate a labor wage rate. We disagree.

AFMC argues that the use of industry-specific data from ISIC Revision 2 is arbitrary and capricious because of Commerce's stated preference for a large "basket" of countries from which to choose. AFMC claims that requiring industry-specific wage data unnecessarily reduces the number of available countries from which to draw data when country-wide wage data is available from more countries. AFMC Br. at 32.

Commerce, in response, asserts correctly that the governing statute is silent on this issue, leaving the determination to Commerce's reasonable discretion. *See* 19 U.S.C. § 1677b(c)(1). Commerce explains that using industry-specific data is preferable because it comports with Commerce's long-standing practice of valuing the most specific

[23] As discussed *infra*, Commerce has reasonably chosen to use industry-specific data in its calculations.

[24] AFMC has placed on the record numerous pages extracted from the ILO website which state that the ILO wage rate data is capped. *AMFC Comments Concering Wage Data Placed on the Record on August 11, 2010*, A-570–890, RRI 4/1/03 - 9/30/03 (Aug. 16, 2010), Remand Admin. R. Pub. Doc. 3, Exhibit 6. However, the court finds this evidence unpersuasive because the record also contains an email from an ILO representative stating that the cited methodological description dates back to 1995 and has not been updated since. *Id.* at 377. Because this e-mail suggests that the data may not be capped, and in the absence of further evidence on the record that the data is capped, Commerce's use of the India wage rate data is reasonable.

data for production factors, and, at the very least, such data is more specific to the subject merchandise than country-wide data. Remand Results at 28–29.

While Commerce acknowledges AFMC's concerns, it notes, and we agree, that AFMC has failed to provide evidence to show that industry-specific data are unsuitable for calculating wage rates. Remand Results at 28. Furthermore, AFMC's argument misses the point. Our inquiry here is not whether Commerce used a certain number of countries in its calculations. Rather it is whether Commerce reasonably adhered to the remand order and the statutory requirements set forth in 19 U.S.C. § 1677b(c)(4), and whether Commerce's determination is supported by a reasonable reading of the record evidence as a whole.

Nonetheless, with regards to whether Commerce used the best available information from the record, Commerce states that it believes industry-specific data will yield the most accurate results, and explains that it used ISIC Revision 2 because it contains a two-digit sub-classification of industry-specific wages which Commerce feels to be most relevant to the production of wooden furniture. Remand Results at 15 ("[Commerce] identified the two-digit series most specific to wooden bedroom furniture as Sub-Classification 33, which is described as "Manufacture of Wood and Wood Products, Including Furniture"). Commerce also stated that it chose to use ISIC Revision 2 rather than the updated Revision 3 because Revision 2 contained the specific sub-classification which was more specific to, and thus a better match for, the subject merchandise.[25] Remand Results at 15. Here, Commerce has explained the standards it applied and made a rational connection between this standard and its decision to use ISIC Revision 2 data. *See Matsushita Elec. Indus. Co.*, 750 F.2d at 933.

For the reasons given above, Commerce's decision to use industry-specific data is reasonable and in compliance with the statutory requirements set forth in 19 U.S.C. § 1677b(c)(4).

[25] "[W]e find that the two-digit description under ISIC-Revision 2 Sub-Classification 33 ('Manufacture of Wood and Wood Products, Including Furniture') to be more specific and a better match for the wooden bedroom furniture industry than the applicable ISIC -Revision 3, Sub-Classification 36 two-digit description ('Manufacture of Furniture; Manufacturing NEC') since the ISIC-Revision-2 does not contain the broad catch-all category of 'manufacturing NEC,' or merchandise 'not elsewhere classified." Remand Results at 15. In addition, Commerce explained that it found ISIC Revision 2 to be better because it contained source data from all the countries determined to be both economically comparable and a significant producer of the subject merchandise.

Conclusion

Accordingly, Commerce's initial selection of two "bookend" countries – the Philippines and Pakistan – to limit its consideration of countries with economies comparable to China, is remanded for further consideration in accordance with this opinion. Commerce shall have until March 28, 2011 to complete and file its remand determination. Plaintiffs shall have until April 11, 2011 to file comments. Defendant and Defendant-Intervenors shall have until April 25, 2011 to file any reply. Commerce's other data choices are affirmed.

It is SO ORDERED.

Dated: February 9, 2011
New York, NY

/*s*/ *Donald C. Pogue*
DONALD C. POGUE, CHIEF JUDGE

Slip Op. 11–15

NORMAN G. JENSEN, INC., Plaintiff, v. UNITED STATES, Defendant.

Before: Richard K. Eaton, Judge
Court No. 10–00115

[Defendant's motion to dismiss granted.]

Dated: February 10, 2011

Joel R. Junker & Associates (*Joel R. Junker*), for plaintiff.

Tony West, Assistant Attorney General; *Barbara S. Williams*, Attorney in Charge, International Trade Field Office, Commercial Litigation Branch, Civil Division, United States Department of Justice (*Jason M. Kenner*, *Justin R. Miller*, and *David S . Silverbrand*); Office of Assistant Chief Counsel, International Trade Litigation, United States Customs and Border Protection (*Paula Smith*), of counsel, for defendant.

OPINION AND ORDER

Eaton, Judge:

INTRODUCTION

This matter is before the court on the motion of defendant the United States, on behalf of United States Customs and Border Protection ("Customs"), to dismiss the complaint of plaintiff Norman G. Jensen, Inc. ("Jensen") for lack of subject matter jurisdiction. The question presented is whether the court has jurisdiction to issue a writ of mandamus compelling Customs to rule on protests of liquida-

tion[1] that have been pending beyond the two year statutory time frame set forth in 19 U.S.C. § 1515(a) (2006).[2] For the reasons stated below, the court grants defendant's motion and dismisses this action.

BACKGROUND

The facts, as set forth in Jensen's complaint, are largely uncontested, and are accepted as true for purposes of defendant's motion to dismiss. *See Michael Simon Design, Inc. v. United States*, 33 CIT , , 637 F. Supp. 2d 1218, 1223 (2009). On February 15, 21, and 22, 2007, Jensen, on behalf of importers that it represents, filed 308 protests with Customs, covering 1,529 entries of softwood lumber from Canada.[3] Compl. ¶ 9. On March 9, 2009, more than two years after filing its protests, plaintiff, through its counsel, contacted Customs' Office of Regulations and Rulings ("OR&R") to inquire about the protests' status. Compl. ¶ 12. Following nearly two months of exchanged phone messages, OR&R informed plaintiff that its protests had been consolidated under a "lead protest," and that a draft protest decision letter had been prepared, but not yet finalized or issued.

Plaintiff, then, asked for a list identifying which of its 308 protests had been consolidated under the "lead protest." Compl. ¶ 13. Plaintiff's request stemmed from its concern that, because its protests pertained to entries from a number of different ports, including, among others, Buffalo, New York, Seattle, Washington, and Great Falls, Montana, the consolidation might not include all 308 protests. Compl. ¶ 15.

Customs never provided plaintiff with the requested information. Compl. ¶¶ 15–16. Rather, by email message dated August 7, 2009,

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[1] "Liquidation means the final computation or ascertainment of duties on entries for consumption or drawback." 76 Fed. Reg. 2573, 2576 (Jan. 14, 2011) (to be codified at 19 C.F.R. § 159.1).

[2] In relevant part, 19 U.S.C. § 1515(a) provides:
Unless a request for an accelerated disposition of a protest is filed in accordance with subsection (b) of this section the appropriate customs officer, within two years from the date a protest was filed in accordance with section 514 of this Act [19 U.S.C. § 1514], shall review the protest and shall allow or deny such protest in whole or in part.

[3] Plaintiff's 308 protests are identified in Schedule A to its complaint. The protests involve the liquidation of entries of softwood lumber from Canada pursuant to the 2006 U.S.Canada Softwood Lumber Agreement ("SLA"). According to plaintiff, for a number of reasons, it overpaid antidumping and countervailing duty deposits on these entries. Under the SLA, the U.S. agreed to refund all cash deposits on certain entries of Canadian softwood lumber, including plaintiff's. In turn, importers receiving the refunds were then obligated to pay a certain percentage of the refunded amounts to the Canadian government. Plaintiff claims that by failing to adjust plaintiff's deposit rates, Customs included the overpaid deposits in the amounts refunded under the SLA, which caused plaintiff to become obligated to pay a percentage of the overpaid deposits to the Canadian government. According to plaintiff, had the overpayments been corrected prior to liquidation of its entries, plaintiff would not have incurred these additional financial obligations. *See* Ex. 1 to Pl.'s Resp. to Def.'s Mot. to Dism. and Mot. to Ext. Dead. ("Pl.'s Mem").

OR&R suggested that plaintiff contact the Port of Detroit, Michigan to obtain a list of consolidated protests. Compl. ¶ 14. By reply email, plaintiff expressed its concern that the port of Detroit might not have information on the entries from other ports. Accordingly, plaintiff stated that "[w]e would appreciate if whoever in your office has access to the file would be able to send us a listing of the protests covered by the ruling." Compl. ¶ 15. When plaintiff did not receive any further response to its inquiries, it commenced an action in this Court on August 10, 2009 "for the purpose of preserving its appeal rights in the event [Customs] had issued any decisions regarding some or all of the protests within the statutory deadline and not given notice to [Jensen]."[4] Compl. ¶ 16; *See Norman G. Jensen, Inc. v. United States,* Court No. 0900332 ("2009 Action").[5]

On October 20, 2009, plaintiff again contacted OR&R to inquire about the protests. Compl. ¶ 17. By email message dated October 22, 2009, OR&R responded that pursuant to 19 C.F.R. § 177.7(b),[6] Customs would not issue a ruling with respect to any issue pending before this Court, and, therefore, Customs would not rule on plaintiff's protests because they were the subject of the 2009 Action. Compl. ¶ 18. By letter dated November 10, 2009, plaintiff's counsel responded to OR&R's October 22 communiqué, "reiterat[ing] [Customs'] statutory obligation to issue a decision with respect to the protests within two years from the date the protests were filed, and requested once again that [Customs] advise when a decision would be rendered on the protests." Compl. ¶ 19.

Plaintiff received no further response from Customs, and on April 2, 2010 Jensen commenced the action now before the court, seeking a writ of mandamus to compel Customs to rule on its protests. *See* Compl. ¶ 27. Jurisdiction is asserted under 28 U.S.C. § 1581(i). Compl. ¶ 2; Pl.'s Resp. to Def.'s Mot. to Dism. and Mot. to Ext. Dead. ("Pl.'s Mem.") 5.

Defendant moves to dismiss plaintiff's action for lack of subject matter jurisdiction,[7] arguing that "an importer may not obtain jurisdiction under 28 U.S.C. § 1581(i) where another administrative av-

[4] Pursuant to 28 U.S.C. § 2636(a), an action in this Court seeking review of the denial of a protest must be filed within 180 days of the denial of the protest.

[5] Notably, jurisdiction is lacking over the 2009 Action because plaintiff's protests have not been denied. *See* 28 U.S.C. § 1581(a). Plaintiff acknowledges this jurisdictional defect in its papers. *See* Pl.'s Mem. n.3.

[6] In relevant part, 19 C.F.R. § 177.7(b) (2010) provides that "[n]o ruling letter will be issued with respect to any issue which is pending before the United States Court of International Trade . . . ."

[7] Defendant also moved to dismiss this action under USCIT R. 12(b)(5), claiming that plaintiff's complaint fails to make out a claim for mandamus, and, therefore, fails to state a claim for which relief may be granted. The court does not reach the merits of this

enue, such as accelerated disposition of a protest under 19 U.S.C. § 1515(b) and 19 C.F.R. § 174.22(d), exists." Mem. in Supp. of Def.'s Mot. to Dis. and Mot. to Stay the Fil. of its Resp. to the Pet. for Writ of Mand. Pend. the Res. of the Mot. to Dis. ("Def's Mem.") 6. According to defendant, plaintiff can obtain the relief sought from this Court by following the statutory scheme set forth in 19 U.S.C. §§ 1514 (providing the procedure for protesting decisions of Customs) and 1515 (providing for the accelerated disposition of protests), and, if necessary, seeking review of Customs' determinations in this Court pursuant to 28 U.S.C. § 1581(a). Defendant argues, therefore, that plaintiff may not invoke this Court's § 1581(i) residual jurisdiction because of the availability of an adminstrative procedure that could lead to jurisdiction under § 1581(a). Def's Mem. 6–7.

STANDARD OF REVIEW

Whether jurisdiction exists is a question of law for the court. *Shah Broths., Inc. v. United States*, 34 CIT , , Slip Op. 10—115 at 9 (October 6, 2010). The party seeking to invoke this Court's subject-matter jurisdiction bears the burden of establishing it. *Alden Leeds Inc. v. United States*, 34 CIT , , 721 F. Supp. 2d 1322, 1327 (2010) (citing Auto Alliance Int'l, Inc. v. United States, 29 CIT 1082, 1088, 398 F. Supp. 2d 1326, 1332 (2005)). To meet its burden, the plaintiff must plead facts from which the court may conclude that it has subject-matter jurisdiction with respect to each of its claims. *Schick v. United States*, 31 CIT 2017, 2020, 533 F. Supp. 2d 1276, 1281 (2007) (citing *McNutt v. Gen. Motors Acceptance Corp.*, 298 U.S. 178, 189 (1936)).

DISCUSSION

I. Jurisdiction Under 28 U.S.C. § 1581(i)

"It is a 'well-established principle that federal courts . . . are courts of limited jurisdiction marked out by Congress.'" *Norcal/Crosetti Foods v. United States,* 963 F.2d 356, 358 (Fed. Cir. 1992) (quoting *Aldinger v. Howard,* 427 U.S. 1, 15 (1976)). The jurisdiction of the Court of International Trade is found in 28 U.S.C. § 1581. Subsections (a)-(h) of § 1581 delineate the specific actions over which this Court has subject matter jurisdiction. *See* 28 U.S.C. § 1581.

argument because the court lacks jurisdiction to hear plaintiff's claim. *See Duferco Steel, Inc. v. United States*, 29 CIT 1249, 1252, 403 F. Supp. 2d 1281, 1284 (2005) ("Once a defendant moves to dismiss an action under USCIT R. 12(b)(1) for lack of subject matter jurisdiction, the plaintiff has the burden of proving that assertion of jurisdiction is proper. The Court must limit its inquiry to the jurisdictional question, and avoid examining the merits of a case.") (citations omitted).

Section 1581(i) sets forth this Court's so-called "residual" or "catch-all" jurisdictional grant. Although § 1581(i) is a "broad residual jurisdictional provision," its application is generally limited to cases for which jurisdiction is not or could not have been available under another subsection of § 1581. *See Hartford Fire Ins. Co. v. United States,* 544 F.3d 1289, 1292–93 (Fed. Cir. 2008) (citing *Int'l Customs Prods. v. United States*, 467 F.3d 1324, 1327 (Fed. Cir. 2006)).

If jurisdiction is or could have been available under another subsection of § 1581, jurisdiction under subsection (i) will not lie "unless the other subsection is shown to be manifestly inadequate." *Hartford Fire Ins. Co.*, 544 F.3d at 1292. As the Court of Appeals for the Federal Circuit explained:

> '[W]here a litigant has access to the [Court of International Trade] under traditional means, such as 28 U.S.C. § 1581(a), it must avail itself of this avenue of approach by complying with all the relevant prerequisites[8] thereto. It cannot circumvent the prerequisites of 1581(a) by invoking jurisdiction under 1581(i)' unless such traditional means are manifestly inadequate.

Id. (quoting *Am. Air Parcel Forwarding Co. v. United States,* 718 F.2d 1546, 1549 (Fed. Cir. 1983)). When 1581(i) jurisdiction is asserted, the party invoking jurisdiction bears the burden of demonstrating that another subsection is either unavailable or manifestly inadequate. *Miller & Co. v. United States*, 824 F.2d 961, 963 (Fed. Cir. 1987).

II. Jurisdiction Under Section 1581(a)

Section 1581(a) governs this Court's jurisdiction to review Custom's treatment of protests. Pursuant to that subsection, "[t]he [Court] shall have exclusive jurisdiction of any civil action commenced to contest the denial of a protest, in whole or in part, under section [19 U.S.C. § 1515]." 28 U.S.C. § 1581(a). Accordingly, in order to invoke this Court's jurisdiction to review Customs' treatment of a protest, a plaintiff must first obtain a denial of that protest from Customs. *See Playhouse Imp. & Exp., Inc. V. United States*, 18 CIT 41, 43, 843 F. Supp. 716, 719 (1994).

Under 19 U.S.C. § 1514(a), a party can challenge Customs' liquidation of entries by filing a protest with Customs. In turn, 19 U.S.C. § 1515(a) provides that Customs shall allow or deny a protest within two years of its filing. Pursuant to § 1515(b), however, a party may submit a request to Customs for accelerated disposition at any time concurrent with or after the filing of a protest. If accelerated dispo-

[8] By prerequisites, the *Hartford Fire Ins. Co.* Court was referring to established administrative procedures such as the filing of a protest.

sition is requested, the protest is deemed denied unless Customs takes action to allow or deny it by the thirtieth day following mailing of the request. *See* 19 U.S.C. § 1515(b). A party can seek judicial review of a protest that is denied, or deemed denied, by filing a summons in this Court within 180 days of the denial or deemed denial. *See* 28 U.S.C. § 2632(b); 28 U.S.C. § 2636.

III. The Parties' Jurisdictional Arguments

Defendant argues that the Court lacks jurisdiction over this matter because plaintiff can obtain the relief it seeks by following the administrative procedure of filing a request for accelerated disposition set forth in § 1515(b). Def.'s Mem. 5–8. According to defendant, by following this statutory procedure, within thirty days after filing its request for accelerated disposition, Jensen will either have an allowed protest or a denied protest--the very result it hopes to obtain by mandamus. Therefore, defendant insists, plaintiff has not demonstrated that the jurisdiction provided for under § 1581(a) could not have been available to it. Def.'s Mem. 8. Nor, defendant insists, has plaintiff demonstrated that the remedy afforded by the administrative route of seeking an accelerated disposition is manifestly inadequate. Accordingly, defendant maintains that to find that jurisdiction existed over plaintiff's claim under this Court's residual jurisdiction when an administrative path to § 1581(a) jurisdiction is clearly available would "circumvent the statutory scheme set up by 19 U.S.C. § 1514 and 28 U.S.C.§ 1581(a)." Def.'s Mem. 7–8.

Plaintiff counters that jurisdiction lies under § 1581(i) because it is not seeking the relief that is available by requesting an accelerated disposition pursuant to § 1515(b). Pl.'s Mem. 2–3. Rather, plaintiff maintains that it is seeking to have Customs perform its obligation to allow or deny protests within the time allotted by statute. According to plaintiff, it is not seeking to "circumvent the statutory scheme," but rather, to enforce the statutory scheme by compelling Customs to act in accordance with the law. Pl.'s Mem. 3.[9]

IV. Analysis

The court holds that there is no jurisdiction over this action under § 1581(i). While the government's delay in ruling on plaintiff's protests is unfortunate, plaintiff has a clear path to having its protests promptly decided by Customs by following the accelerated disposition procedure under 19 U.S.C. § 1515(b). Were plaintiff to seek an accel-

[9] According to plaintiff, "[t]he only relief sought by [plaintiff] is an agency protest review and determination to which it is expressly and specifically entitled to under the clear language of § 1515(a) . . . ." Pl.'s Mem. 3–4.

erated disposition one of three things would happen: (1) the protests could be allowed by Customs; (2) the protests could be denied by Customs; or (3) Customs could fail to take any action within thirty days from the filing of the request, in which case the protests would be deemed denied. By following this procedure, plaintiff could obtain the administrative ruling it seeks within thirty days,[10] and should Customs deny plaintiff's protest or fail to rule within the thirty day time frame, this Court could hear its case pursuant to § 1581(a).

Where, as here, "Congress has provided a specific and detailed framework for parties to challenge Customs' actions under 28 U.S.C. § 1581, it is inappropriate for this Court to permit plaintiffs to circumvent those procedures by invoking section 1581(i)." *Duferco Steel, Inc. v. United States*, 29 CIT 1249, 1255, 403 F. Supp. 2d 1281, 1287 (2005); *See also* S. Rep. No. 91–576, at 28 ("Importers concerned about unreasonable delay at the administrative level are fully protected by the new provision in section [1515(b)] for obtaining accelerated disposition of a protest.").

This Court's recent decision in *Hitachi* v. *United States,* 34 CIT , 704 F. Supp. 2d 1315 (2010) supports a finding that the court lacks jurisdiction. In *Hitachi*, the issue was whether Custom's failure to take action on a protest within two years conferred jurisdiction upon the Court under § 1581(i). The *Hitachi* Court decided that the availability of accelerated disposition under § 1515(b) precluded jurisdiction under § 1581(i) because jurisdiction under § 1581(a) was or *could have been* available. *Hitachi*, 34 CIT at , 704 F. Supp. 2d at 1320 ("Jurisdiction under § 1581(a) . . . could have been available if Hitachi had requested an accelerated disposition of its protest pursuant to 19 U.S.C. § 1515(b).").

As the *Hitachi* Court noted, it has been consistently held that delays in the protest and denial procedure do not render the jurisdiction provided under § 1581(a) "manifestly inadequate" because of the availability of the accelerated disposition procedure under § 1515(b). *See Hitachi*, 34 CIT at , 704 F. Supp. 2d at 1320–21 ("As numerous cases have held, delays in the protest and denial procedure do not render the remedy provided under Section 1581(a) manifestly inadequate where the importer has not used the procedure for accelerated disposition and deemed denial."); *see also Am. Air Parcel Forwarding Co.*, 718 F.2d at 1551 (finding that the availability of accelerated disposition procedure precluded a finding that the protest and denial prerequisite to jurisdiction made § 1581(a) manifestly inadequate).

[10] Thirty days is the exact period of time plaintiff would have the court provide Customs to issue a written ruling on the protests were the court to grant plaintiff's petition for mandamus. *See* Plaintiff's Proposed Order on Petition for Writ of Mandamus.

Finally, plaintiff's attempt to distinguish its case by arguing that it does not seek the denial and judicial review of its protests, but, rather, a determination by Customs within the time prescribed by statute, is unconvincing. According to plaintiff, "it is clear that an accelerated disposition request for a 'more rapid decision' is unquestionably futile and will inevitably result in a deemed denial after three and a half years and all [Jensen's] entreaties have failed to result in a protest review and decision." Pl.'s Mem. 5. Plaintiff contends, therefore, that it seeks an actual ruling and not a deemed denial, and "there is no alternative to a mandamus remedy for relief, and no other jurisdiction but § 1581(i) for that remedy." Pl.'s Mem. 5.

What plaintiff's argument fails to take into account is that a request for an accelerated disposition will not necessarily result in a deemed denial. Pursuant to the statute, a deemed denial only results if Customs fails to actually allow or deny the protest within thirty days. In other words, Congress established the accelerated disposition procedure so that Customs would have an opportunity to make a decision and the court will not assume that Customs will fail to act.[11]

CONCLUSION

For the foregoing reasons, the court finds that it lacks jurisdiction to hear plaintiff's claims under 29 U.S.C. 1581(i). Accordingly, plaintiff's complaint is dismissed. Judgment will be entered accordingly.

Dated: February 10, 2011
New York, New York

/s/ Richard K. Eaton
RICHARD K. EATON

[11] As noted above, defendant maintains that Customs failure to rule on plaintiff's protests to date is a direct result of plaintiff's filing of the 2009 Action as well as the case now before the court. Defendant insists that 19 U.S.C. § 1515(c) required Customs to refrain from ruling on plaintiff's protests. Section 1515(c) provides, in relevant part:

> If an action is commenced in the Court of International Trade that arises out of a protest or an application for further review, all administrative action pertaining to such protest or application shall terminate and any administrative action taken subsequent to the commencement of the action is null and void.

Defendant has represented to plaintiff and the court that Customs had prepared a draft ruling letter on plaintiff's protests, but ceased work on the ruling upon plaintiff's filing of the 2009 Action. Def.'s Mem. 2–3; Pl.'s Mem. n.3; Def.'s Status Report, dated November 8, 2010 ("[T]he government is prepared to provide the Court with the time line within which U.S. [Customs] anticipates resolving [Jensen's] Application for Further Review on the lead protest, once both of Jensen's pending actions (Court Nos. 09–003332 and 10–00115) are dismissed."). Accordingly, it is reasonable to assume that, upon the dismissal of this action and the 2009 Action, Customs would resume work on its ruling and issue the same to plaintiff.