U.S. Customs and Border Protection

Slip Op. 11–140

CISCO SYSTEMS, INC., v. Plaintiff, UNITED STATES OF AMERICA, Defendant.

Before: WALLACH, Judge
Court No.: 04–00135

[Defendant's Partial Motion To Dismiss is DENIED.]

Dated: November 18, 2011

Neville Peterson, LLP (*Michael K. Tomenga* and *Meredith A. DeMent*) for Plaintiff Cisco Systems, Inc.

Tony West, Assistant Attorney General; *Barbara S. Williams*, Attorney-in-Charge, International Trade Field Office, U.S. Department of Justice (*Alexander J. Vanderweide*) for Defendant United States.

OPINION

Wallach, Judge:

I
INTRODUCTION

Cisco Systems, Inc. ("Plaintiff" or "Cisco") seeks reclassification of "networking equipment and parts" entered into the United States between 2001 and 2002. Summons, Doc. No. 1. Defendant United States ("Defendant" or "the Government") contests the court's jurisdiction over the entries listed in certain challenged protests alleging that Cisco did not "specifically name and accurately identify the merchandise at issue" and that amendments to some of those protest were filed untimely. Defendant's Partial Motion to Dismiss, Doc. No. 48 ("Defendant's Motion"); Memorandum in Support of Defendant's Partial Motion to Dismiss, Doc. No. 48 at 1 ("Defendant's Memo").

The Motion to Dismiss filed by the Defendant United States is DENIED. Taking as true all allegations in Plaintiff's Complaint that are "plausible on [their] face," *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007), the Plaintiff filed valid protests, and the court therefore has jurisdiction pursuant to 28 U.S.C. § 1581(a).

II
BACKGROUND

Cisco seeks reclassification of merchandise entered into the United States between 2001 and 2002. Summons at 2–4; Complaint, Doc. No. 4 ¶ 14. Customs liquidated these entries under Subheadings 9013.80.90 and 9013.90.90 of the Harmonized Tariff Schedule of the United States ("HTSUS") between 2002 and 2003. Defendant's Memo at 2; Complaint ¶ 14. It is contested whether Cisco filed timely protests requesting reliquidation of the articles under various subheadings of HTSUS Chapter 85. *See* Complaint ¶ 15; Answer, Doc. No. 15 ¶ 15.

In its protests, Cisco challenged the classification of its merchandise as "networking equipment and parts thereof" and as "networking equipment and parts thereof, including amplifiers and transponders for optical fiber systems." *See* Defendant's Exhibit A, Cisco Systems, Inc., Detailed Reasons for Protest Against Appraised Value and Classification, Doc. No. 48–2 at 2; Defendant's Exhibit B, Cisco Systems, Inc., Detailed Reasons for Protest, Doc. No. 48–3 at 2. Customs reliquidated those entries it could determine contained amplifiers, transponders, and/or dispersion compensation modules ("DCMs").[1] Defendant's Memo at 2–3. "Customs denied in whole or in part the 23 protests between October 2, 2003 and October 7, 2003 . . . because [it said] Cisco's description of its goods as 'networking equipment and parts thereof' was so overly broad that Custom's could not determine what merchandise other than amplifiers, transponders, and/or DCMs was being challenged." *Id.* Before Customs ruled on Cisco's protests, Cisco filed amendments to a number of the protests, but Customs deemed these amendments untimely and did not consider them. *Id.* at 3–4.

In its Summons subsequently filed with the court in March 2004, Cisco listed specific HTSUS headings for each type of merchandise covered by the entries. *Id.* at 4; Summons at 2.[2] Cisco filed its Complaint in September 2005, and Defendant filed its Answer in April 2006. Complaint; Answer to Complaint, Doc. No. 11.

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[1] Transponders, optical amplifiers, and DCMs were classified under HTSUS 8517.50.90. Defendant's Exhibit C, HQ 965367, Doc. No. 48–4; Defendant's Exhibit D, Revocation of Ruling Letter and Treatment Relating to Tariff Classification of Certain Optical Amplifiers and Dispersion Compensation Modules Used in Long-Haul Digital Telecommunications Systems, Doc. No. 48–5.

[2] The Summons indicates that Cisco claims amplifiers, transponders, dispersion [compensation] modules, multiplexers, and demultiplexers under HTSUS 8517.50.9000; photodiode modules under HTSUS 8541.40.6050; and filters, couplers, isolators, splitters, array wave guide modulators, electronic printed circuit board assemblies, and other fiber telecommunications equipment under either HTSUS 8517.90.5600 or 8517.90.6600. Summons at 2.

The Government has filed a Partial Motion to Dismiss in accordance with USCIT Rule 12(b)(1) and USCIT Rule (12)(b)(5). Defendant's Motion at 1.[3]

III
STANDARD OF REVIEW

When the court's jurisdiction is challenged, "[t]he party seeking to invoke . . . jurisdiction bears the burden of proving the requisite jurisdictional facts." *Former Emps. of Sonoco Prods. Co. v. United States*, 27 CIT 812, 814, 273 F. Supp. 2d 1336 (2003) (citing *McNutt v. Gen. Motors Acceptance Corp.*, 298 U.S. 178, 189, 56 S. Ct. 780, 80 L. Ed. 1135 (1936)). However, in deciding a motion to dismiss, "the Court assumes that 'all well-pled factual allegations are true,' construing 'all reasonable inferences in favor of the nonmovant.'" *United States v. Islip*, 22 CIT 852, 854, 18 F. Supp. 2d 1047 (1998) (quoting *Gould, Inc. v. United States*, 935 F.2d 1271, 1274 (Fed. Cir. 1991)). "To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Ashcroft v. Iqbal*, 556 U.S. 662, 129 S. Ct. 1937, 1949, 173 L. Ed. 2d 868 (2009) (quoting *Twombly*, 550 U.S. at 570).

Therefore, in this case, Plaintiff must prove the requisite jurisdictional facts. Here, where Defendant filed the motion to dismiss, the court must construe all reasonable inferences in favor of Plaintiff. *See Sonoco Prods.*, 27 CIT at 814; *Islip*, 22 CIT at 854.

IV
DISCUSSION

Defendant argues that the "court lacks jurisdiction over the entries listed [in several protests] because the protests do not specifically name and accurately identify the merchandise at issue." Defendant's Memo at 1. Furthermore, the Defendant argues that "this Court lacks jurisdiction over the claims and merchandise referenced in" amendments to several of those protests because they were not filed pursuant to statutory requirements. Defendant's Motion at 1–2. In its response, Cisco claims that its protests and the amendments thereto are valid and convey subject-matter jurisdiction on this court. Plaintiff's Response to Defendant's Partial Motion to Dismiss, Doc. No. 58 at 1–2 ("Plaintiff's Response"). Cisco further requests that the court consider Defendant's Motion to dismiss under the standards appli-

[3] Defendant's Partial Motion to Dismiss was held in abeyance while the parties completed jurisdictional discovery. Order, Doc. No. 63. After discovery was complete, Cisco filed a supplemental response to the Motion to Dismiss, Plaintiff's Supplemental Brief in Opposition to Defendant's Motion to Dismiss in Part, Doc. No. 85, and the Government filed a response to Cisco's Supplemental Response, Defendant's Supplemental Reply to Plaintiff's Supplemental Response to Defendant's Partial Motion to Dismiss, Doc. No. 86.

cable to a motion for summary judgment under USCIT R. 56. *Id.* at 2.

Whether this court has jurisdiction depends upon the validity of Plaintiff's protest under 28 U.S.C. §1581(a) and whether Plaintiff has filed a valid protest under the standard of review applicable to a motion to dismiss. *See infra* Part IV.A. Given that standard, the protests at issue are valid because Cisco did adequately specify the merchandise at issue. *See infra* Part IV.B. The court has jurisdiction over the amended protests. *See infra* Part IV.C. Due to the posture of this case at this time, Plaintiff's motion to dismiss will not be converted to a motion for summary judgment. *See infra* Part IV.D.

A
Relevant Statutory Framework

Under 28 U.S.C. §1581(a) "[t]he Court of International Trade shall have exclusive jurisdiction of any civil action commenced to contest the denial of a protest, in whole or in part, under section 515 of the Tariff Act of 1930." 28 U.S.C. §1581(a). Whether the court has jurisdiction over the case under §1581(a) depends on whether the plaintiff filed a valid protest. *Computime, Inc. v. United States*, 772 F.2d 874, 878–79 (Fed. Cir. 1985). 19 U.S.C. §1514(c)(1) sets out the requirements for validity:

> A protest must set forth distinctly and specifically—
> (A) each decision described in subsection (a) as to which protest is made;
> (B) each category of merchandise affected by each decision set forth under paragraph (1);
> (C) the nature of each objection and the reasons therefor; and
> (D) any other matter required by the Secretary by regulation.

19 U.S.C. §1514(c)(1). The pertinent regulation, 19 C.F.R. §174.13, further requires the protest to contain "[a] specific description of the merchandise affected by the decision as to which protest is made." 19 C.F.R. §174.13(a)(5). Additionally, subject to limitations not applicable here:

> [A] protest may be amended . . . to set forth objections . . . which were not the subject of the original protest, in the form and manner prescribed for a protest, any time prior to the expiration of the time in which such protest could have been filed under this section. New grounds in support of objections raised by a valid protest or amendment thereto may be presented for consideration . . . at any time prior to the disposition of the protest in accordance with that section.

19 U.S.C. §1514(c)(1). For entries made prior to December 18, 2004, amendments may be made within the 90-day period after the date of notice of liquidation. 19 C.F.R. §174.12(e). Customs has discretion whether to consider any "alternative claims and additional grounds or arguments" submitted after the 90-day period has expired "with respect to any decision which is the subject of a valid protest at any time prior to disposition of the protest." 19 C.F.R. §§174.28, 174.14(a).

In a protest "[t]echnical precision is not required; but the objections must be so distinct and specific, as, when fairly construed . . . it was sufficient to notify the [duty] collector of its true nature and character." *Davies v. Arthur*, 96 U.S. 148, 151, 24 L. Ed. 758 (1877) (citations omitted). A protest has been deemed valid and therefore confers jurisdiction as long as it is "sufficiently distinct and specific to enable the Customs Service to know what is in the mind of the protestant." *Computime, Inc.*, 772 F.2d at 879 (quoting *United States v. Parksmith Corp.*, 62 C.C.P.A. 76, 82, 514 F.2d 1052 (1975)).[4] "Protest sufficiency does not turn on whether Customs can decide the entire claim based solely on information contained in the papers submitted . . . . the protest 'should have prompted Customs to seek the precise factual evidence necessary to evaluate [it].'" *Estee Lauder, Inc. v. United States*, Slip Op. 2011–23, 2011 Ct. Intl. Trade LEXIS 23 at *19–20 (CIT March 1, 2011) (quoting *Saab Cars USA, Inc. v. United States*, 276 F. Supp. 2d 1322, 1329 (CIT 2003), *aff'd*, 434 F.3d 1359 (Fed. Cir. 2006)); *see also Am Nat'l Fire Ins. Co. v. United States*, 441 F. Supp. 2d 1275, 1282 (CIT 2006); *Koike Aronson, Inc. v. United States*, 21 CIT 1056, 1056–57, 976 F. Supp. 1035 (1997), *aff'd*, 165 F.3d 906 (Fed. Cir. 1999).

"[D]enial of jurisdiction for insufficiency of protest is a severe action which should be taken only sparingly." *Eaton Mnfr. Co., v. United States*, 60 C.C.P.A. 23, 30, 469 F.2d 1098 (1972). "The general rule [is] that customs protests are to be construed 'generously in favor of finding them valid.'" *Saab*, 434 F.3d at 1365 (quoting *Koike Aronson, Inc.*, 165 F.3d at 908). The court has denied the validity of protests on grounds of "overbreadth and indefiniteness" *Saab*, 434 F.3d at

[4] With regard to a Customs Officer's knowledge, Cisco argues that "[a]n import specialist with reasonable knowledge of [Customs' various publications] would comprehend the scope of merchandise Cisco intended its protests to cover." Plaintiff's Supplemental Brief at 20. The Defendant responds that despite knowledge, experience, and effort, the Customs Officer was unable to classify the entries at issue. Defendant's Supplemental Response at 7. In light of the motion herein to be decided, what a knowledgeable Customs Official should know is beyond the scope of this review.

1366,[5] and being "too general," *Castelazo & Assocs., Atwood Imports, Inc. v. United States*, 64 Cust. Ct. 508, 514–15, 314 F. Supp. 38 (1970).[6]

B
For The Purpose Of This Motion To Dismiss Cisco's Protests Adequately Specify The Merchandise At Issue

The Government contends that the Court of International Trade lacks jurisdiction over this case because Cisco's "protests did not specifically name or identify the merchandise at issue in accordance with 19 U.S.C. §1514(c)(1) and 19 C.F. R. §174.13(a)." Defendant's Reply to Plaintiff's Response to Defendant's Partial Motion to Dismiss, Doc. No. 60 at 2–3 ("Defendant's Reply"); *see also* Defendant's Memo at 11. The Government argues that merchandise labeled "networking equipment and parts thereof," or "networking equipment and parts thereof, including amplifiers and transponders for optical fiber systems" is too vague and general. Defendant's Memo at 11. The Government maintains that "networking equipment and parts thereof" could include any number of things, such as "phone systems, computer equipment, internet hardware, fiber optics." *Id.* at 12.[7]

Cisco argues that "'[n]etworking equipment' is a specific category of merchandise that is used to describe the telecommunications apparatus included in Cisco's protests by both the telecommunications industry and by Customs." Plaintiff's Response at 12.

To apply the requirements of 19 USC §1514(c)(1)(B) this court must determine whether "networking equipment" is in fact a recognized "category of merchandise." A category is defined as "any of several fundamental and distinct classes to which entities or concepts belong." Merriam-Webster Online, http://www.merriam-webster.com/

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[5] "[A] 'blanket protest' raising every conceivable ground for protest is overbroad and therefore invalid, because it fails to 'apprise[] the collector and the court of real claims as distinguished from possible claims.'" *Saab*, 434 F.3d at 1366 (quoting *Lichtenstein v. United States*, 1 Ct. Cust. 79, 82, Treas. Dec. 31105 (1910)). Similarly, in *XL Specialty Ins. Co. v. United States*, the court found the protest invalid because it did not include any reasons for the plaintiff's objections. *XL Specialty Ins. Co. v. United States*, 28 CIT 858, 568–69, 341 F. Supp. 2d 1251 (CIT 2004).

[6] "[O]ther merchandise" is too general a phrase and cannot be used to expand the scope of items covered by a protest that otherwise specifically identifies the merchandise at issue. *Castelazo*, 64 Cust. Ct. at 514–15.

[7] Plaintiff did list in the summons: "Amplifiers, Transponders, Dispersion Compensation Module, Multiplexers, Demultiplexers, Photodiode Modules, Filters, Couplers, Isolators, Splitters, Array Wave Guides, Modulators, Electronic Printed Circuit Board Assemblies, Other Fiber Telecommunications Equipment." Summons. However, only amplifiers, transponders, and Dispersion Compensation Modules ("DCM") were specifically named in Cisco's protests or protest memoranda. *See* Defendant's Exhibit B, Cisco Systems, Inc. Detailed Reasons for Protest, Doc. No. 48–3; Defendant's Exhibit F, Cisco Systems Inc., Detailed Reasons for Protest Against Classification, Doc. No. 48–7.

dictionary/category (last visited Nov. 17, 2011). Although "networking equipment" is not a specific type of merchandise, it does adequately identify, albeit broadly, a category of merchandise specifically enough to fulfill the statutory requirements of §1514.

Plaintiff points out that Customs has previously acknowledged that in its own publication Cisco is a "importer and manufacturer of networking equipment." Plaintiff's Response at 19 (citing Plaintiff's Exhibit 30, U.S. Customs Service, Pre-Assessment Survey Report 821–01-FA117071, Cisco Systems, Inc. (Aug. 28, 2002), Doc. No. 85–5).[8] Additionally, Customs has, on numerous occasions, used the phrase in its own rulings and publications. For example, Customs has described the types of goods it considers to be "networked equipment" and laid out guidelines for their classification. General Notice: Modification/Revocation of Ruling Letters and Revocation of Tariff Treatment Relating to Tariff Classification of Certain Networked Equipment, 35 Cust. B. & Dec. 15 (July 23, 2001). Numerous Customs' rulings consider the classification of goods described as "networking equipment" or "networked equipment."[9] Additionally, an index of Customs' decisions on specific items by category of merchandise includes the specific category "networking equipment." *See* Plaintiff's Exhibit 8, Excerpt from the Legal Precedent Retrieval System (Mar. 22, 1999), Doc. No. 85–1.[10]

The parties dispute the relevance and nature of this court's decision in *Beck Distributing Corp. v. United States*, 67 Cust. Ct. 358 (1971). *See* Plaintiff's Response at 14; Defendant's Reply at 3–4. In that case, the question was whether merchandise was properly classified as automobile or engine parts, but in its decision, the court deemed a protest naming "engine parts" specific enough to confer jurisdiction because

> [i]n view of the previous litigation and the tariff provisions for parts of automobiles and for parts of internal-combustion engines, . . . classifying officers, who must have a degree of familiarity with internal-combustion engines and parts and with

[8] Counsel for Government conceded at oral argument, for purposes of this motion to dismiss, "lets assume that this term networking equipment that there is a certain understanding within Customs of what it meant." November 3, 2011 Oral Argument at 11:02:28 – 11:02:35.

[9] *See, e.g.*, NY N017724 (Oct. 12, 2007); HQ 967631 (Dec. 14, 2005); HQ 963240 (July 23, 2001); HQ 963235 (July 23, 2001).

[10] Customs asserts that "[a]ny mention of 'networking equipment' or 'networked equipment' in . . . [Customs'] publications are used as mere shorthand general references to specific goods that are explicitly identified elsewhere in the rulings." Defendant's Reply at 8. But, as Cisco points out, that "is precisely what a 'category' is intended to do—provide a shorthand reference to a grouping of specific items." Plaintiff's Supplemental Brief at 7.

> automobiles and parts, could not have been perplexed by the claim as to "engine parts" in the protest herein.

Beck, 67 Cust. Ct. at 361.

However, "previous litigation" and "tariff provisions" for claimed merchandise, *id.*, are not the only authority available to determine if the protest was sufficiently specific. Customs needs to examine the circumstances surrounding the protest to determine a protest's sufficiency. *See VWP of Am., Inc. v. United States*, 30 CIT 1580, 1584–85 (2006) ("Thus, the inquiry for purposes of subject matter jurisdiction is whether the summons constituted fair notice to the government. That implicates the protest, and what indicia or implicit circumstances surround it as would clarify to the mind of Customs the intent of the importer and the matter of the protest."); *Mattel, Inc. v. United States*, 72 Cust. Ct. 257, 260–61, 377 F. Supp. 955 (1974) (emphasis omitted) ("that one great rule of construction is that at the time he makes his protest the importer must . . . sufficiently, in view of all the circumstances, call the collector's attention thereto"). In light of Customs' familiarity with Cisco's business, Customs' publications, rulings, and workshops;[11] for the purposes of this motion, the term "networking equipment and parts thereof" was sufficient to notify Customs of the nature of the claim.[12]

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[11] Customs identified four seminars it held between 1998 and 2003 to train import specialists on electronics and information technology products. Plaintiff's Exhibit 25, Excerpts from Defendant's Response to Plaintiff's Fourth Set of Interrogatories and Requests for Production of Documents, Doc. No. 85–5 at Request for Production of Documents No. 7, No. 9. Materials produced from one of the seminars show repeated use of the phrase "networking equipment" and "networked equipment." Plaintiff's Exhibit 27, U.S. Customs and Border Protection, Electronics Seminar: San Francisco, CA, August 12–14, 2003, Doc. No. 85–5.

[12] Additionally, in the 1996 WTO Information Technology Agreement, to which the United States is a member, "network equipment" is defined as:

> Local Area Network (LAN) and Wide Area Network (WAN) apparatus, including those products dedicated for use solely or principally to permit the interconnection of automatic data processing machines and units thereof for a network that is used primarily for the sharing of resources such as central processor units, data storage devices and input or output units - including adapters, hubs, in-line repeaters, converters, concentrators, bridges and routers, and printed circuit assemblies for physical incorporation into automatic data processing machines and units thereof.

World Trade Organization, Ministerial Declaration on Trade in Information Technology Products, Dec. 13, 1996, 36 I.L.M. 375, Attachment B (1997). Although this court is not bound by WTO agreements, *see Dongbu Steel Co. v. United States*, 635 F.3d 1363, 1368 (Fed. Cir. 2011); *Corus Staal BV v. United States*, 502 F.3d 1370, 1375 (Fed. Cir. 2007), this definition is a useful explanation of the term at issue. Customs has admitted its use of the term is consistent with this definition. Plaintiff's Exhibit 1, Excerpts from Defendant's Responses to Plaintiff's Third Set of Interrogatories and Requests for Production of Documents, Doc. No. 85–1 at Interrogatory No. 5 ("The phrase 'networked equipment' is used in the General Notice of August 8, 2001 to encompass all Local Area Network ('LAN') and Wide

C
For The Purpose Of This Motion to Dismiss The Court Has Jurisdiction Over The Amended Protests

Customs argues, "an amendment with additional claims or grounds requires an underlying valid protest." Defendant's Memo at 18. Customs asserts "'networking equipment and parts thereof' is not specific enough to constitute a valid protest claim in accordance with 19 U.S.C. §1514(c)(1) and 19 C.F.R. §174.13(a). As such the underlying original protests . . . are all invalid. Therefore, no additional claims . . . can properly be amended . . . past the 90 day post-liquidation expiration period." *Id.* at 18–19; *see* Defendant's Reply at 12. Moreover, Customs states that it "may not consider newly additional claims or merchandise beyond those contained in the original protests as . . . [Cisco's] amendments were filed beyond the 90 day post-liquidation period"[13] and "attempt[ed] to add claims and merchandise that were not specified in the original protests."[14] Defendant's Memo at 18.

Cisco counters that "[t]he amendments did not add any new claims," but rather "provided additional legal arguments in support of its classification claim" as permitted under 19 C.F.R. §174.28. Plaintiff's Response at 25. Plaintiff adds that "[w]ith respect to the identification of the category of merchandise subject to protest, the submission merely added exemplars of items of networking equipment, namely 'amplifiers and transponders for optical fiber systems . . . .'" Plaintiff's Supplemental Brief at 29.

Any amendments and "[n]ew grounds in support of objections" made to protests after the initial 90 day post-liquidation period must relate back to valid protests. 19 U.S.C. §1514(c)(1); *Fujitsu Gen. Am., Inc. v. United States*, 283 F.3d 1364, 1372 (Fed. Cir. 2002) (internal citations omitted) ("in order to qualify as a new ground in support of a protest, a supplemental claim must challenge[] the same decisions as those challenged in the original protest.").

Area Network ('WAN') apparatus, consistent with the manner in which the phrase 'network equipment' is used in the Information Technology Agreement (1996), to which the United States is a signatory. *See* references to LAN and WAN apparatus throughout the General Notice. *See also* Attachment B to the Information Technology Agreement defining 'network equipment.' Defendant further notes, however, that 'networked equipment' is not a tariff term used in the Harmonized Tariff Schedule of the United States ('HTSUS').")

13 Defendant argues "[i]n fact, every attempted amendment was filed anywhere from 10 months to over a year after the entries contained in the unamended protests were liquidated." Defendant's Motion at 18.

14 According to the Defendant, the original protests only claim "networking equipment and parts thereof" without any further description, whereas the amendments to the protests at issue "include claims for amplifiers, transponders, and DCMs." Defendant's Motion to Dismiss at 18.

Cisco's amendments are not untimely, even if they were filed after the 90 day period, since they support what are taken to be valid protests.[15] This action is distinguishable from that before the court in *United States v. Weigert-Dagen*, where the court refused an amendment after the initial post-liquidation period to add "slippers (for housewear)" to protests originally claiming "certain leather Huaraches." *United States v. Weigert-Dagen*, 39 C.C.P.A. 58, 62 (1951); *see* Defendant's Memo at 17. In that case, the amendment attempted to add new merchandise that had its own entry line in the applicable trade agreement, separate and distinct from that claimed in the original protest. *See Weigert-Dagen*, 39 C.C.P.A. at 60. Here, the amendment identified particular goods that fall under the category of merchandise specified in the original protest, not new merchandise.

D
The Court Will Not Convert The Motion To Dismiss To A Motion For Summary Judgment

Cisco argues that "[t]he Government's Partial Motion to Dismiss . . . is procedurally irregular and should be treated as a motion for summary judgment," pursuant to USCIT Rule 56, because it was filed after the Government filed an answer, contravening USCIT Rule 12(b), and since "it relies on facts and assertions not included in the pleadings," contravening USCIT Rule 12(d).[16] Plaintiff's Response at 4, 6.

The Defendant argues that it "raise[d] no genuine issues of material fact in [its] partial motion to dismiss." Defendant's Reply at 8. The Government maintains that all reference to other materials were to "inform the Court of the procedural history giving rise to the denial of the protests. . . . Cisco's failure is a failure to meet a legal threshold of protest specificity. No evidence external to the pleadings is required to demonstrate such failure." *Id.* at 10. Finally, the Government asserts that their motion should be considered a USCIT Rule12(c) motion, because it was filed after an answer was interposed. *Id.* at

[15] See infra Part IV.B.

[16] The pertinent part of USCIT Rule 12 says:

> (b) . . . A motion asserting . . . [lack of jurisdiction] must be made before pleading if a responsive pleading is allowed . . . .
>
> (c) Motion for Judgment on the Pleadings. After the pleadings are closed – but early enough not to delay trial – a party may move for judgment on the pleadings.
>
> (d) Result of Presenting Matters Outside the Pleadings. If, on a motion under Rule 12(b)(5) or 12(c), matters outside the pleadings are presented to and not excluded by the court, the motion must be treated as one for summary judgment under Rule 56. All parties must be given a reasonable opportunity to present all the material that is pertinent to the motion.

USCIT Rule 12.

11–12 (citing *Makita Corp. v. United States*, 17 CIT 240, 243–44, 819 F. Supp. 1099 (1993).

Because Defendant's Motion to Dismiss was filed after the pleadings had closed,[17] the court treats Defendant's motion in accordance with USCIT Rule 12(c) as a Motion for Judgement on the Pleadings. *See id.*; USCIT Rules 12(b) and 12(c); *see also Makita*, 17 CIT at 243–44 (1993). If a party attaches matters outside of the pleadings in a USCIT Rule 12(c) motion that are not excluded by the court, USCIT Rule 12(d) mandates conversion of the motion to a motion for summary judgment. USCIT Rule 12(d). However, "a court retains discretion to exclude matters outside the pleadings and, if such matters are excluded, conversion to summary judgment is not required." *FAG Holding Corp. v. United States*, 744 F. Supp. 2d 1353, 1357 n.5 (CIT 2010). "A court has wide discretion in electing to consider matters outside of the pleadings." *Skyberg v. United Food & Commercial Workers Int'l Union*, 5 F.3d 297, 302 n.2 (8th Cir. 1993);[18] *see Larsen v. American Airlines, Inc.*, 313 F.2d 599, 601 (1963); *Citizens Nat. Trust & Sav. Bank v. Munson Equip.*, 24 F.R.D. 193, 195–96 (S.D. Cal. 1959). In this case the court has decided to exclude all matters presented outside the pleadings. Accordingly, the mandate imposed by USCIT Rule 12(d) does not apply, and in the interest of securing a "just, speedy, and inexpensive determination of every action and proceeding," USCIT Rule 1, the court will not convert Defendant's Motion to Dismiss to a Motion for Summary Judgment.

[17] The USCIT Rule 12(b) provision to file a motion asserting lack of jurisdiction must be made before the pleading if a pleading is allowed; since Defendant's Answer was filed in April 2006 and Defendant's Motion to Dismiss was filed in October 2008, USCIT Rule 12(b) is inapplicable to the Government's motion.

[18] Additionally, when all parties have actual notice of all documents the movant relied upon in its motion, the necessity of converting to a motion for summary judgment is diminished, *Cortec Indus., Inc. v. Sum Holding L.P.*, 949 F.2d 42, 48 (2d Cir. 1991), since all parties have had the "reasonable opportunity to present all the material that is pertinent to the motion," USCIT Rule 12(d). In the case at hand the Defendant's Partial Motion to Dismiss was held in abeyance while the parties conducted jurisdictional discovery. Order, Doc. No. 63. Plaintiff subsequently submitted numerous exhibits including correspondences, answers to interrogatories, and depositions nearly two years after the Motion to Dismiss was filed. Plaintiff's Supplemental Brief, Exhibits 1–43. Additionally, the "court engaged in a colloquy with the parties during oral argument on the motion to dismiss regarding whether the proceding should be treated as a summary judgment proceeding." *Easter v. United States*, 575 F.3d 1332, 1336 (Fed. Cir. 2009); November 3, 2011 Oral Argument at 11:11:57–11:12:36; 11:13:00–11:14:19. Both parties conceded at oral argument that there are still material facts at issue. November 3, 2011 Oral Argument at 11:14:55–11:15:50; 11:17:27–11:17:32. Therefore, Cisco did have "reasonable opportunity to present . . . material that is pertinent to the motion." USCIT Rule 12(d); *see also Easter*, 575 F.3d at 1336 ("whether a party has had a 'reasonable opportunity' to present pertinent summary judgment materials when a trial court converts a motion to dismiss" depends on whether the party has had notice and time to respond).

V
CONCLUSION

For the above stated reasons, Defendant's Motion to Dismiss is DENIED.

Dated: November 18, 2011
New York, New York

/s/ Evan J. Wallach
EVAN J. WALLACH, JUDGE

Slip Op. 11–141

HORIZON LINES, LLC, Plaintiff, v. UNITED STATES, Defendant.

Before: WALLACH, Judge
Court No.: 08–00009

[Defendant's Motion for a Directed Verdict is DENIED]

Dated: November 18, 2011

Williams Mullen (*Evelyn M. Suarez*, *George H. Bowles*, *Dean A. Barclay*, and *Julia Forbes Thompson*) for Plaintiff Horizon Lines, LLC; and *Robert S. Zuckerman*, Of Counsel, for Plaintiff Horizon Lines, LLC.

Tony West, Assistant Attorney General; *Barbara S. Williams*, Attorney in Charge, International Trade Field Office, U.S. Department of Justice (*Edward F. Kenny* and *Jason M. Kenner*); and *Paula Smith*, U.S. Customs and Border Protection, Of Counsel, for Defendant United States.

FINDINGS OF FACT, CONCLUSIONS OF LAW, AND JUDGMENT

Wallach, Judge:

I
STANDARD OF REVIEW

Pursuant to the court's jurisdiction under 28 U.S.C. § 1581(a), the statute provides for judicial review of denied protests filed in accordance with 19 U.S.C. § 1514. Although Customs' decisions are entitled to a presumption of correctness under 28 U.S.C. § 2639(a)(1), the Court makes its determinations upon the basis of the record made before the Court, rather than that developed by Customs. *See United States v. Mead Corp.*, 533 U.S. 218, 233 n.16, 121 S. Ct. 2164, 150 L. Ed. 2d 292 (2001). Accordingly, the Court makes the following findings of fact and conclusions of law as a result of the *de novo* trial. *See* 28 U.S.C. § 2640(a).

II
FINDINGS OF FACT

1. Plaintiff Horizon Lines, LLC ("Plaintiff") owns the Horizon Crusader, a U.S.-flagged vessel.
2. In January 12, 2006, to February 8, 2006 the Crusader was drydocked at Guangzhou Wenchong Shipyard ("GWS") in the People's Republic of China.
3. On October 5, 2001, the International Maritime Organization ("IMO") had adopted the International Convention of the Control of Harmful Anti-Fouling Systems on Ships ("Convention") which banned tin-based anti-fouling coatings forbidding the application of tin-based anti-fouling coatings after January 1, 2003 and requiring that the tin-based anti-fouling coatings on existing vessels be removed or sealed by January 1, 2008.
4. At the previous drydocking of the Crusader in 2003, among other work, the entire underwater portion of the hull was coated with Hempel's Anti-fouling Oceanic Tin-Free Paint.
5. When the Crusader entered GWS in China in 2006, it was approximately three years since its last application of anti-fouling paint.
6. Anti-fouling paint works in two ways: 1) it contains a biocide active or chemical which inhibits marine growth and 2) it physically polishes or sloughs off the hull if marine growth attaches to the paint.
7. Following the Crusader's return to the United States, Horizon Lines submitted Customs Form 226, "Record of Vessel Foreign Repair or Equipment Purchase."
8. This form, as subsequently supplemented by the Application for Relief and associated documentation, identified the work performed on the Crusader.
9. Customs reviewed this entry and associated submission and determined that, pursuant to 19 U.S.C. § 1466, Horizon Lines "would owe $251,077.63 on the entire entry which included duties on the charges associated with the application of tin-free antifouling paint."
10. Horizon Lines protested portions of this determination, and Customs denied the protest in part. *See* Customs Headquarters Ruling ("HQ") H0151615 (October 23, 2007).
11. During the 2006 drydocking, the shipyard performed work on the Crusader consisting of the complete removal of all coatings from the vessel's underwater hull.
12. Those coatings included tin-bearing anti-fouling coatings and epoxy coatings.

13. The decision by Horizon to drydock the Crusader and to remove those coatings was made without knowledge by the decision-makers whether there was any blistering or corrosion on the vessel's underwater hull.
14. The decision by Horizon, at the time it was made, was part of a "fleet-wide concept" solely based on the intention of Horizon to comply with the IMO's Convention.
15. Testimony at trial by Joseph Walla provided the only percipient evidence regarding the condition of the Crusader's hull during that drydocking.
16. Walla's testimony and the six admitted photographic exhibits demonstrated that at the time of drydocking the Crusader's hull had suffered only minimal blistering and corrosion in the total amount of approximately ten (10) square meters.
17. Walla specifically testified, and the court believes his testimony, that when he physically examined the underwater hull in drydock, he photographed anything "out of the ordinary."
18. The court specifically finds that all other testimony on this issue was speculative and made by non-percipient witnesses.
19. While the court permitted qualification as an expert of the Government's witness, Erik Roberts, the court commented at the time that there was considerable doubt as to whether any weight should be accorded to his testimony.
20. In fact, the court found Mr. Roberts' testimony to be internally contradictory and declines to accord any weight to his opinion that as much as 25% of the underwater hull was blistered.
21. Mr. Roberts conceded at trial that his conclusions were based on reports which could be erroneous.
22. Mr. Roberts testified that he relied upon a report by Gary Watson and that he did not know if that report was an accurate description of the actual condition of the underwater hull.
23. Mr. Roberts admitted that he would have no reason to disbelieve Mr. Walla's testimony that each of the photographs admitted as evidence represented, at most, one to two square meters.
24. Mr. Roberts conceded at trial that calculations in the report he prepared were, in fact, incorrect.
25. Similarly, James Dolan and Pete Saliaris were non-percipient witnesses as to the actual physical condition of the underwater hull.
26. The court did find Mr. Dolan provided useful, competent, and accurate testimony about the underlying intent of the Con-

vention, but his opinion testimony regarding the condition of the vessel was speculative and unreliable.

27. The Government called Pete Saliaris as an adverse expert witness. Given the convoluted nature of the questioning of Mr. Saliaris, his testimony was less useful to the court than it might have been in other circumstances.
28. Mr. Saliaris certainly has a considerable degree of practical expertise in marine hull coating systems. However, his testimony about the physical condition of the Horizon Crusader was speculative and lacked a competent foundational basis.
29. Mr. Saliaris conceded at trial that until he heard Mr. Walla's testimony he did not know the "approximate size" depicted in the photographic evidence.
30. Accordingly, the court finds that the testimony of Mr. Dolan and Mr. Saliaris provides no useful evidence regarding the amount of blistering which actually existed on the underwater hull of the Horizon Crusader.
31. The paint company data sheets offered in evidence showing the existence of a 36-month system were general guidelines at best, designed to foster paint sales and to insulate the manufacturer against possible claims for defects. They did not accurately forecast the life of an underwater hull coating system.
32. The court finds that the paint system in place on the underwater hull of the Crusader was in good order in 2006 and would have lasted for an indefinite time past the drydocking date.
33. The Court concludes that when the Crusader was drydocked in 2006 all cognizable evidence demonstrates that the work performed on it was necessitated only by a desire on the part of Horizon to comply with the Convention, and that any "repair" of blisters or corrosion was minimal and solely incidental to Horizon's purpose of compliance.
34. If any of these Findings of Fact should more properly deemed a Conclusion of Law it is so designated.

III
CONCLUSIONS OF LAW

1. This court has jurisdiction over this matter pursuant to 28 U.S.C. §1581(a) and no jurisdictional defects exist.
2. The Government is entitled to a "presumption of correctness" under 28 U.S.C. § 2639(a)(1) that the work performed on the Horizon Crusader was dutiable repairs, but that presumption has been overcome by the facts determined in this trial.

3. Under 19 U.S.C. §1466 the court must determine the primary purpose of the work in order to conclude whether or not the work is dutiable. *See H.C. Gibbs v. United States*, 28 Cust. Ct. 318 (1952), *aff'd*, 41 C.C.P.A. 57 (1953).
4. The work performed on the Horizon Crusader was solely undertaken to comply with the Convention, and as a matter of law, any repairs effected were incidental and irrelevant to the nature of the work.
5. If the work performed had been intended to repair underwater hull damage, or if it had actually repaired more than minimal and inconsequential underwater hull damage, then the amounts expended would have to be allocated to repair and non-repair categories.
6. Given the factual findings of the court, however, it is clear that the Horizon Crusader's hull was in "good working order." *Horizon Lines v. United States*, 752 Fed. Supp. 2d 1305, 1314 (CIT 2010).
7. Horizon's protest was sufficiently distinct for Customs to completely comprehend its nature and character, and it was neither overbroad nor indefinite as to the invoice it was protesting. The government's Motion for a Directed Verdict is accordingly denied.
8. The expenses incurred by Horizon in connection with replacement of its anti-fouling system are non-dutiable.
9. If any of these Conclusions of Law should more properly be deemed a Finding of Fact it is so designated.

JUDGMENT

This case having been heard at trial and submitted for decision, and the court, after due deliberation, having issued Findings of Fact and Conclusions of Law herein, now in conformity therewith, it hereby

ORDERED, **ADJUDGED** and **DECREED** that judgment be, and hereby is, entered in favor of Plaintiff; and it is further

ORDERED, **ADJUDGED** and **DECREED** that the vessel expenses at issue in this case are non-dutiable; and it is further

ORDERED, **ADJUDGED** and **DECREED** that the appropriate United States Customs and Border Protection officials shall reassess the duties at issue in accordance with the judgment of the court; and it is further **ORDERED** , **ADJUDGED** and **DECREED** that the appropriate United States Customs and Border Protection officials shall refund to Plaintiff all excess duties together with interest as provided by law.

Dated: November 18, 2011
New York, New York

/s/ *Evan J. Wallach*
EVAN J. WALLACH, JUDGE

Slip Op. 11–142

CLEARON CORPORATION AND OCCIDENTAL CHEMICAL CORPORATION, Plaintiffs, v. UNITED STATES, DEFENDANT, AND ARCH CHEMICALS, INC., Defendant-Intervenor.

Before: Richard K. Eaton, Judge
Court No. 08–00364
Public Version

[The Final Results are remanded.]

Dated: November 18, 2011

Gibson, Dunn, & Crutcher LLP (*Daniel J. Plaine*, *J. Christopher Wood*, *Andrea F. Farr*, and *Zia C. Oatley*), for plaintiffs Clearon Corporation and Occidental Chemical Corporation.

Tony West, Assistant Attorney General; *Jeanne E. Davidson*, Director, *Franklin E. White, Jr.*, Assistant Director, Commercial Litigation Branch, Civil Division, United States Department of Justice (*David F. D'Alessandris*); Office of Chief Counsel for Import Administration, United States Department of Commerce (*Brian Soiset*), of counsel, for defendant United States.

Blank Rome LLP (*Peggy A. Clarke* and *Roberta Kienast Daghir*), for defendant-intervenor Arch Chemicals, Inc.

OPINION AND ORDER

Eaton, Judge:

INTRODUCTION

This action is before the court on the motion of Clearon Corporation and Occidental Chemical Corporation (collectively, "plaintiffs") for judgment on the agency record pursuant to USCIT Rule 56.2.[1] The motion challenges certain aspects of the United States Department of Commerce's ("Commerce" or the "Department") Final Results of the Second Administrative Review of the antidumping duty order on chlorinated isocyanurates[2] from the People's Republic of China ("PRC"), in which Commerce assigned dumping margins to Chinese

[1] Plaintiffs are domestic producers of chlorinated isocyanurates.

[2] "'Chlorinated isocyanurates are derivatives of cyanuric acid, described as chlorinated s-triazine triones. . . . [They are] available in powder, granular, and tableted forms.'" *Arch Chems., Inc. v. United States*, 33 CIT __, __, Slip Op. 09–71 at 3 n.1 (July 13, 2009) (not reported in the Federal Supplement) (citation omitted).

respondents Hebei Jiheng Chemical Corporation, Ltd. ("Jiheng") and Nanning Chemical Industry Co. Ltd. ("Nanning")[3] of 0.80% and 53.67%, respectively. *See* Chlorinated Isocyanurates from the PRC, 73 Fed. Reg. 52,645 (Dep't of Commerce Sept. 10, 2008) (notice of final results); Chlorinated Isocyanurates from the PRC, 73 Fed. Reg. 62,249 (Dep't of Commerce Oct. 20, 2008) (notice of amended final results) (collectively, the "Final Results").

The Final Results cover the period of review ("POR") June 1, 2006 through May 31, 2007, and incorporate by reference the Department's Issues and Decision Memorandum. *See* Issues and Decision Mem. for the 2006–2007 Admin. Review of Chlorinated Isocyanurates from the PRC (Dep't of Commerce Sept. 5, 2008) (the "Issues & Dec. Mem."). The court has jurisdiction pursuant to 28 U.S.C. § 1581(c) (2006) and 19 U.S.C. § 1516a(a)(2)(B)(iii) (2006).

For the reasons that follow, the Final Results are remanded.

BACKGROUND

Plaintiffs' motion challenges three aspects of the Final Results: (1) the selection of surrogate values for urea; (2) the selection of surrogate values for steam coal; and (3) the valuation of the waste ammonia gas as a by-product. Defendant-intervenor Arch Chemicals, Inc.[4] fully supports the Final Results and asks the court to deny plaintiffs' motion. For its part, the Department seeks a voluntary remand on the valuation of the waste ammonia gas by-product, but asks the court to sustain its Final Results on the first two issues raised by plaintiffs. Aspects of plaintiffs' motion were addressed by this Court when considering the First Administrative Review in *Arch Chemicals, Inc. is an importer of subject merchandise and participated in the underlying administrative review. See Def.-Int.'s Mot. to Intervene 1, Dec. 8, 2008. Chemicals, Inc. v. United States, 33 CIT __, Slip Op. 09–71 (July 13, 2009) (not reported in the Federal Supplement).*

On December 14, 2009, the Department filed a motion to dismiss certain counts in plaintiffs' complaint. According to Commerce, plaintiffs' failure to serve their injunction on named government officials at Commerce and United States Customs and Border Protection rendered the injunction incapable of preventing a deemed liquidation. As a result, the Department insisted that the court dismiss portions of plaintiffs' complaint as moot because all entries of the subject merchandise had been liquidated pursuant to the deemed liquidation provisions of 19 U.S.C. § 1504(d), and because the cash

[3] Jiheng and Nanning are Chinese producers and exporters of chlorinated isocyanurates.

[4] Arch Chemicals, Inc. is an importer of subject merchandise and participated in the underlying administrative review. *See* Def.-Int.'s Mot. to Intervene 1, Dec. 8, 2008.

deposit rates at issue in this litigation had been supplanted by those resulting from the Third Administrative Review. Def's Mot. to Dismiss in Part as Moot 1, Dec. 14, 2009.

On January 15, 2010, the court stayed further action on the Rule 56.2 motion for judgment on the agency record until the motion to dismiss was resolved. The court then denied the motion to dismiss in *Clearon Corp. v. United States*, 34 CIT __, 717 F. Supp. 2d 1366 (2010), based on the "intent of the parties" holding laid out in *Agro Dutch Industries Ltd. v. United States*, 589 F.3d 1187 (Fed. Cir. 2009).

The court now returns to the Rule 56.2 motion for judgment on the agency record.

DISCUSSION

I. Surrogate Valuation of Urea

A. Legal Framework

The United States imposes duties on foreign-produced goods that are sold in the United States at less than fair value. If the price of a good in the home market ("normal value") is higher than the price for the same good in the United States ("export price"), then the comparison produces a positive number that indicates that dumping has occurred, and the magnitude of the number determines the dumping margin.

In determining whether the subject merchandise is being, or is likely to be, sold at less than fair value, 19 U.S.C. § 1677b(a) requires Commerce to make "a fair comparison . . . between the export price[5] or constructed export price[6] and normal value." When merchandise that is the subject of an antidumping investigation is exported from a nonmarket economy country,[7] such as the PRC, Commerce, under most circumstances, determines normal value by valuing the factors

[5] The "export price" is "the price at which the subject merchandise is first sold . . . by the producer or exporter of the subject merchandise outside of the United States to an unaffiliated purchaser in the United States or to an unaffiliated purchaser for exportation to the United States" as adjusted. 19 U.S.C. § 1677a(a).

[6] The "constructed export price" is "the price at which the subject merchandise is first sold . . . in the United States . . . by or for the account of the producer or exporter of such merchandise or by a seller affiliated with the producer or exporter, to a purchaser not affiliated with the producer or exporter" as adjusted. 19 U.S.C. § 1677a(b).

[7] A "nonmarket economy country" is "any foreign country that [Commerce] determines does not operate on market principles of cost or pricing structures, so that sales of merchandise in such country do not reflect the fair value of the merchandise." 19 U.S.C. § 1677(18)(A). "Because it deems China to be a nonmarket economy country, Commerce generally considers information on sales in China and financial information obtained from Chinese producers to be unreliable for determining, under 19 U.S.C. § 1677b(a), the normal value of the subject merchandise."*Shanghai Foreign Trade Enters. Co. v. United States*, 28 CIT 480,481, 318 F. Supp. 2d 1339, 1341 (2004). Therefore, because the subject merchandise comes from

of production (the "FOPs") used in producing the merchandise by employing surrogate data.[8] The statute directs Commerce to value the FOPs "based on the best available information regarding the values of such factors in a market economy country or countries considered to be appropriate by the [Department]." 19 U.S.C. § 1677b(c)(1). Specifically, Commerce's task in a nonmarket economy review is to determine, using surrogate costs, what a producer's costs would be if the inputs were valued at market prices. *See Tianjin Mach. Imp. & Ex. Corp. v. United States*, 16 CIT 931, 940, 806 F. Supp. 1008, 1018 (1992).

B. Surrogate Data for Urea Valuation

1. Philippine Data

As it did in the First Administrative Review, Commerce calculated the surrogate value for the input urea using the weighted-average unit value of urea imports into India found in the World Trade Atlas ("WTA"), concluding that the data represents an average non-export value, and was contemporaneous with the POR, product specific, and tax exclusive. *See* Issues & Dec. Mem. at 8.

Plaintiffs object to this methodology claiming that: (1) Commerce failed to make the legally required comparison between the WTA data and the Philippine data they placed on the record; and (2) the WTA data contained prices that were not set by market forces. According to plaintiffs:

> With respect to the surrogate value for urea, Commerce made two basic errors. First, Commerce misinterpreted 19 U.S.C. § 1677b to permit selection of a source of surrogate value data without comparing it to other sources on the record to determine which is the "best available information." In this administrative review, two sources of urea price data were available on the record: Indian import data and Philippine domestic price data. Instead of comparing both sources to determine which was the "best available information," Commerce restricted its evaluation to the adequacy of the Indian import data.

Pls.' Mem. in Supp. of Mot. for J. on Agency R. ("Pls.' Mem.") 3. As to plaintiffs' second argument, they maintain that Commerce erred by

the PRC, Commerce constructed normal value by valuing the factors of production using surrogate data from India. *See* 19 U.S.C. § 1677b(c)(4).

[8] Section 1677b(c)(4)(A) requires that Commerce "in valuing factors of production, shall utilize, to the extent possible, the prices or costs of factors of production in one or more market economy countries that are . . . at a level of economic development comparable to that of the nonmarket economy country."

"failing to exclude from the Indian import data prices for urea imports from Oman that were not set by market forces." Pls.' Mem. 3.

As noted, plaintiffs contend that Commerce valued the input urea using Indian import data without first assessing the relative merits of the Indian and the Philippine data. Pls.' Mem. 9. Therefore, the domestic producers describe Commerce's selection process as limited to a determination of whether the Indian import data (1) satisfied the minimum requirements for use as surrogate data, and (2) met the agency regulation that it "normally will value all factors in a single surrogate country." 19 C.F.R. § 351.408(c)(2) (2011). Plaintiffs characterize this selection process as "foreclos[ing] any objective comparison of the merits of the Indian and Philippine data sets." Pls.' Mem. 9.

In making their argument, plaintiffs claim that the phrase "best available information" means Commerce "must compare the relative merits of alternative sources of surrogate values on the record." Pls.' Mem. 19. Thus, they insist that Commerce did not comply with the statute when it failed to address any of their substantive arguments or conduct an express comparison between the Indian and Philippine data when making its determination. Pls.' Reply Br. in Supp. of Mot. for J. on Agency R. ("Pls.' Reply") 1. Looking at the single sentence offered by the Department to explain its decision not to select the Philippine data, plaintiffs found nothing "evaluating both data sets with respect to objective criteria for accuracy or reliability." Pls.' Reply 1; *see also* Pls.' Mem. 10.

Commerce's sentence, justifying its decision not to select the Philippine data, states that the Department found "the domestic Philippine prices for urea not to be the best available information on the record of this review because these prices are for urea used as fertilizer and sold in 50-kg bags which are not product specific to the urea used by the respondents in this review." Issues & Dec. Mem. at 8. For plaintiffs, this explanation is mistaken in two "critical respects,"[9] i.e., it assumes (1) that urea used in agriculture and urea used for industrial processes are sold in separate markets, and (2) that the packaging of urea is a material consideration, indicating a difference between urea used for agriculture and industrial grade urea used for chemical feedstock. Pls.' Mem. 10.

The domestic producers further maintain that Commerce limited its actual analysis to testing the Indian data for "basic indicia of

[9] First, plaintiffs argue that "there is no record evidence . . . that 'urea used as fertilizer' can be differentiated from urea used for chemical production" and, in fact, . Pls.' Mem. 10. Second, . Pls.' Mem. 10.

adequacy" and, therefore, "failed to take into account any of the significant differences in the quality and reliability of the Indian and Philippine urea prices." Pls.' Mem. 21. They believe that the Philippine data is "clearly superior," and question why Commerce "failed to consider whether a urea price obtained from an uncontrolled, tax-free, *laissez-faire* urea market in the Philippines might not be a preferable source of market-based surrogate values." Pls.' Mem. 26, 22.

Plaintiffs, therefore, *see* Commerce's methodology as elevating "adequate" or "sufficient" sources of surrogate values in a primary surrogate country over "superior sources of information that may exist in alternative surrogate countries," thereby creating an "irreconcilable conflict with the plain terms of the statute." Pls.' Mem. 22, 23 ("The statutory command to use the 'best available information' . . . cannot be interpreted to permit use of information from a primary surrogate country when objectively superior data exist in a secondary surrogate country."). They insist, then, that "Commerce's passing reference to the Philippine price data plainly did not satisfy its obligation." Pls.' Mem. 24.

The Department[10] explains that it used weighted-average unit values for Indian imports of urea as listed in the WTA, finding that the data was "the best available information because they are average, non-export values, contemporaneous with the period of review, product specific, tax exclusive, and in-line with import values from other potential surrogate countries." Def.'s Opp. to Pls.' Mot. for J. on Agency R. ("Def.'s Mem.") 8. Moreover, using the Indian data conformed with Commerce's preference to value all factors within a single surrogate country. Def.'s Mem. 9. *See* 19 C.F.R. § 351.408(c)(2) ("[T]he [Department] normally will value all factors in a single surrogate country.").

Responding to plaintiffs' argument that its analysis of the Indian and Philippine data was inadequate, the Department claims that it did consider the merits of Philippine domestic pricing data, and determined that the data "were not product specific to the large-scale industrial usage of chemical feedstock urea reported by Chinese respondents in the present case and was therefore not the best available information." Def.'s Mem. 14. In making its argument, the agency quotes defendant-intervenor's comment that purchase of urea in small bags, as it is sold in the Philippines, would be "ludicrous" for the purpose of making the subject merchandise. Def.'s Mem. 15.

[10] Defendant-intervenor's arguments are substantially similar to the Department's. Thus, only Commerce's arguments are summarized below.

Commerce further explains that Philippine domestic pricing data exclusively represents urea used as fertilizer, while the record evidence establishes there are distinct markets for urea used in agriculture versus industrial processes. The Department points to plaintiffs' submission from a chemical industry website stating that "[a]n estimated 10–15% of urea manufactured is used in industrial processes . . . . The balance is used in agriculture." Pls.' Submission to Commerce Regarding Surrogate Values for FOPs, Ex. 14, May 27, 2008 (C.R. 834) ("Pls.' Surrogate Value Subm."). The Department, then, concluded that the WTA data "represent a broad category of urea," and "better captures the industrial grade urea reported by respondents." Def.'s Mem. 15.

2. Commerce's Conclusions Were Reached Without the Required Analysis

While the Department's analysis indicates some examination of the disadvantages of the Philippine data, at the very least, "selecting the surrogate value data that yield the most accurate dumping margin necessarily requires Commerce to conduct a fair comparison of the data sets on the record." *Allied Pacific Food (Dalian) Co. Ltd. v. United States*, 30 CIT 736, 757, 435 F. Supp. 2d 1295, 1313–14 (2006). In addition, the Supreme Court has "frequently reiterated that an agency must cogently explain why it has exercised its discretion in a given manner." *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 48 (1983). Commerce's analysis of the input urea violates both of these principles.[11]

Here, the Department subjected the Philippine data to none of the tests it used to justify its use of the Indian data, e.g., whether it is from a public source or contemporaneous with the POR. Nor did Commerce compare the relative merits of the two urea sources or explain how it reached its conclusions about the Philippine data. That is, here the Department took steps necessary to demonstrate that urea from India met the minimum standards for use as a surrogate value, but failed to (1) perform an analysis of the Philippine data using these same standards; (2) compare the Indian data with the Philippine data in order to determine which was the "best available information;" or (3) explain its conclusions with respect to product specificity or the sale of urea in bags, and detail how these conclu-

[11] First, "the fact that strongly suggests that no such distinctions [between urea purchased for fertilizer and industrial uses] exist." Pls. Reply 4. Second,

> [i]f packaging size does matter in valuing urea, then Commerce
>
> .

Pls.' Reply 5.

sions were reached. 19 U.S.C. § 1677b(c)(1); *see also Peer Bearing Co.-Changshan v. United States*, 35 CIT __, __, 752 F. Supp. 2d 1353, 1373 (2011) ("[T]he statute requires Commerce to compare the chosen data set with other data sets on the record and thereby determine what is the best available information."); *Globe Metallurgical, Inc. v. United States*, 28 CIT 1608, 1622 (2004), 350 F. Supp. 2d 1148, 1160 ("Commerce must compare the reliability of each potential surrogate country's values to determine which values are most reliable."); *Olympia Indus., Inc. v. United States*, 22 CIT 387, 390, 7 F. Supp. 2d 997, 1000–01 (1998) ("From the statute, it is clear that Commerce must identify and use the best information available when it values the factors of production. . . . [Therefore,] Commerce has an obligation to review all data and then determine what constitutes the best information available or, alternatively, to explain why a particular data set is not methodologically reliable.") (citation omitted).

Thus, the court finds that Commerce's explanation for its decision to disregard the Philippine data does not comply with the unfair trade laws, and that its failure to adequately support its conclusions with reasoning based on the record evidence reveals that these conclusions were not supported by substantial evidence.

3. Omani Prices

Plaintiffs' primary argument with respect to the inclusion of the Omani prices in the WTA data is that because one hundred percent of the Oman India Fertiliser Company ("OMIFCO") output is sold to the Indian government at predetermined prices, the prices are necessarily not set by the market. Indeed, the "prices for the Omani imports do not involve typical competitive forces of supply and demand that characterize arm's-length market transactions among buyers and sellers." Pls.' Mem. 27. Similar arguments were advanced in *Arch Chemicals* where the Court addressed this issue and found that Commerce's decision to include the Omani prices was supported by substantial evidence:

> Here, the WTA data is from a publicly available source for the POR. Additionally, Commerce analyzed that data to ensure that "value for imports from Oman to India was not aberrational, and was comparable to imports from other market economy countries." Def.'s Br. 11 (citation omitted). As has been seen, the Omani value was within the range of values examined, though at the low end, and was close to the average value, i.e., 6.99 rupees/KG for Oman and 8.83 rupees/KG for the average of all data sets. . . . In addition, Commerce acted reasonably in concluding that "economies of scale is one factor contributing to

> OMIFCO's price [being lower than that of other urea imports into India], given the quantity of imports from Oman into India." *See* I&D Mem. at Comment 1; Def.'s Br. 12 (noting that "the quantity of Omani imports of urea was higher than the quantity of all other Indian imports of urea combined"). Thus, having found that the OMIFCO data was "within the normal range" and taking into consideration the large quantity of OMIFCO imports, it cannot be said that Commerce was unreasonable in using this information.
>
> Moreover, the court is unconvinced that Commerce erred by not excluding the OMIFCO data as tainted by reason of government involvement. Oman and India are market economy countries and there is no evidence that, at the time the contract was entered into, the prices set were not market-driven. In addition, Commerce could reasonably find that, the mere fact that a product is sold to a single purchaser pursuant to a long-term contract, does not necessarily make the price anomalous. Further, there was no record evidence demonstrating that urea sales made subject to the contract were distorted.

Arch Chems., 33 CIT at __, Slip Op. 09–71 at 28–30.

Here, however, the facts are not precisely the same as in the First Administrative Review that was the subject of *Arch Chemicals*. There, it was significant that the Omani import data was "within the range of values examined" when compared to other imports of urea into India, and there was also one urea source priced lower than the Omani value. *Id.* at __, Slip Op. 09–71 at 29. In this Second Review, it appears that the Omani data no longer fall within this range. In fact, the Government of India noted that the "fixed price of imported urea from Oman is much cheaper than the present prevailing international prices." Pls.' Rebuttal Comments on Surrogate Values for FOPs, Ex. 4 at 11, Nov. 13, 2007 (P.R. 692). An examination of a table of the prices confirms this observation. *See* Prelim. Surrogate Value Mem., Attach. 3, Apr. 29, 2008 (P.R. 820) ("Surrogate Value Mem.") (adopted by Issues & Dec. Mem. 6).

Country	**Quantity (KG)**	**Average Value (Rupees/KG)**
Oman	1,500,193,218	7.87
Liberia	26,451,000	11.49
Bahrain	24,003,000	11.58

Country	**Quantity (KG)**	**Average Value (Rupees/KG)**
Egypt	99,887,000	11.63
Russia	118,252,000	11.67
Saudi Arabia	100,085,000	11.70
Ukraine	1,036,565,024	11.73
Malaysia	69,397,000	11.74
Romania	44,000,000	11.76
Kuwait	94,831,700	11.78
Bangladesh	116,260,000	11.78
United Arab Emirates	250,283,278	11.81
Libya	141,291,921	11.87
Qatar	220,282,807	12.18
Germany	5,000,200	15.35
Total	3,846,783,148	10.26

As has been noted, in *Arch Chemicals*, the Omani value was at the low end of sales prices, at 6.99 rupees per kilogram. Although this price was less than the average unit value of 8.83 rupees per kilogram for all data sets for imports into India, it was not outside the range of all values because urea sourced from the United Kingdom was priced at 6.67 rupees per kilogram, while that from Germany was priced at 30.26 rupees per kilogram. *Arch Chems.*, 33 CIT at __, Slip Op. 09–71 at 29. In this Second Review, though, the Omani value, at 7.87 rupees per kilogram, was the lowest value considered, and was 30% lower than the average unit value of 10.26 rupees per kilogram for all data sets. *See* Surrogate Value Mem., Attach. III. In fact, the next lowest value that was considered, that for Liberia, was 46% higher than the Omani value, and the remaining values ranged from 47% to 95% more than the Omani value. Surrogate Value Mem., Attach. III. This change from the First Administrative Review is significant and eliminates one of the two important factors upon which the Court relied in *Arch Chemicals,* because in this review it cannot be said that "the Omani value is within the range of values examined." *Arch Chems.*, 33 CIT at __, Slip Op. 09–71 at 29.

Furthermore, the *Arch Chemicals* Court found it significant that "'the quantity of Omani imports of urea was higher than the quantity of all other Indian imports of urea combined'" in finding that Commerce reasonably concluded that "'economies of scale [was] one factor contributing'" to the low Omani value. *Arch Chems.*, 33 CIT at __, Slip Op. 09–71 at 29. By contrast, here the correlation between quantity and price is less pronounced. In this Second Review, the Omani inputs comprise less than 40% of the total during the POR, and, while Ukraine's export quantity was the second highest after Oman, its prices fell about midway down the list of values. Similarly, the United Arab Emirates had the third largest export quantity, but its prices fell within the top four highest among those considered. *See* Surrogate Value Mem., Attach. III. All of this being the case, the court cannot conclude that Commerce's "economies of scale" explanation is supported by substantial evidence in this Second Review.

One factor in this Second Review, however, remains consistent with the First Review. In *Arch Chemicals*, the Court found that there was no evidence that the data was "tainted by reason of government involvement." *Arch Chems.*, 33 CIT at __, Slip Op. 09–71 at 30. That is, the fact that "a product is sold to a single purchaser pursuant to a long-term contract . . . does not necessarily make the price anomalous." *Id.* Similarly, here, there does not appear to be any evidence on the record that demonstrates how India's long-term contract with Oman tainted the sale prices of urea.

The court is aware that its task is not to "reweigh the evidence or substitute its own judgment for that of the agency," *Usinor v. United States*, 28 CIT 1107, 1111, 342 F. Supp. 2d 1267, 1272,(2004), but rather to determine whether Commerce's determinations are supported "by substantial evidence on the record." 19 U.S.C. § 1516a(b)(1)(B)(I); *see also Hoogovens Staal Bv v. United States*, 24 CIT 242, 247, 93 F. Supp. 2d 1303, 1307 (2000) (citing *Consolo v. Fed. Mar. Comm'n*, 383 U.S. 607, 620 (1996)) ("In reviewing agency determinations, the court declines to reweigh or reinterpret the evidence of record."). Indeed, "when reviewing substantial evidence challenges to Commerce's actions, the court assesses whether the agency action is 'unreasonable' given the record as a whole." *Catfish Farmers of Am. v. United States*, 33 CIT __, __, 641 F. Supp. 2d 1362, 1366 (2009) (citing *Nippon Steel Corp. v. United States*, 458 F.3d 1345, 1350–51 (Fed. Cir. 2006)). Here, given the data on the record, and in light of its differences from the data used in *Arch Chemicals*, the court finds that Commerce's explanation for the inclusion of the Omani data is not supported by substantial evidence, as the Omani data no longer falls within the range of values considered, and this price discrepancy cannot be attributed to the quantity of urea imported from Oman.

II. Surrogate Valuation of Steam Coal

Next, in the Final Results, Commerce valued steam coal using the prices listed in the Tata Energy Research Institute ("TERI") Data Directory and Yearbook. Plaintiffs argue that a producer of chlorinated isocyanurates in India could not purchase steam coal at these prices. They insist that only purchasers in certain "core sectors" could buy coal at the prices listed in the TERI data, while purchasers in non-core industries could purchase domestic coal only at significantly higher prices from the monopoly supplier, Coal India, or would have been required to use imported coal. Pls.' Mem. 30–31. Plaintiffs argue that although the coal sector may have been deregulated in name, in practice, non-core sector buyers in India cannot purchase coal at TERI prices. Pls.' Reply 10 n.3. Plaintiffs therefore urge the use of the WTA Indian import data. Pls.' Mem. 30.

According to plaintiffs, the record includes an express identification of precisely which industries are "core sector," and this list plainly shows the chemical industry is not a member. Pls.' Mem. 31. Indeed, they insist that "every piece of evidence on the record demonstrates that the chemical industry is *not* part of the core sector in India." Pls.' Mem. 32. Thus, plaintiffs argue that "[i]t makes no sense for Commerce to choose as the 'best available information' for valuing steam coal a surrogate value that would be *unavailable* to a hypothetical free-market producer of chlorinated isocyanurates operating in the structure of the Indian market." Pls.' Mem. 32.

In response, the Department asserts that it used the TERI data, rather than WTA import data as proposed by plaintiffs, "because the TERI data are more product specific to [defendant-intervenor's] reported coal input." Def.'s Mem. 17. As Commerce explains, TERI data is categorized by the major types of coal products, while WTA import data simply lists "steam coal" without further specificity. Def.'s Mem. 17.

With respect to plaintiffs' argument that a producer of chlorinated isocyanurates could not purchase steam coal at the prices listed in the TERI data, the Department contends that the record evidence regarding the "core sector" was "inconclusive," with no clear evidence that purported to classify the Indian chemical industry as either a core or non-core industry. Def.'s Mem. 18. In addition, Commerce stresses that it has repeatedly found the use of TERI data to be the best available information for steam coal prices in India, a conclusion that has been affirmed by this court. Def.'s Mem. 18.

In *Arch Chemicals*, which decided the appeal of the First Administrative Review, this Court held that "Commerce acted reasonably in using the TERI data to value steam coal." *Arch Chems.*, 33 CIT at __, Slip Op. 09–71 at 41. The Court found that Commerce was reasonable in determining that "the TERI data was the most 'product specific' surrogate available, and therefore the most representative of Jiheng's actual coal input." *Id.* In reaching this conclusion, the Court noted Commerce's observation that "'TERI Data are categorized by major types of coal and UHV value whereas WTA import data are listed under 'steam coal' without further specificity.'" *Id.* (citation omitted).

In addition, the *Arch Chemicals* Court found that the evidence indicated that Commerce was reasonable in concluding that coal was available to the chemical industry at TERI prices. In reaching this conclusion, the Court cited to record evidence that "revealed that deregulation occurred in 1996 and that the coal used by Jiheng has been sold at market prices since 2000." *Id.* The Court also observed that one source referenced by plaintiffs (defendant-intervenors in that action) on the "core sector" point was "at best equivocal," "while the other article appear[ed] to support Commerce's position." *Id.* at __, Slip Op. 09–71 at 42. The first source noted that "'customers in the non-core sector are of three types - linked customers, non-linked customers, and small and tiny industries,'" while the second referenced companies "being 'in the core sector like power, steel and *chemicals*.'" *Id.* Thus, the Court concluded:

> The court finds that the evidence cited by Commerce meets the substantial evidence test. Put another way, the Department has shown that: (1) the TERI data represents most closely the coal actually used by Jiheng, and (2) Clearon and OxyChem's claim that TERI data prices were unavailable to chemical manufacturers like Jiheng is, at best, subject to conflicting interpretations of the record evidence. . . . Accordingly, the court finds the Department's explanation to be reasonable and sustains Commerce's surrogate value calculation for steam coal.

Id. at __, Slip Op. 09–71 at 43 (citation omitted).

Although the *Arch Chemicals* Court found that Commerce's use of the TERI data to value steam coal was supported by substantial evidence in the First Administrative Review, the record in this Second Review directs a different result. Plaintiffs emphasize that the "record includes an express identification of precisely which industries are 'core sector' industries, and this list plainly shows that the chemical industry is *not* a member of the core sector." Pls.' Mem. 31. Among the exhibits placed on the record by plaintiffs are a listing of core sector industries from Coal India's website, an interview with Coal India's Marketing Director that occurred during the POR, a decision from the Supreme Court of India, and various industry articles. Pls.' Mem. 13; Pls.' Surrogate Value Subm., Ex. 17, 32, 35. The list on Coal India's website includes the following "Core Sector Consumers": power, defense, railways, fertilizer, steel and other metallurgical industries, cement, aluminum, paper, public sector undertakings, and coal exports. Pls.' Mem. 14; Pls.' Surrogate Value Subm., Ex. 17.

Additionally, Coal India's Marketing Director stated in his interview that Coal India "has basically two sets of consumers—the core sector and the non-core sector. The core sector consists of power, cement, steel, paper, aluminum, and fertilizer manufacturing units, and Central public sector undertakings." Pls.' Mem. 31–32; Pls.' Surrogate Value Subm., Ex. 35. Plaintiffs emphasize that none of the lists of core sectors on the record include the chemical industry. Pls.' Mem. 31. Finally, a January 2006 Supreme Court of India decision provided by plaintiffs characterizes the domestic coal market in India as follows:

> "[A]fter nationalization, coal consumers were categorized into two main sectors, namely, core sector and non-core sector. The core sector consumers include the vital sections of national economy related to infrastructural development as for example, power, steel, cement, defence, fertilizer, railway, paper, aluminum, export, central public sector undertaking etc. *All other remaining industries/consumers constituted non-core sector."*

Pls.' Mem. 31; Pls.' Surrogate Value Subm., Ex. 17.

Having provided these various examples, plaintiffs believe that Commerce's determination that, "because there was 'no conclusive record evidence identifying the chemical industry as a non-core industry' the Department would assume that it was in the 'core sector,'" is "a quintessential example of a decision that is *not* supported by substantial evidence on the record." Pls.' Mem. 31 (quoting Issues & Dec. Mem. 11).

Despite the presence of this record evidence, Commerce determined that "we find no conclusive record evidence identifying the chemical industry as a non-core industry. While the record evidence lists examples of 'core' industries, this list is not exhaustive, and there is no listing positively identifying the chemical industry as a non-core industry." Issues & Dec. Mem. 11. Defendant therefore argues that plaintiffs "failed to demonstrate that the chemical industry is a non-core industry," and thus "Commerce properly concluded that the record evidence on this issue was inconclusive." Def.'s Mem. 18. Defendant also asserts that "Commerce has found consistently in recent cases that the TERI data are the most appropriate source for steam coal prices in India." Def.'s Mem. 18; Issues & Dec. Mem. 11. Finally, defendant argues that Commerce used the TERI data because it is "more product specific" to the type of coal used by Jiheng as the "TERI data are categorized by major types of coal," while the WTA import data simply list "'steam coal' without further specificity." Def.'s Mem. 17. Thus, because the TERI data represent the most product-specific prices, defendant argues that the data constitute the best available information.

While defendant maintains that "there is no listing positively identifying the chemical industry as a non-core industry," Issues & Dec. Mem. 11., it is equally apparent that there is no list that identifies the chemical industry as a core sector industry. Nor, for that matter, does the record contain any evidence that would lead the court to conclude, as it did in *Arch Chemicals*, that the evidence is subject to "conflicting interpretations." That is, absent from this record is the evidence this Court found important in *Arch Chemicals,* i.e., the Coal India documents that "'clearly specified that the type of coal used by Jiheng had been deregulated in 1996 and has been sold at market prices since 2000,'" and the BioLab submission that referenced companies being "'in the core sector like power, steel and chemicals.'" *Arch Chems.*, 33 CIT at __, Slip Op. 09–71 at 40, 42 (citations omitted).

While Commerce concludes that the lists of core sector industries provided by plaintiffs were "not exhaustive," it does not discuss the record evidence that supports this conclusion, or explain how it reached this finding. It also fails to address the record evidence from the Supreme Court of India's decision that listed several industries, not including the chemical industry, and stated that "[a]ll other remaining industries/consumers constitute[] non-core sector." Pls.' Mem. 31; Pls.' Surrogate Value Subm., Ex. 17. In other words, the Department fails to address a court decision that certainly appears to be definitive.

Although Commerce's conclusion with respect to the specificity of coal types reported in the WTA and TERI data is important, so are its conclusions with respect to core industries. As these conclusions are not fully explained, and there appears to be no record evidence to support the conclusion that the chemical industry is a core sector industry, the court finds that the surrogate value calculation for steam coal must be remanded as not supported by substantial evidence. On remand, Commerce "must explain its rationale . . . such that a court may follow and review its line of analysis, its reasonable assumptions, and other relevant considerations." *Allegheny Ludlum Corp. v. United States*, 29 CIT 157, 168, 358 F. Supp. 2d 1334, 1344

(2005). Its conclusions should be supported by substantial evidence, that is, “such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.” *Consol. Edison Co. v. NLRB*, 305 U.S. 197, 229 (1938).

III. Surrogate Valuation of Waste Ammonia Gas By-Product Offset

The Department generally grants an offset to normal value for sales of by-products, generated during the production of subject merchandise, if the respondent can demonstrate that the by-product is either resold or has commercial value, and reenters the respondent’s production process. *See Arch Chems. v. United States (Arch Chems. II)*, 35 CIT __, __, Slip Op. 11–41 at 5–6 (Apr. 15, 2011) (not reported in the Federal Supplement). In valuing by-product offsets in nonmarket economy proceedings, Commerce uses surrogate values, as it does for other factors of production. *See QVD Food Co. v. United States*, 34 CIT __, __, 721 F. Supp. 2d 1311, 1318 (2010).

By their motion, plaintiffs challenge the Department’s decision to value the waste ammonia gas by-product, claimed by Jiheng, using import prices for anhydrous ammonia. Plaintiffs contend that “there was no reasonable source of surrogate value on the record for the waste ammonia gas by[-]product of Jiheng’s cyanuric acid production” because “Jiheng’s waste ammonia gas plainly did not consist of such anhydrous ammonia.” Pls.’ Mem. 33, 34. For plaintiffs, “[b]ecause Jiheng’s waste ammonia gas is not comparable to anhydrous ammonia and Jiheng provided no other sources of surrogate values, Commerce should have denied the offset.” Pls.’ Mem. 34.

While defendant-intervenor argues this choice is supported by substantial evidence, the Department itself “request[s] a remand to permit Commerce to reconsider and explain its selection of anhydrous ammonia to value Jiheng’s ammonia gas by-product offset.” Def.’s Mem. 19. After reexamining the record, “Commerce has determined that it has not fully explained its reasons for selecting anhydrous ammonia to value Jiheng’s ammonia gas by-product offset and that it should therefore reconsider and give further explanation for its decision.” Def.’s Mem. 19. Notably, plaintiffs do not object to this offer in their reply brief.

“[I]f the agency’s concern is substantial and legitimate,” granting a voluntary remand request “is usually appropriate.” *SKF USA Inc. v. United States*, 254 F.3d 1022, 1029 (Fed. Cir. 2001). The court, therefore, grants Commerce’s request for a voluntary remand to reconsider and explain its selection of anhydrous ammonia to value Jiheng’s ammonia gas by-product offset.

CONCLUSION AND ORDER

For the reasons stated, it is hereby

ORDERED that plaintiffs' Rule 56.2 motion is GRANTED, in part, and defendant's motion is GRANTED, in part, and the matter is REMANDED; it is further

ORDERED that Commerce issue, upon remand, a redetermination that complies in all respects with this Opinion and Order, is based on determinations that are supported by substantial record evidence, and is in all respects in accordance with law; it is further

ORDERED that Commerce, in preparing the Remand Redetermination, shall reexamine its determination with respect to (1) whether urea used for agricultural purposes can be differentiated from urea used for chemical production, and (2) any reason urea sold in fifty kilogram bags cannot be the source of a surrogate price in this case; it is further

ORDERED that Commerce fully analyze the evidence presented by both sides in reviewing its decision to exclude the Philippine data, further examine the Philippine data using the same criteria it employed in selecting the Indian data, provide a complete comparison of the two data sets, and adequately explain how it has come to its final determination; it is further

ORDERED that Commerce shall revisit its determination with respect to the Omani prices, fully analyze the evidence regarding the Omani data, and fully explain and support with substantial evidence its determination of whether or not to include the Omani data in the WTA data; it is further

ORDERED that Commerce revisit its determination with respect to its surrogate valuation of steam coal, and fully analyze the use of the TERI data, including whether the chemical industry would be considered a core sector industry, and whether the use of this data is supported by substantial evidence; it is further

ORDERED that Commerce's request for a voluntary remand to reconsider and explain its selection of anhydrous ammonia to value the ammonia gas by-product offset is GRANTED, and Commerce shall, on remand, reconsider and fully explain its decision and its reasons for selecting anhydrous ammonia; it is further

ORDERED that Commerce shall fully explain why the data it has selected for all remanded issues constitutes the best available information, demonstrating that each of its conclusions are supported by substantial evidence, and may reopen the record if it finds that the existing record is inadequate; it is further

ORDERED that Commerce file the remand results on or before March 19, 2012; it is further

ORDERED that plaintiffs file any comments thereon on or before May 3, 2012; it is further

ORDERED that defendant file any rebuttal to such comments on or before May 18, 2012.

Dated: November 18, 2011
New York, New York

/s/ Richard K. Eaton
RICHARD K. EATON

Slip Op. 11–143

UNITED STATES COURT OF INTERNATIONAL TRADE PEER BEARING COMPANY-CHANGSHAN, Plaintiff, v. UNITED STATES, Defendant, and THE TIMKEN COMPANY, Defendant-Intervenor.

Before: Timothy C. Stanceu, Judge
Consol. Court No. 10–00013

[Remanding to the U.S. Department of Commerce the final results of an administrative review of an antidumping duty order on tapered roller bearings and parts thereof from the People's Republic of China]

Dated: November 21, 2011

John M. Gurley and *Diana Dimitriuc Quaia*, Arent Fox LLP, of Washington, DC, argued for plaintiff. With them on the brief was *Matthew L. Kanna*.

L. Misha Preheim, Trial Attorney, Commercial Litigation Branch, Civil Division, U.S. Department of Justice, of Washington, DC, argued for defendant. With him on the brief were *Tony West*, Assistant Attorney General, *Jeanne E. Davidson*, Director, *Patricia M. McCarthy*, Assistant Director. Of counsel on the brief was *Joanna V. Theiss*, Office of the Chief Counsel for Import Administration, U.S. Department of Commerce, of Washington, DC.

William A. Fennell and *Nazakhtar Nikakhtar*, Stewart and Stewart, of Washington, DC, argued for defendant-intervenor. With them on the brief was *Terence P. Stewart*.

OPINION AND ORDER

Stanceu, Judge:

I. INTRODUCTION

In this consolidated case, plaintiffs Peer Bearing Company - Changshan ("CPZ") and The Timken Company ("Timken"), challenge the final determination ("Final Results") that the U.S. Department of Commerce ("Commerce" or the "Department") issued in the twenty-first review of the antidumping duty order pertaining to imports of tapered roller bearings ("TRBs") and parts thereof, finished and unfinished, from the People's Republic of China (the "subject merchandise”). *Tapered Roller Bearings & Parts Thereof, Finished & Unfinished, from the People's Republic of China: Final Results of the 2007–2008 Admin. Review of the Antidumping Duty Order*, 75 Fed. Reg. 844 (Jan. 6, 2010) (“*Final Results*”). Compl. (Jan. 20, 2010), ECF No. 2 (“CPZ's Compl.”); Compl. (Mar. 5, 2010), ECF No. 11 (Court. No. 10–00045) (“Timken's Compl.”). The twenty-first review pertained to entries of subject merchandise made during the period June 1, 2007 through May 31, 2008 (“period of review” or “POR”). *Final Results*, 75 Fed. Reg. at 845. CPZ, a respondent in the review, brings three claims: (1) that “Commerce's decision to treat certain bearings further manufactured in a third country as covered by the antidumping order for purposes of the Final Results is not in accordance with law,” CPZ's Compl. ¶ 30; (2) that “Commerce improperly issued an assessment rate that results in a significant over-statement of the antidumping duties owed,” *id.* ¶ 33; and (3) that “Commerce valued CPZ's inputs of steel bar using aberrational price data that should be rejected,” *id.* ¶ 35. Timken, a domestic producer of tapered roller bearings that participated in the proceedings before Commerce, claims that Commerce, in determining a surrogate value for steel wire rod, a material used in producing CPZ's subject merchandise, “acted contrary to its statutory obligation to value factors based on the most accurate information available . . . .” Timken's Compl. *¶* 13.

Before the court are the motions filed by CPZ and Timken for judgment on the agency record pursuant to USCIT Rule 56.2. Pl.'s Rule 56.2 Mot. for J. upon the Agency R. (Aug. 13, 2010), ECF No. 34; Pl.'s Rule 56.2 Mot. for J. upon the Agency R. (Aug. 16, 2010), ECF No. 38. The court determines that CPZ is entitled to a remand on the claim challenging the Department's country-of-origin determination and the claim challenging the Department's valuation of steel bar, but not on the claim challenging the assessment rate. The court also orders Commerce to reconsider and redetermine the surrogate value for steel wire rod, in response to Timken's claim that the surrogate value was contrary to law and in response to a request for a voluntary remand on this claim that defendant filed following oral argument. Def.'s Mot. for Voluntary Remand (June 15, 2011), ECF No. 88 (“Def.'s Remand Mot.”).

II. BACKGROUND

The Department initiated the twenty-first review on July 30, 2008. *Initiation of Antidumping & Countervailing Duty Admin. Reviews, Request for Revocation In Part, & Deferral of Admin. Reviews*, 73 Fed. Reg. 44,220 (July 30, 2008). On July 8, 2009, Commerce issued the preliminary results of the review, which assigned CPZ a margin of

32.02%. *Tapered Roller Bearings & Parts Thereof, Finished or Unfinished, from the People's Republic of China: Prelim. Results of the 2007–2008 Admin. Review of the Antidumping Duty Order*, 74 Fed. Reg. 32,539, 32,544 (July 8, 2009) ("*Prelim. Results*"). On January 6, 2010, Commerce issued the Final Results, which assigned CPZ a margin of 24.62%. *Final Results*, 75 Fed. Reg. at 845.

CPZ filed its complaint on January 20, 2010 and Timken filed its complaint on March 5, 2010. CPZ's Compl.; Timken's Compl. The court consolidated the two actions on May 24, 2010. Order (May 24, 2010), ECF No. 27. CPZ and Timken filed memoranda in support of their motions for judgment on the agency record on August 16, 2010. Pl.'s Mem. of Points & Authorities in Supp. of its Mot. for J. on the Agency R. (Aug. 16, 2010), ECF No. 37 ("CPZ's Mem."); The Timken Co.'s Mem. of Points & Authorities in Supp. of its Mot. for J. on the Agency R. (Aug. 16, 2010), ECF No. 38 ("Timken's Mem."). CPZ and Timken responded as defendant-intervenors on November 22 and 23, 2010, respectively. Peer Bearing Co.-Changshan's Resp. in Opp'n to Timken's Rule 56.2 Br. in Supp. of Mot. for J. on the Agency R. (Nov. 22, 2010), ECF No. 55; Def.-intervenor The Timken Co.'s Opp'n to Mot. for J. on the Agency R. of Pl. Peer Bearing Co.-Changshan (Nov. 23, 2010), ECF No. 56 ("Timken's Resp."). CPZ also filed a notice of supplemental authority prior to oral argument to inform the court of a recent decision of the Court of International Trade and of the results in the subsequent administrative review. Pl.'s Notice of Supplemental Authority (May 10, 2011), ECF No. 84 (citing *Calgon Carbon Corp. v. United States*, 35 CIT __, Slip Op. 11–21 (Feb. 17, 2011)). Defendant initially opposed each claim in this action, Def.'s Opp'n to Pls.' Mots. for J. upon the Agency R. (Nov. 22, 2010), ECF No. 53 ("Def's Opp'n"), but, after the court held oral argument on May 19, 2011, requested a voluntary remand as to Timken's claim challenging the surrogate value of steel rod, Def.'s Remand Mot.

At oral argument, the court granted permission to CPZ to file a supplemental submission clarifying its position and summarizing the record evidence pertaining to the challenge to Commerce's country-of-origin determination, which submission CPZ filed on June 20, 2011. Peer Bearing Co.-Changshan's Supplemental Submission Regarding Country of Origin of Further Manufactured Merchandise (June 20, 2011), ECF No. 89. Both Timken and defendant filed comments on CPZ's submission. The Timken Co.'s Resp. to Peer Bearing Co.-Changshan's Supplemental Submission Regarding Country of Origin of Further Manufactured Merchandise (June 27, 2011), ECF No. 94; Def.'s Resp. to Peer Bearing Co.-Changshan's Supplemental Submission (June 28, 2011), ECF No. 95.

III. DISCUSSION

The court exercises jurisdiction under section 201 of the Customs Courts Act of 1980, 28 U.S.C. § 1581(c) (2006), pursuant to which the court reviews actions commenced under section 516A of the Tariff Act of 1930 ("Tariff Act" or the "Act"), 19 U.S.C. § 1516a (2006), including an action contesting the final results of an administrative review that Commerce issues under section 751 of the Tariff Act, 19 U.S.C. § 1675(a). The court must hold unlawful any finding, conclusion or determination not supported by substantial evidence on the record, or that is otherwise not in accordance with law. *See* 19 U.S.C. § 1516a(b)(1)(B)(i).

A. Remand is Required on the Department's Determination of the Country of Origin of Certain Bearings Further Manufactured in Thailand

CPZ challenges the Department's determining certain bearings that underwent final processing in Thailand to be within the scope of the antidumping duty order as products of China.[1] CPZ's Mem. 32–39. The production in China consisted of "forging, turning, heat treatment of cups and cones, and roller and cage production"; the processing in Thailand was "finishing which consists of grinding and honing" and assembly of the components into finished bearings. Issues & Decision Mem., A-570–601, ARP 5–08, at 8 (Dec. 28, 2009) (Admin. R. Doc. No. 5701) ("*Decision Mem.*"). Based on what it described as the "totality of the circumstances," Commerce concluded that the processing in Thailand did not "substantially transform" the merchandise and that the finished bearings therefore were products of China for antidumping purposes. *Id.* at 11.

In making its country-of-origin determination, Commerce relied on several findings, including that "the average unit cost of manufacturing in the PRC . . . represents a significant percent of total COM [*i.e.*, cost of manufacture] and that the third-country processor's costs as compared to each product's COM are not significant." *Id.* at 10. Commerce reasoned that "the finishing process performed in the third country did not move the product out of the scope or create a product of a new class or kind because TRBs and parts thereof, finished and unfinished, are considered the same 'class or kind' of merchandise in the antidumping order on TRBs." *Id.* at 7. Commerce found, specifically, that "the finishing process does not change the physical or chemical properties of the TRB, nor does it change the essential

[1] Peer Bearing Company - Changshan ("CPZ") made the identity of the third country public at oral argument. Oral Tr. 4 (May 19, 2011), ECF No. 98.

character of the TRB." *Id.* at 9. Commerce also mentioned as a factor in its decision the level of investment in Thailand but concluded that "we have insufficient information to determine whether this factor would preclude or sustain a finding of substantial transformation in this case." *Id.* at 11. Commerce also found that "unfinished and finished bearings are both intended for the same ultimate end-use." *Id.*

The court determines that remand is appropriate because Commerce based its country-of-origin determination in part on the above-mentioned finding that "the third-country processor's costs as compared to each product's COM are not significant." *Id.* at 10. This finding is not supported by substantial evidence on the record, which contains evidence that the processing costs in Thailand accounted for 42% of the total cost of manufacturing.[2] *Letter from CPZ to the Sec'y of Commerce* exhibit 11 (Aug. 12, 2009) (Admin. R. Doc. No. 5597) ("*CPZ's Case Br.*"). In arguing that the Department's origin determination should be upheld, defendant argues, *inter alia*, that "Commerce did not establish a threshold over which it would consider the investment 'significant' . . . ." Def.'s Opp'n 38. This argument does not resolve the problem that arose from the Department's basing its origin determination, in part, on a finding that is unsustainable under the substantial evidence standard of review. While possessing significant discretion in making country-of-origin determinations, *see Suramerica de Aleaciones Laminadas, C.A. v. United States*, 44 F.3d 978, 985 (Fed. Cir. 1994), Commerce may not disregard record evidence that detracts significantly from, and appears to refute, one of the findings on which the Department relied. On remand, Commerce must reconsider on the whole its determination of the country of origin of the bearings that underwent further processing in Thailand. Commerce must ensure that its redetermination of the origin of these bearings is based on findings supported by substantial evidence on the record of this case.

B. Plaintiff is Not Entitled to Relief on its Challenge to the Assessment Rate Methodology

CPZ challenges the Department's method of assessing antidumping duties on the period-of-review entries[3] made by CPZ's affiliated importer and reseller, Peer Bearing Company ("Peer"). CPZ's Mem.

[2] CPZ made this percentage public at oral argument. Oral Tr. 70.

[3] "Entry" refers to an importer's filing the necessary documents with U.S. Customs and Border Protection ("Customs") "to secure the release of imported merchandise from Customs custody . . . ." 19 C.F.R. § 141.0a(a) (2011). The importer is required to declare the value of the merchandise, which is referred to as the "entered value," as well as make a cash deposit in the amount of estimated duties.

8–19. Although acknowledging that the Department assessed the duties according to the normal method described in the Department's regulations, CPZ argues that, on the particular facts of this case, the normal method impermissibly resulted in a significant over-assessment of antidumping duties. *Id.* CPZ proposed an alternative method, which Commerce rejected during the administrative review in favor of its normal method. *Decision Mem.* 28–29. Before the court, CPZ again advocates use of its proposed alternative method.

In section 751 of the Tariff Act, Congress directed Commerce to use the determination reached in a periodic administrative review as "the basis for the assessment of . . . antidumping duties on entries of merchandise covered by the determination . . . ." 19 U.S.C. § 1675(a)(2)(C). Commerce determines dumping margins based on the examined sales, rather than the entries, of subject merchandise that occurred during a period of review, and it is common for the examined sales not to correspond precisely to the period-of-review entries of a particular importer. *See Koyo Seiko Co. v. United States*, 258 F.3d 1340, 1342 (Fed. Cir. 2001) ("Although the 'dumping margin' is calculated on 'sales' during the review period, the duty is imposed upon 'entries,' *i.e.*, imports during the review period."). This situation occurred in the twenty-first review.

As provided in a Department regulation, the Department "normally" will calculate a single *ad valorem* assessment rate to be applied to the entered value of subject merchandise on an importer's entries subject to a review. 19 C.F.R. § 351.212(b)(1) (2011). The regulation states that the Secretary "normally" will calculate this assessment rate by "dividing the dumping margin found on the subject merchandise examined by the entered value of such merchandise for normal customs duty purposes."[4] *Id*. The regulation is intended to avoid the administrative burdens, including the record-keeping burden on respondents, of linking period-of-review entries with the corresponding sales. *See Antidumping Duties; Countervailing Duties*, 61 Fed. Reg. 7,308, 7,316 (Feb. 27, 1996) ("*Proposed Regs.*") ("[S]uch a requirement would impose a burden on respondents that would be disproportionate to the minor gains in the precision of duty assessments, and simply would render an already complex process even

[4] 19 C.F.R. § 351.212(b)(1) (2011) provides that:

> If the Secretary has conducted a review of an antidumping order . . . the Secretary normally will calculate an assessment rate for each importer of subject merchandise covered by the review. The Secretary normally will calculate the assessment rate by dividing the dumping margin found on the subject merchandise examined by the entered value of such merchandise for normal customs duty purposes. The Secretary then will instruct the Customs Service to assess antidumping duties by applying the assessment rate to the entered value of the merchandise.

more complex."). The U.S. Court of Appeals for the Federal Circuit has held this "normal" method of assessing antidumping duties to be based on a permissible construction of the antidumping statute. *Koyo Seiko*, 258 F.3d at 1348. The regulation affords discretion to use other methods, and Commerce on occasion has done so.[5] CPZ's claim is that Commerce acted contrary to law by declining to make an exception to the normal method when determining an assessment rate for the entries Peer made during the POR. *See* CPZ's Mem. 12–19. For the reasons discussed below, the court concludes that CPZ may not obtain relief on this claim.

In support of its claim, CPZ argues, first, that the normal method produced an "overassessment" of antidumping duties that was "manifestly unfair," *id.* at 14, exceeding by nearly 70% the aggregate amount of the individual dumping margins for the period-of-review sales,[6] *id.* exhibit 1. CPZ attributes this outcome to the special circumstances, in which "sales lagged entries" so that "the entered value in the sales database is substantially lower than actual entered value for the POR." *Id.* at 8. CPZ posits that this outcome could be avoided by use of the same numerator, but a different denominator, in the assessment rate calculation for Peer, stating that the only method of ensuring accuracy "is to calculate the assessment rate based on a denominator of *total POR entered value*" rather than a denominator of the entered value of the subject merchandise in the examined sales, which is a much smaller number. *Id.* at 13 & 2 ("On remand, Commerce should amend the assessment rate calculation by distributing the calculated amount of potentially uncollected antidumping duties ('PUDD') over the actual entered value of all of Peer's entries in the POR.").

CPZ's proposed method of determining an assessment rate differs significantly from the normal method. Under the normal method, the amount of antidumping duty assessed on an entry made during the

[5] Notice of Final Results of Antidumping Duty Admin. Review: Certain Softwood Lumber Products From Canada, 70 Fed. Reg. 73,437 (Dec. 12, 2005) and Issues & Decision Mem., A-122–838, ARP 4–04, at 11–12 (Dec. 12, 2005) (modifying an assessment rate for certain non-examined importers, which were not subject to a companion countervailing duty ("CVD") order, when the assessment rate was based on the dumping margins of examined importers subject to the CVD order); *Notice of Final Results of Antidumping Duty Admin. Review: Carbon and Certain Alloy Steel Wire Rod From Mexico*, 71 Fed. Reg. 27,989 (May 15, 2006) and Issues & Decision Mem., A-201–830, ARP 09–04, at 19 (May 15, 2006) (applying a per-unit assessment rate when entered values were not on the record); *Fresh Garlic from the People's Republic of China: Final Results of Antidumping Duty Admin. Review*, 70 Fed. Reg. 34,082 (June 13, 2005) (applying per-unit assessment rate); *Freshwater Crawfish Tail Meat from the People's Republic of China; Notice of Final Results of Antidumping Duty Admin. Review, and Final Partial Rescission of Antidumping Duty Admin. Review*, 67 Fed. Reg. 19,546 (Apr. 22, 2002) (applying per-unit assessment rate).

[6] CPZ made this percentage public at oral argument. Oral Tr. 4.

POR is neither the exact dumping margin for the sale of the merchandise on that entry nor an amount that is necessarily determined according to the aggregate dollar amount of the dumping margins on the sales corresponding to that importer's entries during the POR. Instead, the normal method calculates an assessment rate based on the total dumping margins in the examined sales, regardless of whether the entries corresponding to those sales occurred during the POR. The numerator and the denominator used to calculate the assessment rate are based on the same sales. That is not the case under CPZ's proposed method, by which the aggregated dollar amount of the dumping margins determined for the examined *sales* occurring during the POR would be spread over, and assessed upon, the *entries* occurring during the POR.

Under the normal method as established by the regulation, the starting point for the Department's calculation of an assessment rate is "the dumping margin found on the subject merchandise examined." 19 C.F.R. § 351.212(b)(1). Because the normal method does not depend on a precise correspondence between an importer's POR entries and examined sales, the "dumping margin found on the subject merchandise examined" will not necessarily represent the total amount of antidumping duties that will be owed on all of the entries that an importer makes during a period of review. That was the case here. Commerce calculated Peer's dumping margins on a constructed export price ("CEP") basis, so the date of sale for purposes of determining the U.S. price of the subject merchandise was the date the merchandise was first sold to a party not affiliated with Peer or CPZ. CPZ's Mem. 8; 19 U.S.C. § 1677a(b).[7] Because time lags occurred between the dates of Peer's entries and the dates of the sales to unaffiliated parties of the subject merchandise on those entries, a significant number of Peer's entries during the POR involved merchandise that, for antidumping purposes, did not undergo a "sale" during the POR. Because it applied the normal method, the Department assessed duties based on the aggregated margins, and entered values, for the examined sales on all of Peer's POR entries, including those corresponding to merchandise not sold to unaffiliated parties during the POR.

CPZ mistakenly characterizes as an unfair "over-assessment" the result of the normal method, which estimated dumping margins for

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[7] The statute, in 19 U.S.C. § 1677a(b), defines constructed export price as follows:

> [T]he price at which the subject merchandise is first sold (or agreed to be sold) in the United States before or after the date of importation by or for the account of the producer or exporter of such merchandise or by a seller affiliated with the producer or exporter, to a purchaser not affiliated with the producer or exporter, as adjusted under subsections (c) and (d) of this section.

the unsold merchandise. The Department's estimating these duties was in accordance with the policy underlying section 351.212(b)(1) of the Department's regulations, under which Commerce estimated the margins for the unsold merchandise using data on the administrative record pertaining to the examined sales. The record data did not allow Commerce to determine actual, as opposed to estimated, margins (either individually or collectively) for the entries of unsold merchandise for a straightforward reason: the merchandise was not sold to unaffiliated U.S. customers during the POR. Margins that could be determined when that merchandise eventually is sold to unaffiliated customers may be more or less than the estimates, but the result of the normal method cannot fairly be characterized as an "over-assessment."

CPZ's second argument is that it was unreasonable for Commerce not to use CPZ's proposed method because record information allows for the assessment of the exact amount of duties due and that Commerce should have used CPZ's proposed method in the interest of attaining accuracy. CPZ's Mem. 12. CPZ asserts as facts that all of the sales in the twenty-first POR correspond to entries that occurred during that POR, that the POR entered values in this review are on the record, and that during the subsequent (twenty-second) period of review Peer was acquired by SKF Group and stopped making any entries or sales of subject merchandise as of the acquisition date.[8] *Id.* at 17–18. Citing the preliminary results in the subsequent (twenty-second) review, CPZ also asserts that Peer had both sales and entries in the twenty-second review, which CPZ submits will allow Commerce to assess the full antidumping duties owing due to merchandise not sold by Peer during the twenty-first POR. *Id.* at 17.

In the Decision Memorandum, Commerce disagreed with one of CPZ's factual assertions, concluding that "there is no conclusive evidence on the record of this review to show that all of Peer's sales that occurred during the POR were entered during the POR." *Decision Mem*. 29. The court need not resolve this factual dispute between the parties. Even when the court presumes CPZ's assertion to be true, it still concludes that relief is not available on this claim, which CPZ bases on the premise that "[r]ecord [i]nformation [a]llows for the [a]ssessment of the [e]xact [a]mount of [d]uties [d]ue." CPZ's Mem. 12. The court agrees with this premise only insofar as "the exact amount of duties due" is meant to refer to the duties that, in the aggregate, are owing on those of Peer's twenty-first-review entries that corre-

[8] CPZ states that the SKF Group acquired CPZ and Peer Bearing Company ("Peer") on September 12, 2008. Pl.'s Mem. of Points & Authorities in Supp. of its Mot. for J. on the Agency R. 18 (Aug. 16, 2010), ECF No. 37 ("CPZ's Mem.").

spond to the sales occurring during the POR for the twenty-first review, all of which sales Commerce examined. But, as the court observed above, data does not exist on the record by which the Department may assess the exact (as opposed to estimated) amount of duties owing on Peer's entries of merchandise that was not sold to unaffiliated U.S. customers during the twenty-first POR.

CPZ bases its claim in part on an assertion that Peer will be assessed full and accurate antidumping duties on the twenty-first-review entries of unsold merchandise as a result of the twenty-second review, during which that merchandise, according to CPZ, would undergo sales for antidumping law purposes that Commerce would examine in the twenty-second review. *Id.* at 18. Commerce, of course, did not find that all of the unsold merchandise necessarily would be sold in the next POR.[9] Granting relief on the claim would entail the court's concluding that Commerce was required by the circumstances of this case to reach such a finding and, based on that finding, to decide to depart from the normal method of 19 C.F.R. § 351.212(b)(1). But consistent with the standard of review, the court could reach such a conclusion and order corresponding relief only if the Department's determination not to depart from the normal method was based on one or more findings unsupported by substantial evidence on the record of this case or was otherwise contrary to law. 19 U.S.C. § 1516a(b)(1)(B)(i).

In supporting its claim, CPZ is unable to demonstrate that the Department's decision to apply the normal method depended on any specific findings of fact that were not supported by substantial evidence on the record of the twenty-first review. CPZ asserts only generally, and unconvincingly, that the Department's assessment rate calculation for Peer is unsupported by substantial evidence. CPZ's Mem. 8. And in arguing that its assessment method would be more accurate than the Department's method, CPZ does not demonstrate that the estimates underlying the Department's assessment method were distorted, contrary to evidence of record in the twenty-first review, or otherwise impermissible under the statute or any applicable regulation. In exercising the discretion inherent in 19 C.F.R. § 351.212(b)(1), Commerce, on the record facts of this case, was permitted to insist on assessing some antidumping duties, albeit

[9] To the contrary, the U.S. Department of Commerce ("Commerce" or the "Department") concluded that "there is no information on the record to indicate that all of Peer's POR entries will be sold by Peer in the subsequent review." Issues & Decision Mem., A-570–601, ARP 5–08, at 29 (Dec. 28, 2009) (Admin. R. Doc. No. 5701) ("*Decision Mem.*"). CPZ relies for its argument on certain factual matters it considers uncontested, including statements by Commerce in the preliminary results of the twenty-second review, of which CPZ presumably would have the court take judicial notice. CPZ's Mem. 18.

duties based on estimated margins, on Peer's twenty-first-POR entries of subject merchandise that was not sold to unaffiliated purchasers, rather than rely on the subsequent review. Thus, CPZ's claim reduces to an argument that Commerce acted contrary to law in failing to make a hypothetical finding such as the court has identified and, on the basis of such a finding, depart from the normal method in favor of one that would rely entirely on actual rather than estimated margins for those entries. Commerce was not required to find or presume that the "unsold" merchandise would undergo a sale for antidumping law purposes during the twenty-second POR or that Peer would be the party that sells it. Without deciding whether Commerce permissibly could have acted as CPZ now advocates, the court concludes based on the factual record of the twenty-first review, the antidumping statute, and 19 C.F.R. § 351.212(b)(1) that CPZ is not entitled to a remand under which Commerce would be directed to do so. Such a remand order would be contrary to the deference owed the Department under the standard of review.

CPZ's remaining arguments also lack merit. CPZ distinguishes on a factual basis cases in which the Court of International Trade has upheld the Department's applying the normal method. CPZ's Mem. 14–17. This argument does not overcome the weakness in CPZ's claim, which is the inability to show that Commerce acted contrary to law in deciding to apply that method on the evidentiary record of the twenty-first administrative review. Finally, CPZ takes issue with the Department's stating in the Decision Memorandum that "calculating assessment rates by dividing total dumping duties by the total value of POR entries would complicate continuity from one review period to another." *Id.* at 17–18 (citing *Decision Mem.* 29). Commerce based this statement on its observation that "there is no information on the record to indicate that all of Peer's POR entries will be sold by Peer in the subsequent review." *Decision Mem*. 29. As the court concluded above, Commerce was not required in the circumstances of this case to reach a finding as to the eventual sale of the unsold merchandise. Commerce was permitted in these circumstances to apply the normal method defined by its regulation, regardless of whether acceptance of the CPZ proposal for the twenty-first review assessment process might be considered to "complicate continuity."[10]

[10] Had Commerce accepted as valid all of CPZ's assumptions as to the twenty-second review and on that basis decided to adopt CPZ's proposed assessment method in the twenty-first review, such a decision would have affected the choice of an assessment method for Peer's entries occurring during the period of the twenty-second review, whether or not that decision would be considered to have "complicated" the assessment process for the Peer entries across both reviews.

C. The Department's Choice of Surrogate Value for Bearing-Quality Steel Bar is Not Supported by Substantial Evidence on the Record

Commerce based the surrogate value for one of CPZ's factors of production, bearing-quality steel bar, on World Trade Atlas ("WTA") import data for Indian Harmonized Tariff Schedule ("Indian HTS") subheading 7228.30.29,[11] which reflected an average unit value ("AUV") of $1,889 per metric ton.[12] CPZ's Mem. 25. CPZ contests the Department's choice, arguing that this choice reflects a value that is aberrationally high relative to certain "benchmark data" that CPZ placed on the record during the review, which, according to CPZ, Commerce impermissibly declined to consider. *Id.* at 19. The benchmark data included data from Infodrive India ("Infodrive"),[13] which CPZ describes as demonstrating "that Indian HTS 7228.3[0] contained large amounts of high-priced steel that clearly was not bearing quality steel." *Id.* at 24. CPZ characterizes the AUV reflected by the Indian import data as more than 56% higher than the weight-averaged value for bearing-quality steel imports in India, which according to other Infodrive data are valued at $1,209.50 per metric ton.

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[11] The Indian HTS provides, in pertinent part, for the following subheadings under heading 7228 ("Other bars and rods of other alloy steel; angles, shapes and sections, of other alloy steel; hollow drill bars and rods, of alloy or non-alloy steel"):

7228.10 Bars and rods, of high speed steel:
7228.20.00 Bars and rods, of silico-manganese steel
7228.30 Other bars and rods, not further worked than hot-rolled, hot-drawn or extruded:
  7228.30.1 Bright bars:
  7228.30.2 Other:
    7228.30.21 Lead bearing steel
    7228.30.22 Spring steel
    7228.30.23 Sulphur bearing steel
    7228.30.24 Tool and die steel
    7228.30.29 Other
7228.40 Other bars and rods, not further worked than forged:
7228.50 Other bars and rods, not further worked than cold-formed or cold-finished:
7228.60 Other bars and rods:
7228.70 Angles, shapes and sections:
7228.80 Hollow drill bars and rods:

Harmonized Tariff Schedule of India, *available at* http://www.customsinfo.com (last visited on Nov. 21, 2011).

[12] The surrogate value for bearing-quality steel bar differed slightly from the average unit value reflected by the Indian import data, as Commerce adjusted the value reflected by the import data using the price at which CPZ purchased a small quantity of this input from a market economy country. *Mem. from Int'l Trade Compliance Analyst to the File* 5 (June 30, 2009) (Admin. R. Doc. No. 5582).

[13] Infodrive India is a private entity located in India that provides data on imports and exports. *Letter from CPZ to the Sec'y of Commerce* exhibit 1 (July 28, 2009) (Admin. R. Doc. No. 5587) ("Infodrive India is a 12 year old market leader in providing Competitive Business Intelligence on Exports Imports.").

Id. at 29. CPZ also bases its claim on import and export data pertaining to various other countries, including U.S. import data specific to bearing-quality steel that show a value of $1,081 per metric ton. *Id.* at 25; *Letter from CPZ to the Sec'y of Commerce* exhibit 1 (Jan. 30, 2009) (Admin. R. Doc. No. 5489) ("*CPZ's Jan. 30 Surrogate Value Submission*"). Further, CPZ points to data it submitted for the record on the prices it paid for bearing-quality steel from suppliers in market economy countries, which also were substantially lower than the Department's surrogate value. CPZ's Mem. 25.[14]

Subsection (1) of section 773(c) of the Tariff Act requires generally that when Commerce determines the normal value of subject merchandise of a producer in a nonmarket economy country, "the valuation of the factors of production shall be based on the *best available information* regarding the values of such factors in a market economy country or countries considered to be appropriate by the administering authority." 19 U.S.C. § 1677b(c)(1) (emphasis added). Subsection (4) of section 773(c) instructs Commerce, in valuing factors of production, to "utilize, to the extent possible, the prices or costs of factors of production in one or more market economy countries that are–(A) at a level of economic development comparable to that of the nonmarket economy country, and (B) significant producers of comparable merchandise." *Id.* § 1677b(c)(4). The question presented by CPZ's claim, therefore, is whether substantial evidence on the record supported the Department's finding that Indian HTS data for subheading 7228.30.29 were the best available information to use as the principal basis for the valuation of CPZ's bearing-quality steel bar input.

The record contained sets of WTA import data for Colombia, India, Indonesia, the Philippines, and Thailand. Commerce determined that each of these countries was at a level of economic development comparable to that of China but that only two, India and Thailand, "appear to be significant producers of comparable merchandise." *Prelim. Results*, 74 Fed. Reg. at 32,541; *see* 19 U.S.C. § 1677b(c)(4). The record WTA import data for Thailand pertain to Thailand's Harmonized Tariff Schedule ("Thai HTS") subheading 7228.30.90 and show

[14] In its notice of supplemental authority, plaintiff makes two additional arguments in support of this claim: (1) that the Department's disregarding the Infodrive India data in this review is inconsistent with the Department's treatment of the Infodrive data in the subsequent review, in which the Department, according to plaintiff, revised its surrogate value using Infodrive data; and (2) that the Court of International Trade held the Department's disregarding Infodrive data to be unlawful in a recent case and that the Infodrive data in this case apply to an even larger percentage of covered imports. Pl.'s Notice of Supplemental Authority (May 10, 2011), ECF No. 84 (citing *Calgon Carbon Corp. v. United States*, 35 CIT __, Slip Op. 11–21, at 17 (Feb. 17, 2011) (finding unlawful the Department's disregarding Infodrive data covering 50% of imports)).

an AUV of $1,164 per metric ton.[15] *CPZ's Jan. 30 Surrogate Value Submission* exhibit 3. The record WTA import data pertaining to Indonesian Harmonized Tariff Schedule ("Indonesian HTS") subheading 7228.30 reveal an AUV of $1,038 per metric ton. *Id.* exhibit 2. The record WTA import data pertaining to Filipino Harmonized Tariff Schedule ("Filipino HTS") subheading 7228.30 have an AUV of $870 per metric ton and the record WTA import data pertaining to Colombian Harmonized Tariff Schedule subheading 7228.30 have an AUV of $1,005 per metric ton. *Letter from CPZ to the Sec'y of Commerce* exhibit 7 (July 28, 2009) (Admin. R. Doc. No. 5587).

In the Decision Memorandum, Commerce identified five criteria for selecting the "best available information," stating that its "preference is to use, where possible, a range of publicly available, non-export, tax-exclusive, and product-specific prices for the POR, with each of these factors applied non-hierarchically to the particular case-specific facts and with preference to data from a single surrogate country." *Decision Mem.* 16–17. Commerce explained its choice of the Indian data by stating that "we continue to find that the WTA Indian import data under HTS subheading 7228.30.29 are publicly available, broad market averages, contemporaneous with the POR, tax-exclusive, and representative of significant quantities of imports; thus satisfying critical elements of the Department's SV [*i.e.*, surrogate value] test." *Id.* at 17. Commerce added that "because these data are from the primary surrogate country and representative of an 8-digit basket category, the most specific on the record to the input in question, we find that they represent the best available information for purposes of valuing the steel bar input." *Id.* The Decision Memorandum thus indicates that Commerce chose the Indian HTS data over the Thai HTS data, at least in part, because the Indian import data satisfied two of the Department's five identified criteria that the Thai import data did not. The Indian data, unlike the Thai data, were from the "primary surrogate country." *Id.* at 18; *see* 19 C.F.R. § 351.408(c)(2) ("[T]he Secretary normally will value all factors in a single surrogate country."). Commerce also applied its specificity criterion, finding

[15] The Thai HTS provides, in pertinent part, for the following subheadings under heading 7228 ("Other bars and rods of other alloy steel; angles, shapes and sections, of other alloy steel; hollow drill bars and rods, of alloy or non-alloy steel"):

> 7228.10 Bars and rods, of high speed steel:
> 7228.20 Bars and rods, of silico-manganese steel:
> 7228.30 Other bars and rods, not further worked than hot-rolled, hot-drawn or extruded:
>
> 7228.30.10000 Of circular cross-section
> 7228.30.90000 Other

Harmonized Tariff Schedule of Thailand, *available at* http://www.customsinfo.com (last visited on Nov. 21, 2011).

that the Indian import data represented by the $1,889-per-metric-ton value were more "product specific" to the input than were the Thai import data. *Decision Mem.* 17.

In addition, Commerce indicated that it chose the Indian import data over the Thai import data because it concluded, based on its "benchmarking practices," that CPZ had not made a "colorable claim" that the Indian import data were aberrational. *Id.* at 18 ("CPZ did submit the AUV for Thai import statistics under HTS subheading 7228.30.90 onto the record, which would be an appropriate comparative price for the Indian SV data based on the Department's benchmarking practices, had CPZ presented a 'colorable claim' that the Indian data are aberrational.").

On the topic of the Department's "benchmarking practices," the Decision Memorandum explained that "Department practice has found that the existence of higher prices alone does not necessarily indicate that price data is distorted or misrepresented, and thus, is not sufficient to exclude a particular SV, absent specific evidence the value is otherwise aberrational." *Id.* Commerce then concluded that because it determined that "CPZ has failed to demonstrate the Indian data to be unreliable, we do not find it necessary [to] compare the Indian SV data to any potentially appropriate benchmarks submitted to the record." *Id*. Commerce proceeded to discredit the various items of benchmarking data CPZ had submitted.

Commerce first explained that, consistent with its "practice and policy," it would give no weight to the Infodrive data. Commerce outlined its practice and policy as follows:

> The Department has stated that it will consider Infodrive data to further evaluate import data, provided: 1) there is direct and substantial evidence from Infodrive reflecting the imports from a particular country; 2) a significant portion of the overall imports under the relevant HTS category is represented by the Infodrive India data; 3) distortions of the AUV in question can be demonstrated by the Infodrive data; but that the Department will not use Infodrive data when it does not account for a significant portion of the imports which fall under a particular HTS subheading.

Id. at 18–19 (footnotes omitted). With respect to point two and the last point, Commerce mentioned that "[a] comparative analysis of the Infodrive and the WTA data for Indian imports under HTS subcategory 7228.30.29 shows that only 79.81 percent of the total WTA quantity for all countries that the Department includes in its surrogate value calculations is accounted for in the total quantifiable weight figures from the corresponding Infodrive data." *Id.* at 19. The Decision Memorandum does not shed light on why a percentage of 79.81% did not, in the Department's view, comprise "a significant portion" of the imports which fall under a "relevant" or "particular" HTS "category" or "subheading." The Department mentioned, however, that in comparing the two data sources it found a number of "variances" in country-specific data, which it described individually in the Decision Memorandum, concluding in general that "of the major exporters to India by quantity, only the WTA data for imports from the United States and Germany could be considered to be adequately represented by the Infodrive data, whereas the Infodrive quantity represents a significantly smaller coverage of the corresponding WTA quantity for other significant exporters . . . ." *Id.* Commerce also found that import data from four countries, Slovenia, Italy, Hong Kong, and Turkey, are present in the Infodrive data set but not in the WTA data set. *Id.* at 20. Finally, Commerce relied on a fact not pertaining to its stated criteria for using Infodrive data: variances between the WTA and Infodrive data with respect to country-specific AUVs. *Id.* at 19.

Commerce then determined that no probative weight was due CPZ's market economy purchases of bearing-quality steel bar, stating that these purchases were "not appropriate prices for surrogate valuation purposes based on established Department precedent." *Id.* at 21. The Decision Memorandum did not identify the precedent on which it relied; however, the Decision Memorandum, in discussing comments submitted by the petitioner, identified a policy of using market prices paid for inputs to value the input "when the purchases account for over 33 percent of the total quantity purchased from all sources." *Id.* at 16 n.29. The Decision Memorandum adds that "[h]owever, when this information is not usable, and when faced with similar competing SV sources, the Department has found that WTA import data, when taken as a whole, are preferential because they represent an average of multiple price points and are tax exclusive." *Id.*

The record lacks substantial evidence to support the Department's finding that the WTA import data pertaining to Indian HTS subheading 7228.30.29 are the "best available information" on which to base the surrogate value for bearing-quality steel bar as a factor of production of CPZ's subject merchandise. The principal flaw in the Department's finding is that the value shown by the data pertaining to Indian HTS subheading 7228.30.29, $1,889 per metric ton, which is not specific to bearing-quality steel, is substantially higher than the AUVs shown by each of the other data sets on the record that were specific to bearing-quality steel. There are three such data sets: Infodrive data for India, which show an AUV of $1,209.50 per metric ton for bearing-quality steel bar imports in India, U.S. import data, which show an AUV of $1,081 per metric ton for bearing-quality steel bar, and the actual market-economy purchases of CPZ, which show an AUV that, although confidential, can be described generally as comparable to these other two bearing-quality-steel-specific AUVs. Commerce disregarded all three of these data sets as potential corroboration for an AUV obtained from WTA import data. The bearing-quality-specific AUVs corroborate closely the AUV of $1,164 per metric ton shown by the WTA Thai HTS data. They do not corroborate the $1,889 AUV the Department obtained from the Indian HTS data.

Because it dismisses a significant amount of data on the value of bearing-quality steel bar, the Department's analysis errs by failing to base its determination on the record considered as a whole. Some of the disregarded data (specifically, certain of the Infodrive data), unlike the data Commerce did consider, pertain specifically to the prices for bearing-quality steel in a country (India) economically comparable to China. These data are relevant to and highly probative on the question of how bearing-quality steel bar should be valued as a factor of production. The findings Commerce made to justify ignoring these data are unconvincing and not supported by substantial evidence.

The Department's principal reasons for ignoring the Infodrive data, including the Infodrive data specific to Indian imports of bearing-quality steel bar, were that the data do not reflect the total quantity of imports in certain tariff "subcategories" as shown in WTA data and therefore are not as comprehensive as the WTA data and, in some cases, show greater quantities than the WTA data. *See id.* at 20 n.45 (expressing "some concern as to the reliability of Infodrive's reporting for these subcategories."). Commerce also stated, as a secondary argument, that the Infodrive data showed different AUVs for exports from certain countries than the AUVs shown by the WTA data. *Id.* at 19. The inconsistencies Commerce found to exist between WTA data and Infodrive data are not substantial evidence supporting the Department's finding that the Infodrive data are unreliable for any purpose. Inconsistencies between the quantities reflected in the WTA and Infodrive data may suggest that one data set is more comprehensive than the other but do not show that the Infodrive data lack any probative value on the proper value of bearing-quality steel. Inconsistencies between the AUVs reflected in the WTA and Infodrive data may be entitled to some weight on the premise that WTA data are based on official government statistics, but they are not substantial evidence for the premise that Infodrive data are unsuitable for any purpose, such as use as corroboration for certain WTA import data.

Commerce was also unjustified in disregarding entirely the evidence represented by the AUV for bearing-quality steel shown in the U.S. tariff database, which is relevant to the question of whether the Thai HTS data are better information than the Indian HTS data for valuing the bearing-quality steel bar input. The mere fact that the data do not come from a country at a level of economic development comparable to that of China does not preclude Commerce from considering those data in choosing between data from two countries that are economically comparable to the nonmarket economy country. *See Peer Bearing Company-Changshan v. United States*, 35 CIT __, __, 752 F. Supp. 2d 1353, 1372 (2011).

Next, Commerce improperly disregarded the probative value of CPZ's market-economy purchases of bearing-quality steel bar based on its precedents and based on its finding that the WTA data are superior to the market-economy price data "because they represent an average of multiple price points and are tax exclusive." *Decision Mem*. 16 n.29. The market-economy purchase data pertain to bearing-quality steel bar whereas the WTA data do not. In addition, if the price data for the market-economy purchases were presumed *not* to be tax exclusive, they would be even more indicative than they already are that the AUV obtained from the WTA Indian HTS database is atypically high and uncorroborated and, therefore, a poor basis for the surrogate value of CPZ's use of bearing-quality steel bar. The court does not hold or imply that Commerce erred in declining to value the steel bar input exclusively on data from CPZ's market economy purchases, but it concludes that Commerce erred in deciding, based on inadequate reasoning, to give these data no probative weight.

Other factors underlying the Department's decision to base the surrogate value for steel bar on the Indian WTA import data do not alter the court's conclusion that this decision is unsupported by substantial record evidence. In choosing between the Indian and Thai import data, the Decision Memorandum relies in part on a regulatory preference for valuing each surrogate value using data from the primary surrogate country, which was India. In a previous opinion involving the immediately prior review, the Court of International Trade stated that the preference for use of data from a single surrogate country could support a choice of data as the best available information where the other available data "upon a fair comparison, are otherwise seen to be fairly equal . . . ." *Peer Bearing*, 35 CIT at __, 752 F. Supp. 2d at 1373. The Indian data cannot be said to be "fairly equal" to the Thai data where, as noted previously, the AUV from the Thai data is closely corroborated by the other data on the record and the AUV from the Indian data is not. The Department may give a preference to data from the chosen surrogate country based on its regulation, 19 C.F.R. § 351.408(c)(2), but here the uniformity preferred by the regulation is undercut not only by the lack of substantial evidence supporting the choice of the Indian WTA data but also by the Department's valuing another factor (bearing-quality steel wire rod) using Thai, not Indian, import data. *Decision Mem.* 25.

In choosing the Indian import data over the Thai data, Commerce also found that the Indian data were "representative of an 8-digit basket category, the most specific on the record to the input in question . . . ." *Id.* at 17. Both the Indian and Thai tariff data are at the level of an eight-digit subheading in a "basket" category that is not specific to bearing-quality steel bar. It is possible to view the Indian data as more specific than the Thai data because the Indian subheading contains exclusions for certain specific kinds of steel (bright bars, spring, lead bearing, sulfur bearing, and tool and die) whereas the Thai subheading excludes only bar and rod of circular cross section. However, neither eight-digit subheading is specific to the steel being valued, bearing-quality steel bar, as both are basket subheadings. Because the AUV from the Thai HTS data is closely corroborated by all record data that is specific to bearing-quality steel bar and the AUV from the Indian data is not, whatever degree of additional specificity is imparted to the result by the exclusions from the Indian subheading provides only minimal evidentiary support for the finding that the Indian HTS data are the best available information on the record for valuing the bearing-quality steel bar input.

Defendant's arguments to the court in defense of the Department's surrogate value are not persuasive. Defendant argues that the Department was not required to explain why the Indian HTS data set was superior to the Thai HTS data set because CPZ argued only that the AUV shown by the Indian HTS data was "too high," which is not "a colorable claim that the Indian import data were aberrational," according to the Department's practice. Def.'s Opp'n 22. This argument fails to recognize that the court may not affirm the Department's determination of a surrogate value unless that determination is supported by substantial evidence on the record as a whole. The strong corroboration the record provides to the AUV from the Thai HTS data and the lack of corroboration on the record for the AUV from the Indian HTS data, although given no consideration during the administrative review, must be considered by the court in applying the substantial evidence standard of review to the determination at issue. Defendant also maintains that the U.S. import data lacked any relevance to the determination of the best available information because the statute "requires that Commerce value surrogates in a market economy country that is at a comparable level of economic development" to that of China and "the United States is not considered economically comparable to China." *Id.* This argument misreads the statute in arguing that the U.S. import data had no relevance to the determination at issue. The statute contemplates the use of data from countries at a comparable level of development as the nonmmarket economy country as the source of a surrogate value; it does not prohibit Commerce from considering data from developed countries as evidence to determine which information is the best available. *See Peer Bearing*, 35 CIT at __, 752 F. Supp. 2d at 1372 ("The statute does not prohibit Commerce from considering, for corroboration purposes, record evidence consisting of prices for a commodity in a market economy country when determining which information from countries at a level of economic development comparable to China is the best available information.").

Defendant-intervenor argues that the AUV reflected by the Indian WTA data is corroborated by some U.S. import data because that value, $1,889 per metric ton, is within the range of country-specific AUVs reflected by the U.S. import data, which were as high as $10,625 per metric ton for U.S. imports originating in the United Kingdom. Timken's Resp. 26. This argument overlooks the point that Commerce was selecting from among AUVs determined for all imports occurring in a given country. The example cited by defendant-intervenor does not alter the court's conclusion that the Department's surrogate value is not supported by substantial evidence on the record of the review.

For the reasons the court has stated, substantial evidence does not exist on the record that can support the Department's decision to base the surrogate value of bearing-quality steel bar on the Indian WTA data. Commerce on remand must redetermine the surrogate value for bearing-quality steel bar and reach a result that is supported by substantial evidence on the record.

D. The Department Must Redetermine its Surrogate Value for Steel Wire Rod

Timken claims that the Department's selection of a surrogate value for one of CPZ's factors of production, "bearing-quality steel wire rod," was not supported by substantial evidence. Timken's Mem. 13–20;

Decision Mem. 25. Commerce valued this factor using WTA import data pertaining to Thai HTS subheading 7228.50.90,[16] which show an AUV of $1,559 per metric ton. *Decision Mem.* 25; *Letter from CPZ to the Sec'y of Commerce* exhibit 2 (May 21, 2009) (Admin. R. Doc. No. 5554). Also on the record were WTA import data pertaining to a different Thai HTS subheading, 7228.50.10, which show an AUV of $2,084 per metric ton. *Letter from Timken to the Sec'y of Commerce* exhibit 1 (Aug. 7, 2009) (Admin. R. Doc. No. 5591). These two Thai HTS subheadings differed only at the eight-digit level, with 7228.50.10 pertaining to articles "[of] circular cross-section," and 7228.50.90, the subheading chosen by Commerce, pertaining to a basket category for articles not of circular cross-section.

Timken argues that the Department's use of the import data that applies to articles not of circular cross-section was unlawful because "Commerce ignored record evidence that TRB wire rods were circular in shape and failed to value them using surrogate prices for circular rods (imports under Thai HS 7228.50.100)." Timken's Mem. 14. Defendant, after arguing for affirmance of the Department's decision in its response, Def.'s Opp'n 12–18, now requests a voluntary remand to reconsider this decision "in light of the factual issue raised by Timken during the proceeding concerning the shape of steel wire rod used to produce subject merchandise," Def.'s Remand Mot. 2. Defendant states that "Commerce intends to reconsider its analysis of the record; consider whether to request additional information from the parties; and issue a new determination." *Id.*

The court cannot sustain the Department's choice of a surrogate value without a finding of fact, supported by substantial record evidence, that the product being valued was not of a circular cross-section. *See Peer Bearing*, 35 CIT at __, 752 F. Supp. 2d at 1375–76. The record lacks such a finding in this case. Without such a finding,

[16] The Thai HTS provides, in pertinent part, for the following subheadings under heading 7228 ("Other bars and rods of other alloy steel; angles, shapes and sections, of other alloy steel; hollow drill bars and rods, of alloy or non-alloy steel"):

7228.10 Bars and rods, of high speed steel:
7228.20 Bars and rods, of silico-manganese steel:
7228.40 Other bars and rods, not further worked than forged:
7228.50 Other bars and rods, not further worked than cold-formed or cold-finished:

7228.50.10000 Of circular cross-section
7228.50.90000 Other

7228.60 Other bars and rods:
7228.7000000 Angles, shapes and sections:
7228.80 Hollow drill bars and rods.

Harmonized Tariff Schedule of Thailand, *available at* http://www.customsinfo.com (last visited on Nov. 21, 2011).

and in light of defendant's voluntary remand request, the court will order Commerce to redetermine this surrogate value.

IV. CONCLUSION

Commerce must reconsider its determination of the country of origin of subject merchandise finished and assembled in Thailand and must reconsider and redetermine the surrogate values for bearing-quality steel bar and bearing-quality steel wire rod. The court concludes that no relief is available on CPZ's challenge to the assessment rate Commerce applied to entries of subject merchandise made by Peer.

ORDER

Upon review of *Tapered Roller Bearings & Parts Thereof, Finished & Unfinished, from the People's Republic of China: Final Results of the 2007–2008 Admin. Review of the Antidumping Duty Order*, 75 Fed. Reg. 844 (Jan. 6, 2010) ("Final Results") and all papers and proceedings herein, it is hereby

ORDERED that the Rule 56.2 Motion for Judgment upon the Agency Record of plaintiff Peer Bearing Company - Changshan ("CPZ") be, and hereby is, GRANTED in part and DENIED in part as specified in this Opinion and Order; it is further

ORDERED that the Rule 56.2 Motion for Judgment upon the Agency Record of plaintiff The Timken Company ("Timken") be, and hereby is, GRANTED as specified in this Opinion and Order; it is further

ORDERED that the International Trade Administration, U.S. Department of Commerce ("Commerce") shall issue upon remand a redetermination ("Remand Redetermination") that complies in all respects with this Opinion and Order, is based on determinations that are supported by substantial record evidence, and is in all respects in accordance with law; it is further

ORDERED that Commerce, in preparing the Remand Redetermination in accordance with this Opinion and Order, shall reconsider, and modify as appropriate, its determination of the country of origin of subject merchandise that was finished and assembled in Thailand; it is further

ORDERED that Commerce, in preparing the Remand Redetermination in accordance with this Opinion and Order, shall redetermine the surrogate value of bearing-quality steel bar; it is further

ORDERED that Commerce, in preparing the Remand Redetermination in accordance with this Opinion and Order, shall redetermine the surrogate value of bearing-quality steel wire rod; it is further

ORDERED that Commerce shall file the Remand Redetermination no later than ninety (90) days from the date of this Opinion and Order; it is further

ORDERED that CPZ and Timken shall have thirty (30) days from defendant's filing of the Remand Redetermination to file any comments thereon; and it is further

ORDERED that defendant shall have fifteen (15) days from the filing of plaintiffs' comments in which to file any response.

Dated: November 21, 2011
New York, New York

/s/ Timothy C. Stanceu
TIMOTHY C. STANCEU JUDGE

Slip Op. 11–144

UNION STEEL, Plaintiff, v. UNITED STATES, Defendant, and UNITED STATES STEEL CORPORATION AND NUCOR CORPORATION, Defendant-Intervenors.

Before: Timothy C. Stanceu, Judge
Court No. 08–00101

[Affirming a remand redetermination addressing the application of a model-match methodology in an administrative review of an antidumping duty order and granting plaintiff's motion for reconsideration of the court's previous affirmance of the use of the zeroing methodology in that review]

Dated: November 21, 2011

Donald B. Cameron, *Julie C. Mendoza*, *R. Will Planert*, *Brady W. Mills*, and *Mary S. Hodgins*, Troutman Sanders LLP, of Washington, DC, for plaintiff.

Tara K. Hogan, Trial Attorney, Commercial Litigation Branch, Civil Division, U.S. Department of Justice, of Washington, DC, for defendant. With her on the brief were *Tony West*, Assistant Attorney General, *Jeanne E. Davidson*, Director, *Claudia Burke*, Assistant Director. Of counsel on the brief was *Daniel J. Calhoun*, Office of the Chief Counsel for Import Administration, U.S. Department of Commerce, of Washington, DC.

Robert E. Lighthizer, *Ellen J. Schneider*, and *Jeffrey D. Gerrish*, Skadden, Arps, Slate Meagher & Flom LLP, of Washington, DC, for defendant-intervenor United States Steel Corporation.

Timothy C. Brightbill and *Alan H. Price*, Wiley Rein LLP, of Washington, DC, for defendant-intervenor Nucor Corporation.

OPINION AND ORDER

Stanceu, Judge:

I. INTRODUCTION

In this action, plaintiff Union Steel Manufacturing Co., Ltd. ("Union") contests a final determination ("Final Results") issued by the International Trade Administration, U.S. Department of Commerce ("Commerce" or the "Department"), in the thirteenth administrative review of an antidumping duty order on imports of certain corrosion-resistant carbon steel flat products ("CORE" products or

"CORE") from the Republic of Korea ("Korea"). Compl.; *See Certain Corrosion-Resistant Carbon Steel Flat Products from the Republic of Korea: Notice of Final Results of the Thirteenth Admin. Review*, 73 Fed. Reg. 14,220 (Mar. 17, 2008) ("*Final Results*"). The thirteenth review applied to imports of Korean CORE ("subject merchandise") entered during the period of August 1, 2005 through July 31, 2006 (the "period of review" or "POR"). *Final Results*, 73 Fed. Reg. at 14,220. Union challenges the Department's determination in the Final Results that subject non-laminated, painted CORE products sold in the United States and laminated CORE products plaintiff sold in the home market of Korea could be compared as products "identical in physical characteristics" within the meaning of section 771(16)(A) of the Tariff Act of 1930 ("Tariff Act"), 19 U.S.C. § 1677(16)(A) (2006), a determination the court held unlawful in an opinion and order issued earlier this year. *Union Steel v. United States*, 35 CIT __, 753 F. Supp. 2d 1317 (2011) ("*Union III*"). Union also challenges the Department's use of the "zeroing methodology"[1] in the thirteenth administrative review, which use the court, in ruling on the Department's first redetermination upon remand ("First Remand Results"), upheld in an opinion and order issued in 2009. *Union Steel v. United States*, 33 CIT __, 645 F. Supp. 2d 1298 (2009) ("*Union II*"); *Final Results of Redetermination Pursuant to Remand* (Dec. 28, 2009), ECF No. 79 ("*First Remand Results*").

Before the court is the Department's determination in response to the court's second remand order ("Second Remand Results"), in which the Department, reversing the position it took in the Final Results and in the First Remand Results, determined that subject non-laminated, painted CORE may not lawfully be compared to laminated CORE as products identical in physical characteristics. *Final Results of Redetermination Pursuant to Remand* 5–8 (April 11, 2011), ECF No. 143 ("*Second Remand Results*"). As a result of this change in position, Commerce decreased Union's weighted-average dumping margin from 4.35% to 3.59%. *Id.* at 20. Also before the court is Union's

[1] The court described the zeroing methodology as follows: To calculate a weighted-average dumping margin in an administrative review, Commerce first must determine, for each entry of subject merchandise falling within the period of review, the normal value and the export price (or the constructed export price if the export price cannot be determined). Commerce then determines a margin for each entry according to the amount by which the normal value exceeds the export price or constructed export price. If the export price or constructed export price on a particular entry is higher than normal value, Commerce, in calculating a weighted-average margin, assigns a margin of zero, not a negative margin, to the entry. Finally, Commerce aggregates these individual margins in determining a weighted-average dumping margin.
Union Steel v. United States, 33 CIT __, __, 645 F. Supp. 2d 1298, 1305 (2009) ("*Union II*") (citations omitted).

motion requesting that the court reconsider the decision in *Union II* affirming the Department's use of zeroing in the thirteenth administrative review, which motion Union bases on a decision of the U.S. Court of Appeals for the Federal Circuit ("Court of Appeals") issued after the Final Results and the court's *Union II* decision. Pl. Union Steel's Mot. for Reconsideration (April 5, 2011), ECF No. 142 ("Pl.'s Mot.").

The court affirms the Department's determination that subject non-laminated CORE may not be compared with laminated CORE sold in the home market as merchandise that is identical in physical characteristics. In response to Union's motion for reconsideration, the court sets aside its previous affirmance of the Department's decision to apply zeroing in the thirteenth administrative review and determines that a remand is appropriate under which Commerce must reconsider that decision.

II. BACKGROUND

Background on this litigation is set forth in the court's prior opinions and orders and supplemented herein. *Union Steel v. United States*, 33 CIT __, __, Slip Op. 09–47, at 3–7 (May 19, 2009) ("*Union I*"); *Union II*, 33 CIT at __, 645 F. Supp. 2d at 1300–02; *Union III*, 35 CIT at __, 753 F. Supp. 2d at 1319–1320.

Plaintiff filed its motion for reconsideration on April 5, 2011, relying on the decision of the Court of Appeals in *Dongbu Steel Co. v. United States*, 635 F.3d 1363 (Fed. Cir. 2011). Pl.'s Mot. On May 9, 2011, defendant and defendant-intervenors Nucor Corporation ("Nucor") and United States Steel Corporation ("U.S. Steel") opposed this motion. Def.'s Resp. in Opp'n to Pl. Union Steel's Mot. for Reconsideration (May 9, 2011), ECF No. 151 ("Def.'s Opp'n"); Def. intervenor's Opp'n to Union Steel's Mot. for Reconsideration (May 9, 2011), ECF No. 149 ("Nucor's Opp'n"); Mem. of Def.-intervenor United States Steel Corp. in Opp'n to Pl. Union Steel's Mot. for Reconsideration (May 9, 2011), ECF No. 150 ("U.S. Steel's Opp'n").

The Department filed the Second Remand Results on April 11, 2011, in response to the court's remand order in *Union III*. *Second Remand Results*; *Union III*, 35 CIT at __, 753 F. Supp. 2d at 1333. Plaintiff commented in support of the Second Remand Results on May 11, 2011. Pl. Union Steel's Comments on the U.S. Dept. of Commerce's April 11, 2011 Final Results of Redetermination Pursuant to Ct. Remand (May 11, 2011), ECF No. 152. On May 12, 2011, defendant-intervenors filed comments in opposition to the Second Remand Results. Nucor Corp.'s Comments on Second Remand Results (May 12, 2011), ECF No. 154 ("Nucor's Comments"); United States Steel Corp.'s Comments on the Final Results of Redetermination Pursuant to Ct. Remand Issued by the Dept. of Commerce (May 12, 2011), ECF No. 153 ("U.S. Steel's Comments"). On May 26, 2011, defendant filed its reply in support of the Second Remand Results. Def.'s Resp. to Def.-intervenors' Comments on the Dept. of Commerce's Remand Results (May 26, 2011), ECF No. 164. On the same day, Union moved for leave to file a reply in support of the Second Remand Results. Pl. Union Steel's Mot. for Leave to Reply to U.S. Steel Corp. & Nucor Corp.'s May 11, 2011 Comments on the U.S. Dept. of Commerce's April 11, 2011 Final Results of Redetermination Pursuant to Ct. Remand (May 26, 2011), ECF No. 163.

III. DISCUSSION

The court exercises jurisdiction under section 201 of the Customs Courts Act of 1980, 28 U.S.C. § 1581(c) (2006), pursuant to which the court reviews actions commenced under section 516A of the Tariff Act, 19 U.S.C. § 1516a, including an action contesting the final results of an administrative review that Commerce issues under section 751 of the Tariff Act, 19 U.S.C. § 1675(a). The court "shall hold unlawful any determination, finding, or conclusion found . . . to be unsupported by substantial evidence on the record, or otherwise not in accordance with law . . . ." 19 U.S.C. § 1516a(b)(1)(B)(i).

A. The Second Remand Results Lawfully Determined that Non-Laminated, Painted CORE Was Not "Identical in Physical Characteristics" to Laminated CORE

In an administrative review, Commerce determines the normal value, the export price or constructed export price, and the dumping margin for each entry of the subject merchandise. 19 U.S.C. § 1675(a)(2). Determining a dumping margin requires Commerce to compare the U.S. sale price with the normal value, which typically is based on the price at which the foreign like product is sold for consumption in the exporting country (the "home market"). 19 U.S.C. § 1677b(a)(1)(B). The statute directs in § 1677(16)(A) that Commerce, in determining the foreign like product, first seek to compare a U.S. sale of subject merchandise with a home-market sale of merchandise "which is identical in physical characteristics with, and was produced in the same country by the same person as, that merchandise." *Id.* § 1677(16)(A). If no such comparison can be satisfactorily made, Commerce, in accordance with § 1677(16)(B), seeks to match the subject merchandise with merchandise produced in the same country, produced by the same person, that is "like that merchandise in component material or materials and in the purposes for which used," and "approximately equal in commercial value to that merchandise." *Id.* § 1677(16)(B). If the latter comparison cannot be satisfactorily made under § 1677(16)(B), Commerce is to seek to match the subject merchandise under § 1677(16)(C) with merchandise produced in the same country and by the same person that is "of the same general class or kind as the subject merchandise . . . like that merchandise in the purposes for which used . . . [and] may reasonably be compared with that merchandise." *Id.* § 1677(16)(C).

In the Final Results and the First Remand Results, Commerce rejected Union's proposal that laminated CORE comprise a separate type category for model matching purposes and accordingly included laminated CORE within the "other painted" type category. Issues & Decisions Mem., A-580–816, ARP 3–08, at 13–14 (Mar. 10, 2008) (Admin. R. Doc. No. 4563) ("*Decision Mem.*"); *First Remand Results* 1. As a result, Commerce compared, as merchandise "identical in physical characteristics" for purposes of § 1677(16)(A), subject merchandise consisting of non-laminated, painted CORE with not only home market non-laminated, painted CORE but also with Union's laminated CORE products, which Union sold in the home market, but not in the U.S. market, during the POR. *First Remand Results* 1; *Union III*, 35 CIT at __, 753 F. Supp. 2d at 1319–20 (explaining that the Department's determination that these products were the same "model-match type" meant that they were compared as identical under § 1677(16)(A)). Because it considered the comparisons to be of "identical" merchandise, Commerce did not make an adjustment ("difmer adjustment") to account for differences in the costs of manufacturing laminated and non-laminated, painted CORE. *Union III*, 35 CIT at __, 753 F. Supp. 2d at 1320–22.

The court in *Union III* held unlawful the Department's decision to compare these two sets of products as products "identical in physical characteristics." 35 CIT at __, 753 F. Supp. 2d at 1333. Citing the Department's statutory obligation, the court stated that "[s]uch comparisons are lawful only if substantial evidence on the record in this case can support a factual determination that the physical characteristics distinguishing laminated CORE products from the 'other painted,' *i.e.*, non-laminated, CORE products . . . are minor and not commercially significant." *Id.* at __, 753 F. Supp. 2d at 1322. The court then determined that substantial record evidence did not support such a factual determination, rejecting the critical findings in the First Remand Results as either insufficiently probative on the question of whether the distinguishing characteristics are minor and not commercially significant or unsupported by substantial record evidence. *Id.* at __, 753 F. Supp. 2d at 1323–31. The court found four of the Department's findings to be insufficiently probative on that question: (1) that the sale price of laminated CORE was in the same range as the sale price of non-laminated, painted CORE; (2) that laminated and non-laminated, painted CORE sold at identical prices more frequently in this POR than in the previous POR; (3) that a comparable number of customers bought both sets of products in both the thirteenth review POR and the previous POR; and (4) that the cost of manufacture of laminated CORE was in the same range as the cost of manufacture of non-laminated, painted CORE. *Id.* at __, 753 F. Supp. 2d at 1323–25. The court rejected as unsupported by record evidence the finding in the First Remand Results that laminated CORE was not marketed separately from non-laminated, painted CORE, citing record evidence consisting of Union's product brochures. *Id.* at __, 753 F. Supp. 2d at 1326–27. The court concluded in *Union III* that the record as a whole did not support a determination that laminated and non-laminated, painted CORE products were identical in physical characteristics under 19 U.S.C. § 1677(16)(A), *id.* at __, 753 F. Supp. 2d at 1327–31, set aside the First Remand Results as contrary to law, and ordered a remand, *id.* at __, 753 F. Supp. 2d at 1333. The court's remand order explained that the state of the record allowed Commerce two options. The Department's first option was to "reopen the record to reinvestigate the question of whether the physical differences that have been established to exist between laminated and non-laminated, painted CORE products are minor and commercially insignificant." *Id.* at __, 753 F. Supp. 2d at 1333. The Department's second option was to "alter the model-match methodology that was applied in the [First Remand Results] so that laminated and non-laminated, painted CORE products are not compared according to 19 U.S.C. § 1677(16)(A) . . . ." *Id.* at __, 753 F. Supp. 2d at 1333.

In the Second Remand Results, Commerce chose the second option, considering it unnecessary to reopen the record for further investigation. *Second Remand Results* 4. Noting that the record contained evidence pertaining to the cost of manufacture, sales price, production processes, and marketing of both types of CORE, the Department stated that "sufficient factual information already exists on the record for the Department to determine whether the physical differences distinguishing laminated CORE products and non-laminated, painted CORE products are minor and not commercially significant." *Id.* at 3–4. Upon reconsidering the record evidence, Commerce determined that the two groups of products were not identical in physical characteristics. *Id.* at 4. Commerce based this determination on four findings: (1) the two product groups are distinguished by significant physical differences, *id.* at 5 ("[L]aminated CORE products by their very nature are not painted products" and "are coated by attaching a plastic film to a CORE substrate . . .)"; (2) "the cost of production for laminated CORE products is higher than other non-laminated, painted CORE products," *id.* at 6; (3) "the unit price for laminated CORE products is considerably higher than the unit price of non-laminated, painted CORE products," *id.*; and (4) laminated and non-laminated products are marketed differently, the record evidence having demonstrated that "Union and Unico (Union's affiliate) both differentiate between laminated CORE products and non-laminated, painted CORE products in their brochures," *id.* at 6–7.

The Department's determination on remand not to compare laminated and non-laminated, painted CORE as products "identical in physical characteristics," 19 U.S.C. § 1677(16)(A), rests on essential factual findings that are supported by substantial evidence on the record. Specifically, the evidence justified the Department's findings that the two groups of products differed physically (because of the presence of laminate as opposed to paint) and also differed as to cost of manufacture, sales price, production processes, and marketing. The record evidence, considered on the whole, supported the finding that the physical differences had commercial significance. As the court explained in *Union III*, the record lacks substantial evidence to support the contrary determination that the physical differences are minor and commercially insignificant. *Union III*, 35 CIT at __, 753 F. Supp. 2d. at 1332–33.

Defendant intervenors advance several reasons why they believe the court should not affirm the Department's decision as set forth in the Second Remand Results. The court rejects these arguments.

Nucor argues that the Department's decision is arbitrary and not supported by substantial evidence, alleging that "[t]he Department has failed to explain why the record evidence that it previously found unconvincing or inconclusive now–after two court remands–provides a sufficient basis to make a model-match change." Nucor's Comments 3–4. The Second Remand Results, contrary to Nucor's characterizations, not only are supported by substantial evidence but contain a satisfactory explanation, grounded in the four specific findings the court recounted above, of why the record evidence is sufficient to support an ultimate determination that the two groups of products are not "identical in physical characteristics" within the meaning of the statute. *See Second Remand Results* 5–7. Regarding the justification for changing the model-match methodology, Commerce identified a compelling reason: its obligation "to comply with the statutory requirements of 19 U.S.C. § 1677(16)(A)." *Id.* at 8.

Nucor argues, further, that in light of the Department's reversing its findings on the same record, "[a]t a minimum, the Court should order the Department, on remand, to re-open the record and collect additional information on the model-match issue." Nucor's Comments 7. The court does not have a basis to order Commerce to reopen the record. As the court's decision in *Union III* recognized, Commerce has the discretion to reopen or not reopen the record in the circumstances presented here. The court emphasized that the record as it now exists does not support a finding that the physical differences between the two groups of products are minor and commercially insignificant. *Union III*, 35 CIT at __, 753 F. Supp. 2d at 1327–31. In contrast, the record contains substantial evidence to support each of the essential findings underlying the Department's determination in the Second Remand Results. In brief summary, the record reveals significant physical differences, including the major difference that laminated products are not painted products, and it contains substantial evidence that the differences have commercial significance.

Next, Nucor argues (as does U.S. Steel) that the Department's analysis was insufficient because the Second Remand Results do not explain the Department's abandoning its prior positions in these proceedings. U.S. Steel Comments 8–11; Nucor's Comments 4–7. This argument is based on the misguided premise that Commerce is obligated to provide some explanation, beyond that included in the Second Remand Results, for departing from positions the court has rejected. U.S. Steel also directs the court's attention to inconsistencies between the Second Remand Results and prior briefing in this action, U.S. Steel's Comments 10 (citing Def.'s Resp. to Pl.'s Post-Oral Argument Comments on Commerce's Remand Determination 8–9 (Sept. 24, 2010), ECF No. 130). Contrary to the implied premise of U.S. Steel's argument, Commerce has no obligation to justify departures from prior litigation positions used to defend unlawful determinations.

Finally, Nucor objects that Commerce is reversing its position "based on the data and views of one CORE producer" who "only began challenging the Department's model-match before this Court after the 13th review," and that "there is no evidence on the record that the model-match hierarchy proposed by Union is representative of the Korean CORE industry, let alone the CORE industry as a whole." Nucor's Comments 6–7. Nucor submits that approval of Union's proposal "has the potential to encourage future manipulation of the model-match criteria by respondents." *Id.* at 7. The court finds no merit in this wide-ranging objection. Union unquestionably has the right under section 516A of the Tariff Act, 19 U.S.C. § 1516a, to challenge as contrary to 19 U.S.C. § 1677(16)(A) the Department's model-match methodology as applied to its own products in the thirteenth review. As the Second Remand Results acknowledge, that methodology was applied in the review based on an unlawful determination, *i.e.*, that the non-laminated, painted CORE that Union sold in the United States during the POR and the laminated CORE that Union sold in its home market during the POR satisfied the statutory "identical in physical characteristics" standard. Union, therefore, qualifies for a remedy upon judicial review of the Final Results under which the two product groups would no longer be compared as identical. With respect to Nucor's warning of "future manipulation," Commerce correctly responded in the Second Remand Results when Nucor made this same point in comments to the Department, stating that it was bound by the definition of "foreign like product" in 19 U.S.C. § 1677(16)(A) and that "[i]n this particular case, record evidence supports the Department's decision to treat laminated CORE products as a separate type in its margin analysis." *Second Remand Results* 11.

U.S. Steel argues that Commerce failed to apply the correct legal standard in determining that the physical differences are commercially significant. U.S. Steel's Comments 4–7. According to U.S. Steel, the correct legal standard, as sustained by the Court of Appeals in *Pesquera Mares Australes Ltda. v. United States*, 266 F. 3d 1372, 1385 (Fed. Cir. 2001), is an "industry-wide" standard under which the physical differences must be recognized as commercially significant by an industry as a whole rather than by only an individual producer. U.S. Steel's Comments 5. U.S. Steel argues that Commerce erred in the Second Remand Results when it "did not apply the industry-wide standard" and instead "based its analysis solely on Union's cost of production, prices and product brochures." *Id.* U.S. Steel argues that "like the case in *Pesquera*, here there was absolutely no evidence of industry-wide acceptance of the difference between paints and laminates as a commercially meaningful difference." *Id.* at 5–6. This was legal error, U.S. Steel maintains, because Commerce was obliged to supply a reasoned analysis upon changing its prior policies and standards and because the Court of Appeals "determined that commercial significance was properly based on industry-wide standards, rather than the claims of a single producer or individual customer preferences, in order to avoid the risk of manipulation." *Id.* at 6–7.

U.S. Steel's argument misconstrues the holding in *Pesquera*. In that decision, the Court of Appeals cited approvingly the Department's relying on industry-wide standards for concluding that there was no commercially significant difference between "premium" salmon and "super-premium" salmon. *Pequera*, 266 F.3d at 1385. The Court of Appeals opined on the advantage of industry-wide standards in the context of the issue before it, which arose because the two grades of salmon were shown by record evidence to differ in only minor, commercially insignificant respects, such as the presence of certain minor aesthetic flaws. *Id.* at 1383–85. The Court of Appeals upheld the Department's comparing as identical sales of salmon meeting a quality grade of "super premium" with sales of salmon meeting only the quality grade of "premium" because Commerce found that most industry participants did not distinguish between the two grades, which finding was supported by substantial evidence. *Id. Pesquera* does not hold that Commerce must find a basis in commercially-established, industry-wide product standards before concluding that *any* two groups of products are not "identical in physical characteristics" within the meaning of 19 U.S.C. § 1677(16)(A).

U.S. Steel is also incorrect in arguing that Commerce erred by departing from a past policy or standard without a reasoned analysis. U.S. Steel's Comments 6–7. U.S. Steel overlooks the essential point that the court already has held contrary to law the "past policy or standard," *i.e.*, the existing CORE model-match methodology, as that methodology was applied to Union's products in the thirteenth review. The argument also mischaracterizes the Second Remand Results. Commerce, whether or not required to do so, gave a compelling reason for changing its established model-match methodology for CORE in response to the court's remand order, *i.e.*, the need to comply with the requirement that merchandise compared under § 1677(16)(A) be identical in physical characteristics. *See Second Remand Results* 11.

Finally, U.S. Steel argues that the Second Remand Results inadequately analyze the factual record, impermissibly reaching, on the same evidence, findings of fact that are the opposites of those on which Commerce based its earlier decision. U.S. Steel's Comments 4–11. According to U.S. Steel, "Commerce has simply recited facts that it previously rejected and has decided to rely on them without any analysis" and "at the very least should have reserved decision on the model match question and re-opened the record." *Id.* at 11. U.S. Steel urges that "[at] a minimum, Commerce must now be required to explain how evidence that was previously found to be insufficient, inconclusive or distortive can now constitute substantial evidence and serve as the basis for its determination." *Id.* at 11–12. This argument is meritless. The court already has found contrary to law –either as non-probative or unsupported by the record–the principal factual findings upon which Commerce reached its earlier determination. As the court discussed previously, Commerce permissibly decided against reopening the record, correctly concluding that the record contained substantial evidence to support a finding that non-laminated, painted CORE and laminated CORE are distinguished by significant physical differences, and for a finding that those physical differences have commercial significance. On remand, Commerce did not act contrary to law in reaching new findings based on the same evidentiary record.

Addressing individual findings by Commerce, U.S. Steel argues the Department's finding that laminated CORE was typically more expensive to produce than non-laminated, painted CORE not only was a "complete about-face" from the First Remand Results but also unsupported by substantial evidence. *Id.* at 11. This argument fails because substantial evidence is present on the record to support the finding. In both its original and supplemental questionnaire responses, Union stated that producing laminated CORE costs more than producing painted CORE due to more expensive raw materials and more complicated processing. *Letter from Union to the Sec'y of Commerce* 6 (Nov. 20, 2006) (Admin. R. Doc. No. 3944) ("*Union's Questionnaire Resp.*"); *Letter from Union to the Sec'y of Commerce* 20 (Feb. 2, 2007) (Admin. R. Doc. No. 4036) ("*Union's Supplemental Questionnaire Resp.*") ("Because PET film and PVC film are more expensive than the various paints used for other color coated products, including PVDF, and require more complicated processing know-how, the production cost and sales price are higher than other painted products."). Quantitative data also support this finding. The record contains data showing that in comparisons of thirty-nine sets of otherwise identical CORE products, in thirty-four instances the laminated products were more expensive to produce than the non-laminated, painted CORE products. *See* Pl. Union Steel's Post-Oral Argument Comments on Commerce's Remand Determination 9 n.5 & attachment 1 (Aug. 20, 2010), ECF No. 119.

U.S. Steel also contends, inaccurately, that Commerce improperly construed evidence that laminated and non-laminated, painted CORE go through separate production processes as establishing that these products had commercially significant physical differences. U.S. Steel's Comments 9–10. Commerce did not base its conclusion of commercial significance solely on the "the fact that different production processes happen to be used," *id.* at 9, but determined instead that different production processes resulted in the physical differences that, for various reasons grounded in record evidence, were commercially significant, *Second Remand Results* 10 ("Union's questionnaire responses, price and cost data, and product brochures all indicate that the physical differences between laminated CORE products and non-laminated, painted CORE products are neither minor nor commercially insignificant.”).

For the reasons discussed in the foregoing, the court must affirm the determination in the Second Remand Results that the subject non-laminated, painted CORE may not be compared under 19 U.S.C. § 1677(16)(A) with home-market laminated CORE as merchandise identical in physical characteristics. Based on the Department’s valid findings and the reasoning set forth in the Second Remand Results, the court affirms as the appropriate corrective action the Department’s decision to classify the laminated CORE products as a separate type category and thereby exclude Union’s home market sales of this laminated CORE from the respective comparisons. The court will deny as moot plaintiff’s motion for leave to file a reply to the comments filed by the defendant-intervenors.

B. The Court Reconsiders its Prior Decision Upholding the Use of Zeroing in the Thirteenth Review and Orders an Appropriate Remand

Plaintiff requests that the court reconsider the decision in *Union II* affirming the Department’s use of zeroing methodology in the thirteenth administrative review, arguing that the decision of the Court of Appeals in *Dongbu Steel Co. v. United States*, issued after the court’s decision in *Union II*, now establishes that the court’s decision affirming zeroing in *Union II* was incorrect. Pl.’s Mot. 1–2. In *Union II*, the court relied on decisions of the Court of Appeals upholding the Department’s use of zeroing in administrative reviews despite the Department’s having ceased applying the zeroing methodology in original investigations. *Union II*, 33 CIT at __, 645 F. Supp. 2d at 1306–09 (citing *Corus Staal BV v. United States*, 502 F.3d 1370, 1375 (Fed. Cir. 2007) (“*Corus II*”)). Plaintiff argues that these decisions are not precedents supporting the use of zeroing in this case, citing language in *Dongbu* in which the Court of Appeals stated that it had “never considered” the precise question of whether Commerce permissibly could interpret the statute to allow use of zeroing in administrative reviews even after the Department had ceased to use zeroing in investigations. Pl.’s Mot. 3–4; *Dongbu*, 635 F.3d at 1370.

The court first addresses the question of the authority under which it may reconsider its prior order. The authority under which plaintiff moves, USCIT Rule 59(a)(2), does not apply in this instance. USCIT Rule 59(a)(2) applies “[a]fter a nonjury trial” and allows the court to reconsider prior decisions when a party moves for a new trial or rehearing “not later than 30 days after the entry of the judgment or order." USCIT R. 59(b). Although the Court of International Trade previously has concluded that the concept of a "nonjury trial" encompasses matters, such as this case, decided on the agency record, *see NSK Corp. v. United States*, 32 CIT __, __, 593 F. Supp. 2d 1355, 1362 (2008), Rule 59(a)(2) does not authorize the court to hear plaintiff's motion because plaintiff's motion, filed on April 5, 2011, came more than thirty days after the court's decision in *Union II*, which was on September 28, 2009. *See Union II*, 33 CIT at __, 645 F. Supp. 2d at 1298; Pl.'s Mot; USCIT R. 6(b)(2) ("The court must not extend the time to act under . . . 59(b)"). Nothing in the court's rules, however, provides that USCIT Rule 59 is the only method by which the court can review a remand order. *See Timken Co. v. United States*, 6 CIT 76, 78, 569 F. Supp. 65, 68 (1983).

The alternative authority cited by plaintiff, USCIT Rule 60(b)(6), also is inapplicable to plaintiff's motion. *See* USCIT Rule 60(b)(6) (stating that "the court may relieve a party . . . from a final judgment, order or proceeding for . . . any other reason that justifies relief."). As the advisory notes to the Federal Rules of Civil Procedure clarify, Rule 60(b) applies only to final decisions. Fed. R. Civ. P. 60(b), advisory notes ("[I]nterlocutory judgments are not brought within the restrictions of the rule."). The court's remand order in *Union II*, however, was not a final order.

Instead, the court may reconsider its decision in *Union II* pursuant to its general authority, which is recognized by USCIT Rule 54, to reconsider a non-final order prior to entering final judgment. Rule 54 states that "any order . . . that adjudicates fewer than all the claims or the rights and liabilities of fewer than all the parties does not end the action . . . and may be revised at any time before the entry of judgment." USCIT R. 54(b). As has been observed with respect to the analogous Fed. R. Civ. P. 60(b), motions for reconsideration not subject to Rule 60(b) "are left subject to the complete power of the court rendering them to afford such relief from them as justice requires." *See* Fed. R. Civ. P. 60(b), advisory notes. This authority is recognized by at least one prior decision of this court, which stated that "the court retains the plenary power to modify or alter its prior non-final rulings, particularly where the equitable powers of the court are invoked." *Timken*, 6 CIT at 78, 569 F. Supp. at 68.[2]

The court concludes that reconsideration of its prior decision affirming the use of zeroing is warranted in this case. In two decisions

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[2] Although this court in a prior case "declin[ed] to find the authority to rehear interlocutory orders under USCIT Rule 54(b)," it did so when reconsideration under USCIT Rule 59(a)(2) remained available and thus that case did not involve the issue before the court in this case, in which the time for a motion under USCIT Rule 59 has lapsed. *NSK Corp. v. United States*, 32 CIT __, __, 593 F. Supp. 2d 1355, 1362 n.7 (2008).

issued this year, *JTEKT Corp. v. United States*, 642 F.3d 1378, 1383–85 (Fed. Cir. 2011) and *Dongbu*, the Court of Appeals has held that the final results of administrative reviews in which zeroing was used must be remanded so that Commerce may explain its interpreting the language of § 1677(35) inconsistently with respect to the use of zeroing in investigations and the use of zeroing in administrative reviews. Following the decisions of the Court of Appeals in *JTEKT Corp.* and *Dongbu*, remands to the Department for such an explanation have been ordered in previous cases before this court. *See, e.g.*, *SKF USA Inc. v. United States*, 35 CIT __, __, Slip Op. 11–121, at 16–18 (Oct. 4, 2011); *SKF USA Inc. v. United States*, 35 CIT __, __, Slip Op. 11–94, at 10–13 (Aug. 2, 2011); *JTEKT Corp. v. United States*, 35 CIT __, __, Slip Op. 11–92, at 6–10 (July 29, 2011).

The court concludes, upon reconsidering its decision in *Union II*, that it is appropriate to set aside its affirmance of the use of zeroing and to direct Commerce to provide the explanation contemplated by the Court of Appeals in *Dongbu* and *JTEKT Corp.*, each of which decisions questioned the legality of the Department's construction of § 1677(35) and declined to affirm the judgment of the Court of International Trade upholding that construction. *See Dongbu*, 635 F.3d at 1371–73; *JTEKT Corp.*, 642 F.3d at 1383–85. The issues and decision memorandum ("Decision Memorandum") that Commerce issued to accompany the Final Results attempts to explain the inconsistent interpretation of § 1677(35) using a rationale essentially the same as the one the Court of Appeals rejected in *JTEKT Corp. Decision Mem.* 5. The Decision Memorandum provides a list of differences between investigations and administrative reviews and then concludes that "[b]ecause of these distinctions," the Department's inconsistent interpretation of § 1677(35) was not "improper." *Id.* The distinctions listed in the Decision Memorandum include the different comparison methods for calculating a dumping margin in an investigation or an administrative review, *id.* at 4–5 (citing 19 U.S.C. § 1677f-1(d); 19 C.F.R. § 351.414), and the fact that investigations determine whether an antidumping duty order will be imposed, while administrative reviews establish antidumping duty assessment rates, *id.* at 5.[3]

[3] The entire discussion on the statutory construction issue reads as follows.

> The Federal Circuit (Federal Circuit) has found the language and congressional intent behind section 771(35) of the Act to be ambiguous. Furthermore, antidumping investigations and administrative reviews are different proceedings with different purposes. Specifically, in antidumping investigations, the Act specifies particular types of comparisons that may be used to calculate dumping margins and the conditions under which those types of comparisons may be used. The Act discusses the types of comparisons used in administrative reviews. The Department's regulations further clarify the types of comparisons that will be used in each type of proceeding. In antidumping investigations, the Department generally uses average-to-average comparisons,

Missing, however, is reasoning adequate to link these differences to the Department's varying constructions of the words of the statutes in the two contexts. The Court of Appeals concluded in *JTEKT Corp.* that providing this list of differences "failed to address the relevant question—why is it a reasonable interpretation of the statute to zero in administrative reviews, but not in investigations?" *JTEKT Corp.*, 642 F.3d at 1384.

The arguments other parties to this case advance in opposition to reconsideration do not persuade the court. Defendant argues that *Dongbu* does not justify reconsideration of the decision in *Union II* because *Dongbu* was limited to its unique procedural setting, in which Commerce lacked any opportunity to respond to the plaintiff's statutory interpretation argument. Def.'s Opp'n 6. The court does not read the opinion in *Dongbu* so narrowly as to consider the reasoning of *Dongbu* inapplicable here. To do so would miss the more general point that in *Dongbu*, as well as in *JTEKT Corp.*, the Court of Appeals refused to affirm a judgment of the Court of International Trade affirming the use of zeroing in an administrative review. Moreover, *JTEKT Corp.* vacated a judgment upholding the Department's use of zeroing when the Department not only had an opportunity to explain such use but did so using essentially the same rationale as Commerce offered here.

U.S. Steel argues that the court should not reconsider the decision in *Union II* upholding zeroing because *Dongbu* did not change the controlling law, instead holding the Department's inconsistent interpretation of § 1677(35) to be insufficiently explained but not necessarily unlawful. U.S. Steel's Opp'n 5–6. The court agrees with U.S. Steel's argument in one respect: *Dongbu* did not hold unlawful any conceivable construction of 19 U.S.C. § 1677(35) that allows for a different result as to the use of zeroing in investigations as opposed to reviews. It does not follow, however, that the court may not, or should

> whereas in administrative reviews the Department generally uses average-to-transaction comparisons. The purpose of the dumping margin calculation also varies significantly between antidumping investigations and reviews. In antidumping investigations, the primary function of the dumping margin is to determine whether an antidumping duty order will be imposed on the subject imports. In administrative reviews, in contrast, the dumping margin is the basis for the assessment of antidumping duties on entries of merchandise subject to the antidumping duty order. Because of these distinctions, the Department's limiting of the Final Modification to antidumping investigations involving average-to-average comparisons does not render its interpretation of section 771(35) of the Act in administrative reviews improper. Therefore, because section 771(35) of the Act is ambiguous, the Department may interpret that provision differently in the context of antidumping investigations involving average-to-average comparisons than in the context of administrative reviews.

Issues & Decisions Mem., A-580–816, ARP 3–08, 4–5 (Mar. 10, 2008) (Admin. R. Doc. No. 4563) (internal citations omitted).

not, reconsider its prior decision in *Union II* affirming the use of zeroing in the thirteenth review. To the contrary, reconsideration is appropriate now that the Court of Appeals, in *JTEKT Corp.* and *Dongbu*, has questioned the Department's statutory construction and declined to affirm judgments of the Court of International Trade that resolved zeroing claims on essentially the reasoning the court employed in *Union II*. The decisions in *JTEKT Corp.* and *Dongbu* indicate, at the least, that the Department's interpretation of § 1677(35) is unsustainable absent an explanation different from the one the Department put forth in the thirteenth review. *See JTEKT Corp.*, 642 F.3d at 1383–85; *Dongbu*, 635 F.3d at 1371–73.

Nucor's objections are similarly unpersuasive. Nucor cites the fact that Union's motion for reconsideration was filed more than thirty days after the court's decision in *Union II*, thus making reconsideration under USCIT Rule 59(a) unavailable, and also cites the inapplicability of USCIT Rule 60(b) to the non-final order issued in *Union II*. Nucor's Opp'n 2–4. Nucor's arguments do not negate the general authority of the court to reconsider non-final orders, as recognized by USCIT Rule 54(b).

In summary, remand in this case is appropriate so that Commerce may alter its decision to apply zeroing with respect to Union in the thirteenth review or, alternatively, provide an explanation as contemplated in *JTEKT Corp.* and *Dongbu*, *i.e.*, an explanation of how the language of 19 U.S.C. § 1677(35) as applied to the use of zeroing permissibly may be construed in one way with respect to investigations and the opposite way with respect to administrative reviews.

IV. CONCLUSION AND ORDER

Upon consideration of all proceedings and submissions herein, and upon due deliberation, it is hereby

ORDERED that the *Final Results of Redetermination Pursuant to Remand* (April 11, 2011), ECF No. 143 ("Second Remand Results") be, and hereby are, affirmed with respect to the decision stated therein to modify the Department's model match methodology; it is further

ORDERED that plaintiff's motion for leave to file a reply in support of the Second Remand Results be, and hereby is, DENIED as moot; it is further

ORDERED that plaintiff's Motion for Reconsideration, filed on April 5, 2011, be, and hereby is, GRANTED; it is further

ORDERED that the court's previous affirmance of the decision of the International Trade Administration, U.S. Department of Commerce ("Commerce" or the "Department") in *Certain Corrosion-Resistant Carbon Steel Flat Products from the Republic of Korea: Notice of Final Results of the Thirteenth Admin. Review*, 73 Fed. Reg.

14,220 (Mar. 17, 2008) ("Final Results") to apply the Department's zeroing methodology be, and hereby is, set aside; it is further

ORDERED that, on remand, Commerce must reconsider its decision in the Final Results to apply its zeroing methodology and must either alter that decision or explain how the language of 19 U.S.C. § 1677(35) permissibly may be construed in one way with respect to the use of the zeroing methodology in antidumping investigations and the opposite way with respect to the use of that methodology in antidumping administrative reviews, and shall recalculate any antidumping duty margin applied to plaintiff that is affected by an alteration of that decision; it is further

ORDERED that Commerce shall file the results of its remand redetermination with the court not later than sixty (60) days from the date of this Opinion and Order, and that plaintiff and defendant-intervenors shall have thirty (30) days from the date on which Commerce files its remand redetermination to file any comments thereon; and it is further

ORDERED that defendant shall be allowed fifteen (15) days from the last filing of any comments by plaintiff or defendant-intervenors in which to file a rebuttal or other response to the comments of plaintiff or defendant-intervenors.

Dated: November 21, 2011
New York, New York

/s/ Timothy C. Stanceu
TIMOTHY C. STANCEU JUDGE

Slip Op. 11–145

FORD MOTOR COMPANY, Plaintiff, v. UNITED STATES, Defendant.

Before: Judith M. Barzilay, Senior Judge
Court No. 03–00115

[The court grants Defendant's motion for summary judgment.]

Dated: November 28, 2011

Grunfeld, Desiderio, Lebowitz, Silverman & Klestadt, LLP (*Ned H. Marshak*, *Robert B. Silverman*, and *Frances P. Hadfield*) and *Paulsen K. Vandevert* (Of Counsel), for plaintiff Ford Motor Company.

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 (*Edward F. Kenny*); Office of Chief Counsel, International Trade Litigation, United States Customs and Border Protection (*Beth C. Brotman*, Of Counsel), for defendant United States.

OPINION

BARZILAY, Senior Judge:

I. Introduction

This case returns to the court on remand from the Court of Appeals for the Federal Circuit. *See Ford Motor Co. v. United States*, 635 F.3d 550 (Fed. Cir. 2011). In its motion for summary judgment, Plaintiff Ford Motor Company ("Ford") challenges U.S. Customs and Border Protection's ("Customs") denial of Ford's claims for reliquidation of certain entries and a refund of duties pursuant to 19 U.S.C. § 1520(d). Pl.'s Br. 8–28. Defendant United States cross-moves for summary judgment, arguing that the § 1520(d) claims were untimely because Ford did not file its North American Free Trade Agreement ("NAFTA") certificates of origin – a requisite component of the claims – within one year of importation.[1] Def.'s Br. 5–15. Plaintiff responds that Customs' regulation 19 C.F.R. § 10.112 excuses the late filing of its certificates. Pl.'s Br. 8–11, 13–20; Pl.'s Resp. 6–15. The court has jurisdiction pursuant to 19 U.S.C. § 1581(a). For the reasons below, the court grants Defendant's motion for summary judgment and denies Plaintiff's motion for summary judgment.

II. Background

Between January 1997 and January 1999, Ford imported certain automotive parts into the United States from Canada. Def.'s Br. 2. The parties have agreed to use Entry No. 2312787386–9, imported on June 27, 1997, as a representative entry to resolve the legal issues before the court. Def.'s Resp. to Pl.'s Statement of Undisputed Material Facts ("Undisputed Facts") 1–2. Ford did not at the time of entry assert that the goods were eligible for duty-free treatment under NAFTA and Customs liquidated the goods as entered. Undisputed Facts 2. On May 13, 1998, Ford electronically filed post-importation Claim No. 3801–98–351235 and therein sought a refund of the duties it paid and reliquidation of its entry pursuant to § 1520(d). Undisputed Facts 3. Ford did not submit copies of the certificates of origin for this entry until November 5, 1998, more than one year after the date of importation. Undisputed Facts 4. Customs at the Port of Detroit denied Ford's claim, stating that "[t]he NAFTA Certificate of Origin was not furnished within one year of the date of importation."

[1] Defendant also argues that Customs properly denied the protest on the grounds that Ford failed to make statements that satisfy the regulatory requirements for a valid § 1520(d) claim. Def.'s Br. 15–16. Plaintiff counters that Ford's statements substantially complied with the applicable regulations. Pl.'s Br. 24–28. Because the court finds that the claim was untimely, and thus otherwise invalid, it is unnecessary to reach this question.

Undisputed Facts 5. Ford protested the denial of its § 1520(d) claim and Customs denied this protest on the same grounds on August 29, 2002. HQ 228654 (Aug. 29, 2002), *available at* 2002 WL 31641984. Ford challenged this denial before the court. On January 12, 2010, the court held that it did not have jurisdiction to hear Ford's suit on the grounds that Customs had not made a protestable decision in denying Ford's refund claim. On March 21, 2011, however, the Federal Circuit reversed and remanded the case for further proceedings. *See Ford Motor Co.*, 635 F.3d 550.

III. Standard of Review

An action warrants summary judgment "if the pleadings, discovery and disclosure materials on file, and any affidavits show that there is no genuine issue as to any material fact and that the movant is entitled to judgment as a matter of law." USCIT R. 56(c). "A material fact is one that might affect the outcome of the suit under the governing law." *Marriott Int'l Resorts, L.P. v. United States*, 586 F.3d 962, 968 (Fed. Cir. 2009) (quoting *Anderson v. Liberty Lobby Inc.*, 477 U.S. 242, 248 (1986)) (internal quotation marks omitted).

The Court reviews Customs' denial of a protest *de novo*. 28 U.S.C. § 2640(a)(1). A Customs decision does not enjoy a statutory presumption of correctness on questions of law, *Universal Elecs. v. United States*, 112 F.3d 488, 492 (Fed. Cir. 1997), but may be entitled to "respect proportional to its 'power to persuade.'" *United States v. Mead Corp.*, 533 U.S. 218, 220 (2001) (quoting *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944)). The degree of respect the Court accords "will depend upon the thoroughness evident in [Customs'] consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade, if lacking power to control." *Skidmore*, 323 U.S. at 140.

IV. Discussion

Under NAFTA Article 502(3), importers may file post-importation claims for refunds of duties paid on goods that would have qualified for preferential tariff treatment when entered. North American Free Trade Agreement art. 502(3), Dec. 17, 1992, 32 I.L.M. 289 (1993). Congress codified this provision in § 1520(d), which, like Article 502(3), requires that refund claims be filed "within 1 year after the date of importation" and include (1) "a written declaration that the good qualified under the applicable rules at the time of importation," (2) "copies of all applicable NAFTA Certificates of Origin," and (3) "such other documentation and information relating to the importation of the goods as the Customs Service may require."[2] § 1520(d)(1)-(3). As directed by the statute, Customs enacted implementing regulations that reaffirm the one-year time limitation on refund claims, *see* 19 C.F.R. § 181.31, and specify five requisite components of a claim, including copies of all certificates of origin for the entries, *see* § 181.32(b)(1)-(5).

Plaintiff argues that § 1520(d) and the governing regulations do not require importers to file the certificates of origin within one year. Pl.'s Br. 11–12; Pl.'s Resp. 13–14. Instead, Plaintiff interprets the time restriction as applying only to § 1520(d) "claims," as distinguished from the accompanying certificates.[3] Pl.'s Br. 11–12; Pl.'s Resp. 13–14.

Customs rejected this argument in its denial of Ford's protest. *See* HQ 228654. There, Customs found that a valid refund claim exists only when the importer has filed *all* the documentation that § 1520(d) and § 181.32(b)(1)-(5) require, including copies of applicable certificates of origin. *Id.* at 7. Customs noted that no language in the statute or regulations restricts the one-year limitation to only the first element of the claim, the written declaration. *Id.*; *see* § 1520(d)(1); § 181.32(b)(1). Following this clear logic, Customs concluded that importers must file all components of a claim, including copies of the certificates of origin, within one year of importation.[4] HQ 228654 at 7–8, 12–14.

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[2] On October 21, 2011, while this case was pending before the court, Congress amended § 1520(d) to extend its application to goods entered under three additional trade agreements. *See* United States – Panama Trade Promotion Agreement Implementation Act, Pub. L. No. 112–43, § 206, 125 Stat. 487, 520 (2011); United States – Columbia Trade Promotion Agreement Implementation Act, Pub. L. No. 112–42, § 206, 125 Stat. 462, 484 (2011); United States – Korea Free Trade Agreement Implementation Act, Pub. L. No. 112–41, § 205, 125 Stat. 428, 449 (2011).

[3] Much of the instant dispute arises out of a confusion regarding what constitutes a "claim" within the meaning of § 1520(d) and § 181.31. Plaintiff's framing of the issue is understandable: A claim exists when the importer files a request with Customs for a refund of duties and alleges its goods qualified for duty-free treatment. A certificate of origin must accompany, but is distinct from, the refund "claim." *See generally* Pl.'s Br. The Federal Circuit, in holding that the court has jurisdiction, distinguished between "notice of a party's § 1520(d) claim" and the accompanying "certificate of origin." *Ford Motor Co.*, 635 F.3d at 557. The Federal Circuit limited its holding, however, to the issue of jurisdiction and explicitly recognized the distinction "between the jurisdictional nature of the requirement that notice of a § 1520(d) claim be timely filed . . . and the non-jurisdictional nature of a § 1520(d) claim's content requirements such as certificates of origin." *Id.* at 556 (noting "§ 1520(d)'s formalities, such as timely filing a certification of origin"). On remand, this court focuses on the substantive requirements for a NAFTA refund claim. In that vein and as is discussed *infra*, the court adopts Customs' position that copies of certificates of origin are necessary components of a valid § 1520(d) claim.

[4] Customs noted, however, that the certificates need not accompany the written declaration, so long as they are filed within one year of importation. HQ 228654 at 11.

The analysis in HQ 228654 is thorough and well-reasoned. Customs grounded its conclusions in the plain language of § 1520(d) and §§ 181.31-.32 and responded adequately to Ford's arguments on protest (some of which Ford now repeats before the court). *See id.* at 8–15. Notably, Customs' interpretation accords with the court's own, *de novo* reading of the relevant authority. The court therefore finds that HQ 228654 is entitled to *Skidmore* deference and that § 1520(d) and the implementing regulations require importers to file within one year of importation copies of applicable certificates of origin.[5]

Plaintiff avers that the one-year limitation cannot apply to all elements of a § 1520(d) claim because the final statutory element, § 1520(d)(3), requires importers to supply "such other documentation and information" that Customs may require. Pl.'s Br. 12–13. Ford reasons that Customs could request additional information from importers pursuant to this subsection more than one year after importation and that, as a result, the court cannot interpret the one-year requirement as extending to all elements of the claim. Pl.'s Br. 12–13. As noted, Customs has already enumerated the requisite "other documentation and information" in subsections (3) through (5) of § 181.32(b). *See* § 181.32(b)(3)-(5); s*ee also* HQ 228654 at 14. These subsections require the importer to file certain information regarding third parties' knowledge of the entries and other existing claims and protests. *See* § 181.32(3)-(5). Importers must similarly file these statements within one year of importation. *See id.*; *see also* HQ 228654 at 14. This argument is therefore unavailing.

The court turns next to Plaintiff's argument that § 1520(d) must be read in harmony with Customs' regulation § 10.112. Because the statute directs that refund claims be administered "in accordance with regulations prescribed by [Customs]," Plaintiff maintains that § 10.112 applies and excuses the untimely filing of its certificates of origin. Pl.'s Br. 8–11, 13–20; Pl.'s Resp. 6–15. Section 10.112 provides that

> [w]henever a free entry or a reduced duty document, form, or statement required to be filed in connection with the entry is not filed at the time of the entry or within the period for which a bond was filed for its production, but failure to file it was not due to willful negligence or fraudulent intent, such document, form,

[5] The court agrees with Defendant that Plaintiff's reference to Customs' Reconciliation Program, which waives the necessity of submitting certificates of origin with refund claims, is inapposite. Def.'s Resp. 16–18. Plaintiffs' entries were not subject to the program and the court's inquiry must focus on the statutory and regulatory scheme which governed Plaintiff's entries.

> or statement may be filed at any time prior to liquidation of the entry or, if the entry was liquidated, before the liquidation becomes final.

19 C.F.R. § 10.112. The Court has previously found that this "remedial regulation" deserves broad interpretation. *See, e.g.*, *Gulfstream Aerospace Corp. v. United States*, 21 CIT 1083, 1096–97, 981 F. Supp. 654, 667 (1997) ("*Gulfstream*"); *Aviall of Tex., Inc. v. United States*, 18 CIT 727, 732–33, 861 F. Supp. 100, 105 (1994) ("*Aviall*"). The Federal Circuit has cautioned, however, "that an importer cannot use section 10.112 to circumvent the clear mandate of NAFTA and 19 U.S.C. § 1520(d) . . . ." *Xerox Corp. v. United States*, 423 F.3d 1356, 1365 (Fed. Cir. 2005) ("*Xerox*").

In deciding whether § 10.112 applies to the NAFTA refund scheme governed by § 1520(d) and §§ 181.31-.32, the court must "attempt to give full effect to all words contained within th[e] statute [and] regulation[s], thereby rendering superfluous as little of the statutory or regulatory language as possible." *Glover v. West*, 185 F.3d 1328, 1332 (Fed. Cir. 1999); *accord Duncan v. Walker*, 533 U.S. 167, 174 (2001) ("It is our duty to give effect, if possible, to every clause and word of a statute." (citation and quotation marks omitted)). For this reason, Plaintiff's argument fails. Adopting Plaintiff's position (that § 10.112 allows an importer to file its certificates of origin more than one year after importation) would force the court to read out of the statute and regulations the clear instruction that importers must file "within 1 year after the date of importation . . . a claim that includes . . . copies of all applicable NAFTA Certificates of Origin." § 1520(d); *accord* § 181.31, .32(b)(2). The importance to the NAFTA refund scheme of these two requirements – that (1) claims be filed within one year and (2) include copies of certificates of origin – is obvious. These obligations are thrice repeated in NAFTA, the corresponding statute, and Customs' implementing regulations. Moreover, the legislative history of § 1520(d) "overwhelmingly reiterates the one-year time period for claiming entitlement to a refund premised on NAFTA eligibility." *Xerox Corp.*, 423 F.3d at 1362; *see* H.R. Rep. No. 103361(I), at 38 (1993) ("In order to qualify for such reliquidation, the importer must, within one year after the date of importation, file a NAFTA claim in accordance with the implementing regulations, which includes . . . copies of all applicable NAFTA certificates of origin . . . ."); S. Rep. No. 103–189, at 22 (1993) (same). The court cannot read § 10.112 to ease the content requirements for claims under § 1520(d) and § 181.31-.32 as it would render fundamental aspects of the statute and regulations void.[6]

This conclusion is bolstered by the nature of the regulations at issue. In balancing the strict one-year requirement of § 181.31 with the permissive allowance of § 10.112, the court must prefer the specific regulation to the general one. *See Arzio v. Shinseki*, 602 F.3d 1343, 1347 (Fed. Cir. 2010) ("A basic tenet of statutory construction is that a specific statute takes precedence over a more general one. . . . This canon of construction applies to the interpretation of regulations as well as statutes."). Customs drafted § 181.31 to apply expressly to post-importation claims for refunds of duties in cases where no claims for preferential tariff treatment were filed at entry. In so doing, Customs drafted the regulation to mirror the requirements provided by the statute, which, in turn, mirrors NAFTA Article 502(3).[7] In contrast, § 10.112, enacted in 1960, is a broad provision with undefined boundaries which makes no reference to NAFTA refund claims or reliquidation. *See* § 10.112. Sections 181.31 and 181.32 undoubtedly control over this more general regulation.

Unfortunately for Plaintiff, reliance upon *Aviall* and *Gulfstream* is unhelpful in this context. Pl.'s Br. 17–20. While these cases highlight the broad reach of § 10.112, including its preeminence over other (mandatory) regulatory provisions, neither address the issue of whether § 10.112 would apply if its application would render meaningless *statutory* (and treaty-based) requirements.[8] *See Gulfstream*,

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[6] Defendant argues that § 10.112 is inapplicable because the regulation covers only forms and documents required *at the time of entry*, which NAFTA certificates of origin are not. Def.'s Br. 11–14; Def.'s Reply 8–12. The court is skeptical of this interpretation as it is at variance with the plain language of the regulation and appears to be needlessly restrictive. *See* § 10.112. Nevertheless, because § 10.112 otherwise does not cover certificates of origin required for § 1520(d) claims, the court need not resolve this issue.

[7] Section 181.33 also explicitly addresses Customs' authority to deny NAFTA refund claims: "The port director may deny a claim for a refund filed under this subpart if the claim was not filed timely, [or] if the importer has not complied with the requirements of this subpart . . . ." § 181.33(d)(1).

[8] Unlike *Aviall* and *Gulfstream*, the court in *Corrpro Cos. v. United States*, 28 CIT 1523 (2004) (not reported in F. Supp.), *rev'd on other grounds*, 433 F.3d 1360 (Fed. Cir. 2006) ("*Corrpro*"), squarely addressed the issue of whether § 10.112 excuses the late filing of certificates of origin for § 1520(d) purposes. Adopting the reasoning in *Aviall* that § 10.112 "does not limit its application to certain documents" and should be interpreted broadly, the court held that § 10.112 applies to NAFTA refund claims: "[T]he Court holds that 19 C.F.R. § 10.112 supercedes 19 C.F.R. §§ 181.31 and 181.32 . . . . [U]nder [§ 10.112], Corrpro may submit its NAFTA Certificates of Origin at any time prior to liquidation, barring willful negligence or fraudulent intent in compliance." *Corrpro Cos.*, 28 CIT at 1532. The Federal Circuit reversed this holding on alternative (jurisdictional) grounds. *See Corrpro Cos.*, 433 F.3d 1360. Only in dicta did the Federal Circuit discuss the requirements for a § 1520(d)

21 CIT at 1096–97, 981 F. Supp. at 667; *Aviall*, 18 CIT at 732–33, 861 F. Supp. at 105. As discussed, the court believes that it cannot. Accordingly, § 10.112 does not excuse the late filing of NAFTA certificates of origin for § 1520(d) refund claims.

V. Conclusion

The court recognizes that, in attempting to obtain preferential tariff treatment, Ford was operating in a nascent legal regime with fastidious rules for importation. Nonetheless, the court must respect Customs' lawful adherence to the controlling statute and regulations. For the reasons stated, it is hereby

ORDERED that Defendant's motion for summary judgment is granted, and it is further

ORDERED that Plaintiff's motion for summary judgment is denied.

Dated: November 28, 2011
New York, NY

/s/ Judith M. Barzilay
JUDITH M. BARZILAY, SENIOR JUDGE

Slip Op. 11–146

SINCE HARDWARE (GUANGZHOU) CO., LTD., Plaintiff, v. UNITED STATES, Defendant, and HOME PRODUCTS INTERNATIONAL, LTD., Def.-Int.

Court No. 09–00123

[Plaintiff's motion for judgment on the agency record sustained, in part, and the case is remanded.]

Dated: November 29, 2011

Dorsey & Whitney LLP (*William E. Perry*), for plaintiff.

Tony West, Assistant Attorney General; *Jeanne E. Davidson*, Director, *Patricia M. McCarthy*, Assistant Director, Commercial Litigation Branch, Civil Division, United States Department of Justice (*David S. Silverbrand* and *Carrie A. Dunsmore*); Office of

claim: "In order to make a valid NAFTA claim, an importer must submit a written declaration and the appropriate Certificates of Origin. An importer may not circumvent these statutory and regulatory requirements." *Id.* at 1365 (internal citations omitted); *accord Xerox Corp.*, 423 F.3d at 1365 ("Simply put, we may not construe 19 C.F.R. § 10.112 to increase the one-year time period for making a post-importation NAFTA claim and thus increase the Court of International Trade's jurisdiction . . . ."). The court believes the Federal Circuit's dicta in *Corrpro* and its jurisdictional holding in *Xerox*, while not controlling, nevertheless cancel the persuasive weight the court would normally give to a previous decision by this Court. *See Nucor Corp. v. United States*, 32 CIT __, ___, 594 F. Supp. 2d 1320, 1380 n.47 (2008) (noting that "intervening changes in governing law necessarily affect the persuasive authority of previous decisions of the [Court]").

Chief Counsel for Import Administration, United States Department of Commerce (*Thomas M. Beline*), of counsel, for defendant.

Blank Rome LLP (*Frederick L. Ikenson*, *Peggy A. Clarke*, and *Larry Hampel*), for defendant-intervenor.

OPINION AND ORDER

Eaton, Judge:

INTRODUCTION

Before the court is the Department of Commerce's (the "Department" or "Commerce") Final Results of Redetermination Pursuant to Remand, dated February 17, 2011 ("Remand Results"). The matter was remanded by the court following plaintiff Since Hardware (Guandozhou) Co., Ltd.'s ("Since Hardware" or "plaintiff") motion for judgment on the agency record pursuant to USCIT R. 56.2, *Since Hardware (Guangzhou) Co. v. United States,* 34 CIT __, __, Slip Op. 10–108 at 22 (Sept. 27, 2010) (not reported in the Federal Supplement) ("*Since Hardware I*"), which challenged Commerce's final results of the Third Administrative Review of the antidumping order on ironing boards from the People's Republic of China (the "PRC") for the period of review ("POR") August 1, 2006 through July 31, 2007, Floor Standing Metal-Top Ironing Tables and Certain Parts Thereof from the PRC, 74 Fed. Reg. 11,086 (Dep't of Commerce Mar. 16, 2009) (final results) and the accompanying Issues and Decision Memorandum ("Issues & Dec. Mem.") (collectively, the "Final Results").

In the Final Results, the Department found that Since Hardware's questionnaire responses concerning its factors of production were so unreliable that the application of adverse facts available ("AFA") under 19 U.S.C. § 1677e(b)(2006) was warranted, not only for determining the company's dumping margin, but also in determining whether it operated free from the control of the PRC government.[1] Based on this determination, the Department concluded that Since Hardware was not entitled to a company-specific rate and, therefore, it was assigned the PRC-wide rate of 157.68%.[2]

In its motion for judgment on the agency record, plaintiff challenged, inter alia, the Department's findings with respect to its

[1] The court sustained Commerce's determination to apply AFA with regard to Since Hardware's factors of production because "it is clear that the Department acted reasonably in determining that it could not rely on the material the company placed on the record relating to the country of origin and valuation of the factors of production." *Since Hardware I,* 34 CIT at __, Slip Op. 10–108 at 20.

[2] Whether Since Hardware is entitled to have a company-specific rate assigned to it is an issue because the company operates in the PRC, which is a non-market economy country. A non-market economy country includes "any foreign country that [Commerce] determines does not operate on market principles of cost or pricing structures, so that sales of merchandise in such country do not reflect the fair value of the merchandise." 19 U.S.C.

separate-rate status. On this issue, the court held that Commerce's decision to deny Since Hardware separate-rate status was unsupported by substantial evidence and contrary to law because

> [a]n examination of the record . . . reveals that none of the unreliable information submitted by the company is relevant to the question of government control. . . . [T]he evidence that the company was not controlled by the government (e.g., documentation substantiating its claims that it is a wholly foreign-owned enterprise registered in the PRC . . . and evidence regarding de facto control over its export activities) is far removed from questions relating to the origin of the factors of production and their cost.

See Since Hardware I, 34 CIT at __, Slip. Op. 10–108 at 15. Accordingly, on remand, the Department was instructed to "reexamine the record to again determine if Since Hardware has produced evidence sufficient to qualify for application of a separate rate" in the assignment of its antidumping duty rate. *Id.* at 22.

On remand, Commerce again declined to evaluate the merits of plaintiff's evidence that it was not subject to government control. Rather, the Department determined that Since Hardware failed to meet its burden of proving its independence from government control. Commerce reached this determination by concluding that the company's responses to Commerce's separate-rate questionnaires could only be verified by reviewing Since Hardware's accounting records, which had previously been determined to be unreliable. Remand Results at 2. In other words, Commerce found that plaintiff's separate-rate questionnaire responses were unverifiable and, therefore, could not be considered as evidence. Based on this finding, Commerce determined that plaintiff had failed to establish that it was entitled to a separate rate, and retained its determination to assign the company the PRC-wide rate of 157.68%.

Plaintiff filed its comments challenging the Remand Results on

§ 1677(18)(A); *Shandong Huarong Gen. Group Corp. v. United States*, 28 CIT 1624, 1625 n.1 (2004) (not reported in the Federal Supplement). The PRC has been determined to be a non-market economy country and has been treated as such in all past antidumping investigations. *Zhejiang Native Produce & Animal By-Products Imp. & Exp. Corp. v. United States*, 27 CIT 1827,1834 n.14 (2003) (not reported in the Federal Supplement) (citations omitted).

When an exporter operates in a non-market economy country, Commerce presumes it to be part of a country-wide entity controlled by that country's government. If that exporter can establish that it is free from government control, however, it is entitled to have its own "separate rate" based on its own factors of production and sales data, or if AFA is applicable, by an acceptable method.

March 31, 2011. *See generally Pl.'s Objs. to Rem. Res.* ("Pl.'s Cmnts."). The court has jurisdiction pursuant to 28 U.S.C. § 1581(c) and 19 U.S.C. § 1516a(a)(2)(B)(i). For the reasons stated below, the matter is remanded to Commerce with instructions.

STANDARD OF REVIEW

The standard of review is set forth in 19 U.S.C. § 1516a(b)(1)(B)(i), which provides, in relevant part, that the court "shall hold unlawful any determination, finding, or conclusion found . . . to be unsupported by substantial evidence on the record, or otherwise not in accordance with law." Accordingly, "Commerce's determinations of fact must be sustained unless unsupported by substantial evidence in the record and its legal conclusions must be sustained unless not in accordance with law." *Norsk Hydro Canada, Inc. v. United States*, 472 F.3d 1347, 1357 (Fed. Cir. 2006).

DISCUSSION

I. Remand Results

In the Remand Results, Commerce noted that Since Hardware bears the burden of establishing its entitlement to a separate rate by demonstrating both de jure and de facto independence from the Chinese government. *See Sigma Corp. v. United States,* 117 F.3d 1401, 1405 (Fed. Cir. 1997). In determining whether de jure independence is established, Commerce looks for: "(1) [a]n absence of restrictive stipulations associated with an individual exporter's business and export license; (2) any legislative enactments decentralizing control of companies; or (3) any other formal measures by the government decentralizing control of companies." *Fujian Mach. & Equip. Imp. & Exp. Corp. v. United States*, 25 CIT 1150, 1172, 178 F. Supp. 2d 1305, 1329 (2001) (citations omitted); Remand Results at 4.

The Department considers four factors in determining de facto independence:

> (1) [w]hether the export prices are set by, or are subject to the approval of, a governmental authority; (2) whether the respondent has authority to negotiate and sign contracts and other agreements; (3) whether the respondent has autonomy from the government in making decisions regarding the selection of management; and (4) whether the respondent retains the proceeds of its export sales and makes independent decisions regarding disposition of profits or financing of losses.

Coal. for the Pres. of Am. Brake Drum & Rotor Aftermarket Mfrs. v. United States, 28 CIT 447, 457; 318 F. Supp. 2d 1305, 1313 (2004) (citations omitted); Remand Results at 4.

On remand, Commerce determined that Since Hardware established de jure independence[3] because it "provided a copy of its business license issued by the Guangzhou Municipal Industrial and Commercial Administration, and relied upon the Foreign Trade Law which establishes a decentralization of government control over business operations." Remand Results at 5.

The Department further determined, however, that the company failed to establish its de facto independence from the PRC government because its separate-rate claim necessarily relied on the same accounting records that the Department found to be undependable in the Final Results. According to Commerce:

> [t]he respondent's books and records, including accounting documentation, especially in those cases in which the respondent cites to its books and records to support its claimed independence, are tied to the determination regarding separate rate eligibility. The Department previously found, and the court affirmed, that Since Hardware's submitted accounting ledgers included unreliable data related to market economy purchases.

Remand Results at 4. Thus, the Department takes the position that it was required to reject the company's answers to the separate rate questionnaires because they were unverifiable since they were based on the discredited records.

Specifically, the Department states that it "examined the relevance of the books and records [found unreliable in the Final Results] to the separate rate issue with respect to the statements made by Since Hardware that supports a de facto determination. In examining this question, we find a critical nexus between certain statements made by Since Hardware and the company's books and records." Remand Results at 6. Commerce found the "critical nexus" to be that plaintiff's

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[3] In its Draft Results of Redetermination, the Department determined that Since Hardware had not established dejure independence because it did not disclose a "change" in its ownership structure, and this non-disclosure precluded the Department from further inquiring into the nature of the company's ownership. Commerce, therefore, "conclude[d] that this contradiction in Since Hardware's responses, by itself, renders Since Hardware's separate rate portion of its questionnaire response unreliable for granting Since Hardware a separate rate." Draft Results of Redetermination at 7. Following receipt of Since Hardware's comments to the Draft Results, however, the Department acknowledged that, as a result of an oversight, it had failed to *see* that Since Hardware's responses to the Department's questionnaires concerning the company's ownership structure were consistent and, therefore, they supported a conclusion that it had established de jure independence. Remand Results at 2.

questionnaire responses concerning the first and fourth factors in the de facto independence analysis ((1) the setting of export prices and (4) the retention of proceeds and disposition of profits or financing of losses) could only be verified by examining the company's accounting records, which had already been determined to be unreliable.[4] Remand Results at 6.

In reaching this conclusion, the Department relied solely on the verification procedures used in connection with Since Hardware's separate rate application during the First Administrative Review.[5] After placing its verification report from the First Administrative Review on the record, the Department found that the verification procedures used in that review required it to examine Since Hardware's accounting records to verify the company's claim that it set its own sales prices and independently determined how to dispose of its profits or finance its losses. *See* Remand Results at 14 ("As detailed . . . in the Department's verification report [from the First Administrative Review], the Department verifiers conduct financial traces through each aspect of the respondent's accounting system.").

With regard to the "setting of export price" factor, in this Third Administrative Review, Since Hardware answered the Department's questionnaires, in part, by stating that it "based prices for its . . . U.S. sales . . . on the production costs, taking into consideration overhead and administrative expenses, profit and other expenses incurred during the ordinary course of business." Since Hardware's Section A Questionnaire Responses, dated Oct. 25, 2007 (C.R. Doc. 2) (P.R. Doc. 15) ("Section A Questionnaire Response") at 6. Stated differently, Since Hardware maintained that, at least in part, it set export prices based on its production costs and profit objectives.

Commerce found that "[b]ecause Since Hardware's Section A questionnaire response implicates its production costs and profit in making export pricing decisions, the Department examines certain accounting records during a verification of a respondent." Remand Results at 7. The Department went on to find that "[t]he separate rate response given . . . cites to specific accounting ledgers and implicates

[4] The Department determined that Since Hardware's responses regarding the second and third de facto independence factors (authority to negotiate and sign contracts; and autonomy from government in selection of management) supported a conclusion of independence.

[5] The First Administrative Review covered the POR February 3, 2004 through July 31, 2005. Plaintiff argues that the Department is required to evaluate each segment of the proceedings separately and, thus, it was improper to use evidence from prior segments to support its conclusion in this review. Commerce, however, merely relied on its prior verification report as the source of its verification procedures, rather than evidence of Since Hardware's lack of independence from the PRC government. Accordingly, the Department's mere reference to that verification report is not unlawful.

the production costs ledger in the accounting records. Under accounting principles, and as evidenced by Department verification, these ledger accounts must tie into the general ledger, which in turn ties into the financial records.” Remand Results at 8.

As has been noted, in the Final Results the Department found that these ledgers were unreliable because Since Hardware had misrepresented the source and cost of several of its manufacturing inputs. In *Since Hardware I*, the court sustained the determination that the company’s accounting records were unreliable. *See Since Hardware I*, 34 CIT at __, Slip Op. 10–108 at 20. Thus, Commerce determined that the company’s questionnaire responses concerning how it set its export prices could not support a finding of de facto independence because “[w]ithout reliable accounting ledgers, the Department cannot verify this prong of the separate rates [sic] test.” Remand Results at 8.

With regard to the fourth factor, concerning the company’s retention and use of sales proceeds, Since Hardware responded, in part, to the Department’s questionnaire by stating that it “deposit[s] export earnings into [its] respective bank accounts,” and “[t]he board of directors determines the disposition of profits.” Section A Questionnaire Response at 8–9. When asked whether it is required to exchange its foreign currency for domestic currency, the company responded that it was not, but rather it “use[s] foreign currency earned on the sale of subject merchandise to fund its operational expenses.” Section A Questionnaire Response at 9–10. In other words, as part of its response to the Department’s questionnaires, Since Hardware claimed that it retained the profits it earned on export sales, which it either deposited in bank accounts or used to fund its operations.

As with the submissions regarding the first factor, the Department found that it “is unable to rely upon the statements concerning export proceeds in Since Hardware’s separate rate application because such statements are unverifiable on the ground that they rest on Since Hardware’s accounting documentation.” Remand Results at 10.

As a result, the Department ultimately concluded that:

> Since Hardware’s responses related to its export sales process and its disposition of export proceeds directly implicates its accounting system. As demonstrated through reference to Since Hardware’s verification from the first administrative review, the Department verifies certain accounting ledgers and traces a sample sale through to the general ledger. Each sub-ledger is tied to the general ledger, and Since Hardware cannot demonstrate that the unreliable accounting documents are separate from its general operating ledgers. Therefore, the Department

> cannot conclude through verifiable evidence that Since Hardware sets prices or retains revenue as it explained in its Section A questionnaire response.

Remand Results at 11.

II. Analysis

Plaintiff argues that Commerce's determination that it failed to meet its burden of establishing its de facto independence was unsupported by substantial evidence and unlawful. Since Hardware asserts that the Department has not demonstrated that the integrity of its accounting system necessarily impacted the determination of how it set its prices or disposed of its sales proceeds. In other words, plaintiff insists that reference to its unreliable accounting records was not required for a determination of whether the company is subject to government control because there is other sufficient and verifiable material on the record from which this determination could have been made. According to plaintiff, that material includes evidence of "contractual authority and independent decision-making, which could be shown by reference to communications between a company and the government." Pl.'s Cmnts. 10.

The court finds merit in plaintiff's argument. As a result, as explained below, the Department's determination is remanded for two related reasons. First, by failing to consider all of the record evidence relating to the company's separate-rate application, Commerce did not adhere to the court's remand instructions. Second, Commerce's determination that Since Hardware's de facto independence questionnaire responses were unverifiable was neither supported by substantial evidence nor in accordance with law.

A. By Not Considering Since Hardware's Evidence of Its De Facto Independence, Commerce Failed to Comply with the Court's Remand Order

In the Remand Order, the Department was instructed to consider the evidence on the record concerning Since Hardware's independence from the PRC government. *See Since Hardware I*, 34 CIT at __, Slip Op. 10–108 at 22–23 ("[O]n remand Commerce shall reexamine the record to determine again if Since Hardware has produced evidence sufficient to qualify for application of a separate rate."). Although Since Hardware made reference to its costs of production in responding to Commerce's questionnaires concerning how it set its export prices, its answers did not end there. Much of plaintiff's claim was based on its representation that its export prices were determined through negotiations with its customers. In support of its assertion, the company submitted direct evidence of these negotiations.

For example, Since Hardware provided email correspondence with its customers detailing the negotiations that took place. *See* Since Hardware's Supplemental Questionnaire Responses dated May 20, 2008 ("Supplemental Questionnaire Response") (C.R. Doc. 11) (P.R. Doc. 41) at Exs. 7, 14; Section A Questionnaire Response at Ex. 7. In addition, the company provided purchase orders, invoices, and packing slips, showing the terms of sale, including price. *See* Supplemental Questionnaire Responses at Ex. 11; Section A Questionnaire Response at Ex. 7. These materials tend to support Since Hardware's claim that its prices were the product of customer negotiation, rather than government oversight or involvement.

Although this evidence was on the record, the Department failed to consider it. Rather, Commerce found that Since Hardware's separate-rate questionnaire responses could only be verified by looking at the company's unreliable accounting records. The additional materials submitted by plaintiff, however, appear to demonstrate that, independent of its accounting records, there is evidence that it set its export prices without government oversight or direction.

In responding to the Department's questionnaires concerning the disposition of its sales proceeds, Since Hardware claimed that they were deposited in the company's bank accounts and used to fund operations, as directed by the company's management. *See, e.g.,* Section A Questionnaire Response at 8–9. During the review, at the Department's request, Since Hardware provided evidence showing its U.S. sales, including a "sales reconciliation," which ostensibly demonstrated that the company identified all of its U.S. sales. *See* Since Hardware's Section C Questionnaire Response and Sales Reconciliation, Nov. 13, 2007 ("Section C Questionnaire Response"). In response to supplemental questionnaires, the company also provided revised sales information, including updates concerning the receipt of payments from customers who ordered and received merchandise during the POR, but remitted payment thereafter. *See* Supplemental Questionnaire Response at 11, Ex. 16. Absent from the record was any evidence that plaintiff disposed of its sales proceeds at the direction of the PRC government.

It is worth noting that the Department did not request any specific evidence from Since Hardware to support its claims regarding its independent disposition of proceeds in its supplemental questionnaires. Rather, Commerce's follow-up questionnaires focused exclusively on the accuracy of the company's sales data, suggesting that the Department was concerned with ensuring that all of the company's U.S. sales were accounted for, and not with who directed how the sales proceeds were disposed of. *See, e.g.,* Supplemental Questionnaire, A-570–888 (Dep't of Commerce Apr. 18, 2008) at 6, 8–11. Thus, despite the opportunity to do so, Commerce did not further explore the company's claim that it disposed of its sales proceeds at the sole direction of its management.

Because, on remand, the Department limited its analysis to a finding that the unreliability of plaintiff's accounting records prevented verification, it did not examine or discuss any of the record evidence that might have indicated that the company retained its sales proceeds and made independent decisions regarding the disposition of its profits or the financing of its losses. On remand, however, Commerce was instructed to "reexamine the record to again determine if Since Hardware has produced evidence sufficient to qualify for application of a separate rate." *Since Hardware I*, 34 CIT at __, Slip Op. 10–108 at 22. Furthermore, the court instructed that "Commerce may not assume that the portion of the record relating to independence from government control has been impacted by Since Hardware's questionnaire responses to unrelated matters." *Id.* at 22–23. Commerce, in the Remand Results, failed to follow these instructions by continuing to assume that Since Hardware's unreliable cost of production accounting records prevented any evaluation of whether the company was entitled to a separate rate.

"The failure of an agency to candidly comply with the instructions in a remand order not only shows a disregard for the issuing court's authority, but it is also an act that is contrary to law." *NSK Corp. v. United States*, 33 CIT __, __, 637 F. Supp. 2d 1311, 1318 (2009) (citing *Smith Corona Corp. v. United States*, 915 F.2d 683, 688 (Fed. Cir. 1990)). For this reason alone, the Remand Results must be remanded.

B. Commerce's Determination That Plaintiff's Separate-Rate Questionnaire Responses Could Not Be Verified Was Unsupported by Substantial Evidence and Contrary to Law

In addition to being inconsistent with the court's remand instructions, Commerce's determination that plaintiff's separate-rate evidence could not be verified was not supported by substantial evidence, and was contrary to the Department's own regulations.

1. Legal Framework for Verification

The respondent bears the burden of producing evidence of its de facto independence, and Commerce may refuse to consider any information submitted by a respondent that cannot be verified. *See* 19

U.S.C. §§ 1677e(a)(2)(D), 1677m(e); *see also Shandong Huarong Mach. Co. v. United States,* 30 CIT 1269, 1295, 435 F. Supp. 2d 1261, 1284 (2006). Conversely, where a respondent timely provides verifiable evidence in response to Commerce's request, the Department is required, by statute, to consider such evidence. 19 U.S.C. § 1677m(e).

Verification is the process by which Commerce confirms the truth and accuracy of information and materials in a respondent's questionnaires. *See Bomont Indus. v. United States*, 14 CIT 208, 209, 733 F. Supp. 1507, 1508 (1990) ("Verification is like an audit, the purpose of which is to test information provided by a party for accuracy and completeness."). Commerce is required, by statute, to verify a respondent's submissions in certain circumstances. *See* 19 U.S.C. § 1677m(i). Where not statutorily required, the Department, by regulation, has the discretion to conduct verification. *See* 19 C.F.R. § 351.307(b)(2) (2011). Here, Commerce was not required to verify Since Hardware's questionnaire responses dealing with its claim for an individual rate; rather, the Department chose to exercise its discretion to conduct this verification.

Pursuant to 19 C.F.R. § 351.307(c), whenever Commerce conducts verification it is required to prepare a verification report, which must contain "the methods, procedures, and results of a verification." In addition, Commerce's chosen method and ultimate findings during verification must be supported by substantial evidence. *Micron Tech. Inc. v. United States,* 117 F.3d 1386, 1396 (Fed. Cir. 1997).

Although unverifiable information may be disregarded by Commerce, generally the Department must make an effort to verify information before it can reasonably be deemed unverifiable. *See China Kingdom Imp. & Exp. Co. v. United States*, 31 CIT 1329, 1340 n.7, 507 F. Supp. 2d 1337, 1349 n.7 (2007).

2. Commerce's Determination That Since Hardware's Separate-Rate Responses Could Not Be Verified Was Unsupported by Substantial Evidence and Otherwise Contrary to Law

As noted, in conducting verification, Commerce found that Since Hardware's responses with respect to two de facto independence criteria – export price setting and proceeds disposition - could not be verified without reference to the company's unreliable accounting records. For the reasons stated below, the court finds that Commerce's determinations were unsupported by substantial evidence and unlawful.

a. Setting of Export Prices

With regard to how Since Hardware set its export prices, the Department found that the company claimed that it set its export prices based on its production costs and desired profit margins. Commerce, therefore, found that the company's separate-rate questionnaire responses could only be verified by examining its accounting records, which Commerce determined, and the court found, to be unreliable. As has been seen, however, Since Hardware's claim that it set its export prices based upon production costs and desired profit margins was only part of its argument that its prices were not set by government actors. Plaintiff's entire response to the Department's inquiry as to "how your company sets the prices of the merchandise it exports to the United States" was as follows:

> Since Hardware directly handled the negotiations with the U.S. customers for the sales of subject merchandise. Since Hardware based prices for its direct U.S. sales and the U.S. sales through Best Unity[6] on the production costs, taking into consideration overhead and administrative expenses, profit and other expenses incurred during the ordinary course of business. . . . These prices are not subject to review by or guidance from any governmental organization.

Section A Questionnaire Response at 6–7. The Department's question, and plaintiff's answer, were intended to determine how Since Hardware set its prices, i.e., were the prices subject to government approval. Commerce's inquiry was not intended to determine whether the company kept accurate records of its production costs, or, for that matter, of its sales.

While the company's accounting of its production costs may be inadequate to verify its costs of production, plaintiff's other questionnaire responses indicate that Since Hardware's prices were set through direct and independent negotiations with its U.S. customers. For example, the company explained that "Since Hardware . . . negotiated directly with [its] customers through fax, e-mail, telephone and personal meetings." Section A Questionnaire Response at 7; *see also* Section A Questionnaire Response at 13 ("All U.S. sales were made on a transaction-by-transaction basis based upon the purchase orders issued by the U.S. customer."); Section C Questionnaire Response at 26. Indeed, the Department relied on this very type of evidence to verify Since Hardware's independent price setting in the

[6] As Since Hardware explained, and the parties do not dispute, Best Unity was Since Hardware's Hong Kong affiliate, through which it dealt with customers that did not want to deal with suppliers within the PRC.

verification report from the First Administrative Review. *See* Verification of the Sales and Factors Responses of Since Hardware in the First Administrative Review of Floor-Standing Metal-Top Ironing Tables from the PRC, A-570–888 (Dep't of Commerce Jan. 22, 2007) (C.R. Doc. 1) (P.R. Doc. 1) at 7 ("The team inquired of [upper level manager] as to how Since negotiates and sets prices, and reviewed an example of price negotiation for a sample sale."). As noted supra, plaintiff has provided documentation tending to demonstrate that its prices were, in fact, set through its direct negotiation with customers.

Commerce did not explain why these materials could not be used to verify Since Hardware's claim that it set its own export prices independently. Indeed, Commerce's determination that plaintiff's claim that it sets its own export prices could not be verified without reference to its unreliable accounting records does not appear to be in accord with the other record evidence.

In addition, Commerce does not explain why it insisted on using the verification procedures from the First Administrative Review rather than developing procedures to verify the evidence produced in this review. It appears that Commerce's purpose in relying on the earlier procedure was to allow the Department to continue to assume that the unreliability of Since Hardware's accounting records prevented the company from achieving separate-rate status. As the court held in *Since Hardware I*, however, Commerce has not explained how a finding resting on the accounting records alone is supported by substantial evidence. *See Since Hardware I*, 34 CIT at __, Slip Op. 10–108 at 15–16 ("An examination of the record, however, reveals that none of the unreliable information submitted by the company is relevant to the question of government control. . . . Put another way, the evidence that the company was not controlled by the government . . . is far removed from questions relating to the origin of the factors of production and their cost.").

In light of the foregoing, Commerce's determination that Since Hardware's questionnaire responses concerning how it set its export prices were unverifiable is not supported by substantial evidence. Further, the Department failed to produce a verification report, apparently believing that its obligation to do so was excused by its determination that Since Hardware's accounting records were unverifiable. As noted, Commerce is required by its own regulation to produce such a report. *See* 19 C.F.R. § 351.307(c).[7] "It is a familiar rule of administrative law that an agency must abide by its own

[7] 19 C.F.R. § 351.307(c) is entitled "Verification Report," and provides that "[t]he Secretary will report the methods, procedures, and results of a verification under this section prior to making a final determination in an investigation or issuing final results in a review."

regulations." *See Fort Stewart Sch. v. Fed. Labor Relations Auth.*, 495 U.S. 641, 654 (1990).

Here, rather than producing a verification report, Commerce relied on the procedures found in a verification report from a prior administrative review to excuse itself from following its own regulation. Specifically, Commerce relied on its verification report from the First Administrative Review to establish that Since Hardware's claim that it set its export prices independently could only be verified by reviewing the company's accounting records. Section 351.307(c), however, requires the Department to provide a verification report setting forth its verification methodology, its efforts at verification, and the results thereof, for *this review*. In other words, the Department's own regulation instructs it to establish procedures to verify the evidence produced in each individual review.

It is no doubt true that Commerce may design its own verification procedures. "By requiring that Commerce report, on a case-by-case basis, the methods and procedures used to verify submitted information, Congress has implicitly delegated to Commerce the latitude to derive verification procedures ad hoc." *Micron Tech,* 117 F.3d at 1397. Commerce may not, however, adopt the verification procedures from a prior review, and then find that the evidence in a latter review is unverifiable merely because it is different from that produced in the prior review. That is, Commerce's verification procedures must be reasonable under the circumstances presented. *Id.* at 1396–97; *see also China Kingdom*, 31 CIT at 1340 n.7, 507 F. Supp. 2d at 1349 n.7 ("A deliberate refusal to subject certain factual information to a verification procedure is not the equivalent of a valid finding that . . . such information 'cannot be verified.'").

b. Disposition of Proceeds

Similarly, Commerce's determination that it could not verify Since Hardware's claims regarding its disposition of proceeds cannot be sustained on this record. Commerce hoped to establish, by its questionnaires, whether the company kept the proceeds from its sales, and made independent decisions on how to use them in operating its business. In response to the Department's questionnaire concerning the disposition of its sales proceeds, plaintiff claimed that "[t]here are no restrictions on the use of Since Hardware's or Best Unity's export revenues. Since Hardware and Best Unity deposit export earnings into their respective bank accounts. Their general managers have authorized the accounting department to control and to have access to their respective accounts." Section A Questionnaire Response at 8. In addition, Since Hardware claimed that the "board of directors determines the disposition of profits" and the company and its affiliates "may use freely all foreign currency earnings on the sale of subject merchandise to the United States . . . . There are no restrictions on the use of retained foreign currency. Neither of these two companies is required to sell the foreign currency to the government . . . [and] foreign currency earned on the sale of subject merchandise [is used] to fund its operational expenses." Section A Questionnaire Response at 9–10.

The Department found that it was "unable to rely upon the statements concerning export proceeds in Since Hardware's separate rate application because such statements are unverifiable on the ground that they rest on Since Hardware's accounting documentation." Remand Results at 10. As with its determination with respect to the setting of export prices, this determination was based solely on the Department's purported inability to apply the verification procedures undertaken in the First Administrative Review to the accounting records produced in this review. *See* Remand Results at 6, 14–15.

The Department maintains that the verification report from the First Administrative Review shows that it verified the questionnaire responses concerning disposition of proceeds by "examin[ing] the individual notification of the payments and transfers to ensure Since Hardware reconciled the 'monies received with the moneys owed' and 'k[ept] track of which customers have paid.'" Remand Results at 9. In addition, during the First Review, the Department "examined the production sub-ledgers, and the overhead sub-ledgers, and determined whether Since Hardware accurately documented the amount of money received from export sales." Remand Results at 10.

As with the determination dealing with the setting of export prices, the methodology the Department chose to employ in the First Administrative review cannot, by itself, support the Remand Results. In the First Review, there was no determination that Since Hardware's accounting records were unreliable. Accordingly, the Department had no occasion to determine whether there were alternative means for verifying the company's questionnaire responses concerning its disposition of proceeds. In other words, the verification report from the First Administrative Review does not support Commerce's conclusion that reviewing Since Hardware's accounting records is the exclusive means of verifying that it does not dispose of its proceeds at the direction of the PRC government.

Moreover, as with its determination with respect to how the company set its prices, the Department has neither conducted any verification proceedings in this review, nor explained why it cannot use other responses and documents to verify that Since Hardware disposed of its sales proceeds free from government control. In fact, the Department made no effort to verify Since Hardware's questionnaire responses through other means, such as interviewing management, reviewing internal memoranda and board of directors' meetings, or requesting bank records. As with the question of how plaintiff set its export prices, how it disposes of its sales proceeds is a question of government involvement, not accurate accounting. Accordingly, the Department's focus during verification should have been whether Since Hardware's claims regarding the absence of PRC government direction over the company's disposition of proceeds can be verified by reliable and available questionnaire responses and other documentation.

Without undertaking verification proceedings and preparing a report outlining its verification process *in this review*, including a reasoned explanation for why it could not verify plaintiff's questionnaire responses pertaining to its disposition of sales proceeds, Commerce's determination that these responses were unverifiable is not supported by substantial evidence and contrary to law. *See China Kingdom*, 31 CIT at 1340 n.7, 507 F. Supp. 2d at 1350 n.7.

CONCLUSION AND ORDER

For the reasons stated, it is hereby

ORDERED that, upon remand, Commerce issue a redetermination that complies in all respects with this Opinion and Order, is based on determinations that are supported by substantial record evidence, and is in all respects in accordance with law; it is further

ORDERED that Commerce, in preparing the Remand Redetermination, shall reexamine its conclusion with respect to whether plaintiff established its de facto independence and is, therefore, entitled to a separate rate, by considering all of the questionnaire responses and documents on the record bearing on this question; it is further

ORDERED that, if the Department continues to find that verification of plaintiff's separate-rate questionnaire responses is necessary, it conduct verification and prepare a report explaining its verification methods, procedures, and findings, in accordance with 19 C.F.R. § 351.307(c). The Department may not rely solely on the procedures found in the verification report from the First Administrative Review on remand. To the extent that the Department continues to find that plaintiff's separate-rate questionnaire responses are unverifiable, its reasoning and the evidence supporting this finding should be set forth in its verification report; it is further

ORDERED that, in the event the Department finds that Since Hardware is entitled to a separate rate, it determine that rate; it is further

ORDERED that the Department may reopen the record to solicit any information it determines to be necessary to make its determination; it is further

ORDERED that the remand result shall be due on May 29, 2012; comments to the remand results shall be due thirty (30) days following filing of the remand results; and replies to such comments shall be due fifteen (15) days following filing of the comments.

Dated: November 29, 2011
New York, New York

/s/ Richard K. Eaton
RICHARD K. EATON

Slip Op. 11–147

CLEARON CORPORATION AND OCCIDENTAL CHEMICAL CORPORATION, Plaintiffs, v. UNITED STATES, Defendant, ARCH CHEMICALS, INC., Defendant-Intervenor.

Before: Judith M. Barzilay, Senior Judge
Court No. 10–00377

[Plaintiffs' motion for judgment on the agency record denied.]

Dated: November 30, 2011

Gibson, Dunn & Crutcher LLP, (*Daniel J. Plaine*, *J. Christopher Wood*, and *Andrea F. Farr*), for Plaintiffs Clearon Corporation and Occidental Chemical Corporation.

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

Blank Rome LLP, (*Larry A. Hampel*), for Defendant-Intervenor Arch Chemicals, Inc.

OPINION

BARZILAY, Senior Judge:

I. INTRODUCTION

Plaintiffs Clearon Corp. and Occidental Chemical Corp. (domestic producers), move for judgment upon the agency record pursuant to USCIT Rule 56.2, challenging a decision of the United States Department of Commerce ("Commerce") during an administrative review of the antidumping duty order covering chlorinated isocyanurates from the People's Republic of China for the 2008–09 period of review. *See Chlorinated Isocyanurates from the People's Republic of China*, 75 Fed. Reg. 70,212 (Dep't of Commerce Nov. 17, 2010) (final results admin. review), as amended by *Chlorinated Isocyanurates from the People's Republic of China*, 75 Fed. Reg. 76,699 (Dep't of Commerce Dec. 9, 2010) (correction to final results) ("*Final Results*"); *see also Issues and Decision Memorandum for the 2008 – 2009 Administrative Review of Chlorinated Isocyanurates from the People's Republic of China*, A570–898 (Nov. 10, 2010), *available at* http://ia.ita.doc.gov/frn/summary/PRC/2010–29020–1.pdf ("*Decision Memorandum*"). Specifically, Plaintiffs challenge Commerce's exclusion from the best available information certain surrogate company financial statements that Commerce determined were tainted by subsidies. The court has jurisdiction pursuant to 19 U.S.C. § 1516a(a)(2)(B)(iii) and 28 U.S.C. § 1581(c). For the reasons set forth below, the court sustains the *Final Results*.

II. STANDARD OF REVIEW

For administrative reviews of antidumping duty orders, the court sustains Commerce's determinations, findings, or conclusions unless they are "unsupported by substantial evidence on the record, or otherwise not in accordance with law." 19 U.S.C. § 1516a(b)(1)(B)(i). More specifically, when reviewing agency determinations, findings, or conclusions for substantial evidence, the court assesses whether the agency action is reasonable given the record as a whole. *Nippon Steel Corp. v. United States*, 458 F.3d 1345, 1352 (Fed. Cir. 2006). Substantial evidence has been described as "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Dupont Teijin Films USA v. United States*, 407 F.3d 1211, 1215 (Fed. Cir. 2005) (quoting *Consol. Edison Co. v. NLRB*, 305 U.S. 197, 229 (1938)). Substantial evidence has also been described as "something less than the weight of the evidence, and the possibility of drawing two inconsistent conclusions from the evidence does not prevent an administrative agency's finding from being supported by substantial evidence." *Consolo v. Fed. Mar. Comm'n*, 383 U.S. 607, 620 (1966); *see also Catfish Farmers of Am. v. United States*, 33 CIT __, __, 641 F. Supp. 2d 1362, 1366 (2009) ("The administrative record for an antidumping duty administrative review may support two or more reasonable, though inconsistent, determinations on a given issue.").

Separately, the two-step framework provided in *Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 842–45 (1984)

("*Chevron*"), governs judicial review of Commerce's interpretation of the antidumping statute. *Dupont Teijin Films USA, LP v. United States*, 407 F.3d 1211, 1215 (Fed. Cir. 2005); *Agro Dutch Indus. Ltd. v. United States*, 508 F.3d 1024, 1030 (Fed. Cir. 2007). "[S]tatutory interpretations articulated by Commerce during its antidumping proceedings are entitled to judicial deference under *Chevron*." *Pesquera Mares Australes Ltda. v. United States*, 266 F.3d 1372, 1382 (Fed. Cir. 2001); *Wheatland Tube Co. v. United States*, 495 F.3d 1355, 1359 (Fed. Cir. 2007) ("[W]e determine whether Commerce's statutory interpretation is entitled to deference pursuant to *Chevron*.").

III. DISCUSSION

Commerce calculates antidumping duty margins by comparing the "normal value" of the subject merchandise with its actual or constructed export price. 19 U.S.C. § 1677b(a). In the non-market economy context Commerce approximates normal value by using the "best available information" from surrogate countries and companies. 19 U.S.C. § 1677b(c)(1). Included is "general expenses and profit," *id.*, which Commerce calculates using financial ratios derived from financial statements of one or more surrogate companies. Among the criteria Commerce uses to select the best available financial statements (reliability, availability, quality, specificity, contemporaneity), Commerce generally avoids information tainted by subsidies. *Catfish Farmers of Am.*, 641 F. Supp. 2d at 1378, 1380.

Commerce adopted this criterion from the legislative history to the 1988 amendments to the antidumping statute, which noted that Commerce should avoid prices that "it has reason to believe or suspect may be subsidized," and further explained that Commerce need not "conduct a formal investigation to ensure that such prices are not subsidized, but rather . . . [should] base its decision on information generally available to it at that time." Omnibus Trade and Competitiveness Act of 1988, H.R. Rep. No. 100–576, at 590 (1988) (Conf. Rep.), *reprinted in* 1988 U.S.C.C.A.N. 1547, 1623–24 ("H.R. Report"). Other than this short statement in the legislative history, Congress provided no further guidance as to what would constitute a reasonable basis to believe or suspect that a price may be subsidized, leaving further development to Commerce in its discretion.

Commerce, in turn, has chosen to address the issue, case-by-case, through administrative practice, and has identified some general guideposts: (1) If a financial statement contains a reference to a specific subsidy program found to be countervailable in a formal CVD determination, Commerce will exclude that financial statement from consideration. (2) If a financial statement contains only a mere mention that a subsidy was received, and for which there is no additional information as to the specific nature of the subsidy, Commerce will not exclude the financial statement from consideration. *See Issues and Decision Memorandum for the Final Results of the 3rd New Shipper Reviews: Certain Frozen Fish Fillets from the Socialist Republic of Vietnam*, A-552–801, at 4–5 (Dep't of Commerce June 15, 2009), *available at* http://ia.ita.doc.gov/frn/summary/VIETNAM/E9–14607–1.pdf ("*Decision Memorandum for Frozen Fish from Vietman*").

In the *Preliminary Results*, Commerce used the financial statements of two Indian companies, Aditya Birla Chemicals Limited ("Aditya") and Kanoria Chemicals & Industries Limited ("Kanoria"), to calculate the financial ratios for the respondent. *See Chlorinated Isocyanurates From the People's Republic of China*, 75 Fed. Reg. 27,302, 27,307 (Dep't of Commerce May 14, 2010) (prelim. results); *see also Decision Memorandum* at 15. The respondent challenged Commerce's decision to include Aditya's financial statements, arguing that the reference to "Capital Subsidy" in the annual report reflected the receipt of a subsidy that Commerce found countervailable in a prior administrative proceeding. Respondent's Admin. Case Br. 11 (citing *Polyethylene Terephthalate Film Sheet, and Strip from India*, 71 Fed. Reg. 7,534 (Dep't Commerce, Feb. 13, 2006) ("*PET Films*")). In their rebuttal brief, Plaintiffs argued that the particular reference to "Capital Subsidy" did not reflect a countervailable subsidy, but instead referred to a financial contribution made by the majority owners of the company, not the government. Pl. Admin. Rebuttal Br. 6, 9. Plaintiffs did not make any other arguments; they did not mention or cite *PET Films*, or present any arguments about Commerce's policy of handling information tainted by subsidies. This is all Plaintiffs said in their rebuttal brief on this issue:

> [Respondent's] second argument, that "Aditya received Capital Subsidies," is even less meritorious and is contradicted by the plain language of the ABCIL financial statement. [Respondent's] brief (at p. 11) cites several instances in which the term "Capital Subsidy" appears in the ABCIL financial statement but conspicuously omits any reference to the specific note in the financial statement that explains the meaning of the term. In fact, page 39 of the ABCIL annual report states that "During the year, the Company has reclassified its treatment in respect of Capital Subsidy *related to Promoter's Contribution* and accordingly treated the same as Capital Reserve." [Aditya] *Annual Report* at 39 (emphasis added). In other words, the "Capital Subsidy" on which [Respondent] bases its argument has nothing

> to do with the Government of India. It is a contribution of funds from the Promoters of ABCIL, who are shown in the annual report as the majority owners of the company.

Id. (citation omitted). Commerce reviewed the issue and concluded that "Capital Subsidy" did implicate an impermissible subsidy program that Commerce had found countervailable in *PET Films*. *See Decision Memorandum* at 17. Accordingly, Commerce did not use Aditya's financial statements in its ratio calculation, and instead relied on Kanoria's financial information. *Id*.

Plaintiffs seek a remand instructing Commerce to include Aditya's financial information in the agency's financial ratio calculation. Pl. Br. 15–16. Plaintiffs raise a substantial evidence challenge to Commerce's action, repeating their argument at the administrative level that the subsidies mentioned Aditya's financial statements were not from the Government of India. Pl. Br. 7–8. Plaintiffs then introduce a new argument, not made before the agency, that the "Capital Subsidy" program identified in *PET Films* lacked sufficient specificity to justify exclusion under Commerce's policy for handling information tainted by subsidies. Pl. Br. 9–15.

A. Commerce's Interpretation of Aditya's Financial Statements

On the first issue, Plaintiffs argue that Commerce misread the plain language of Aditya's annual report, which they contend explains that the "Capital Subsidy" entry represents a financial contribution by the majority owners of Aditya and not the Government of India. Pl. Br. 7–8. According to Plaintiffs, Commerce misread page 38 of the Aditya's annual report (which references three types of "Capital Subsidy/Government Grant") and similarly misread page 39 of the report (which, in Note 2, states that Aditya "has reclassified its treatment in respect of Capital Subsidy related to Promoter's Contribution and accordingly treated the same as Capital Reserve"). JA 241, 242. Plaintiffs argue that the language in Note 2 demonstrates that the "Capital Subsidy" entry is not a government subsidy but a financial contribution by the promoters, who, in this case, are the majority owners of the company. Pl. Br. 7–8.

In the *Final Results*, Commerce explained that

> page 38 of Aditya's financial statements characterizes "Capital Subsidy" in multiple ways: (1) Capital subsidy/Government grants are accounted for where it is reasonably certain that the ultimate collection will be made; (2) Capital subsidy/Government grants related to specific non depreciable

> assets are credited to capital reserve account; (3) Capital subsidy/Government grants related to specific depreciable assets are credited to capital reserve account and are recognized as income in profit and loss statement on a systematic and rational basis over the useful life of the assets; (4) Capital subsidy/Government grants in the nature of Promoter's Contribution are credited to capital reserve account. **In other words, Aditya's financial statements clearly indicate that Aditya receives multiple types of aid through "Capital subsidy/Government grants" and that the aid Aditya receives is not limited to "Promoter's Contribution."** Thus, because "Capital Subsidy" is a program the Department has found provides countervailable benefits, the Department has reason to believe or suspect that Aditya received countervailable benefits.

Decision Memorandum at 18 (emphasis added).

Commerce reasonably concluded that the three forms of Capital Subsidies identified in the annual report (depreciable assets, non-depreciable assets, and Promoter's Contribution) constituted evidence that Aditya received multiple forms of government aid. *Id.* Commerce also considered the language in Note 2, which addresses only Promoter's Contribution, and reasonably concluded that the subsidies were not limited to Promoter's Contribution but also included subsidies related to depreciable and non-depreciable assets. *Id.* at 18. Commerce did not agree with Plaintiffs' view that the language in Note 2 proves Aditya receives no government subsidies. *Id.* Commerce therefore did not share Plaintiffs' inferences and assumptions about the financial statements. *See Catfish Farmers of Am.*, 641 F. Supp. 2d at 1380 ("Commerce refused to indulge [petitioner's] hoped for inferences and assumptions. . . .").

Plaintiffs' argument ultimately fails because it requires the court to choose between what appear to be two reasonable interpretations of Aditya's financial statements. For example, one might reasonably infer, as suggested by Plaintiffs, that the references to the subsidies were mere statements of Aditya's accounting policy and did not reflect actual government infusions during the period of review. Pl. Br. 7–8, Pl. Reply Br. 8. Alternatively, one might also reasonably infer, as Commerce did, that the references to the "Capital Subsidy" program (which Commerce previously identified as countervailable in *PET Films*), indicated that Aditya received multiple forms of government aid during the review period in the form of depreciable and non-depreciable assets, and perhaps even Promoter's Contribution. *See Decision Memorandum* at 18.

A well-established principle of substantial evidence review is that "[t]he possibility of drawing two inconsistent conclusions from the evidence does not prevent an administrative agency's finding from being supported by substantial evidence." *Consolo*, 383 U.S. at 620; *see also Catfish Farmers of Am.*, 641 F. Supp. 2d. at 1366 ("The administrative record for an antidumping duty administrative review may support two or more reasonable, though inconsistent, determinations on a given issue."). Although Plaintiffs put forth what might be considered a reasonable interpretation of the Aditya financial statements, Commerce's choice was also reasonable and therefore must be sustained.

B. Commerce's Policy of Excluding Information Tainted by Subsidies

Plaintiffs next argue for the first time that Commerce's decision to reject Aditya's financial statements violated its policy of requiring reference to a "specific subsidy program" before excluding it as a source of surrogate value information. Pl. Br. 9–15. In particular, Plaintiffs dispute Commerce's reliance on *PET Films* (a CVD determination from 2006) to establish a "specific subsidy program." Pl. Br. 13–15; Pl. Reply Br. 1–7; *see Issues and Decision Memorandum for the 2003 Countervailing Duty Administrative Review of Polyethylene Terephthalate Film, Sheet, and Strip from India: Final Results*, C-533–825, at 6 (Feb. 13, 2006), *available at* http://ia.ita.doc.gov/frn/summary/INDIA/E6–1989–1.pdf; *see also Notice of Preliminary Results and Rescission in Part of Countervailing Duty Administrative Review: Polyethylene Terephthalate Film, Sheet, and Strip From India*, 69 Fed. Reg. 18,542, 18,547 (Dep't of Commerce Apr. 8, 2004) (prelim. results of admin. review) unchanged in *Final Results of Countervailing Duty Administrative Review: Polyethylene Terephthalate Film, Sheet, and Strip from India*, 69 Fed. Reg. 51,063 (Dep't of Commerce Aug. 17, 2004) (final results of admin. review). Plaintiffs maintain that *PET Films* did not establish "Capital Subsidy" as a specific subsidy program because Commerce applied facts available to make its determination. Pl. Br. 13–14. Plaintiffs argue that Commerce was unable to define "Capital Subsidy" with sufficient specificity in *PET Films* for it to serve as a valid reference to a specific subsidy program in this case. Pl. Br. 9–14; Pl. Reply Br. 5–7.

Plaintiffs unfortunately did not present these arguments to Commerce when they had the opportunity. As noted above, respondent in its case brief placed the issue of *PET Films* and the "Capital Subsidy" program squarely in play. The time for Plaintiffs to raise the above arguments was in their rebuttal brief to the agency. *See* 19 C.F.R. § 351.309(d) (2010). When reviewing Commerce's antidumping determinations, the Court of International Trade requires litigants to exhaust administrative remedies "where appropriate." 28 U.S.C. § 2637(d) (2006); *see also* 19 C.F.R. § 351.309(c)(2) (2010) ("The case brief must present all arguments that continue in the submitter's view to be relevant to the final determination."). "This form of non-jurisdictional exhaustion is generally appropriate in the antidumping context because it allows the agency to apply its expertise, rectify administrative mistakes, and compile a record adequate for judicial review-advancing the twin purposes of protecting administrative agency authority and promoting judicial efficiency." *Carpenter Tech. Corp. v. United States,* 30 CIT 1373, 1374–75, 452 F. Supp. 2d 1344, 1346 (2006) (citing *Woodford v. Ngo,* 548 U.S. 81, 89 (2006)); *see also Corus Staal BV v. United States,* 502 F.3d 1370, 1379 (Fed. Cir. 2007) (noting that the Court of International Trade "generally takes a 'strict view' of the requirement that parties exhaust their administrative remedies before the Department of Commerce in trade cases."); *Fuwei Films (Shangdong) Co. v. United States,* 35 CIT __, __, 791 F. Supp. 2d 1381, 1384 (2011) ("An important corollary requirement to exhaustion of administrative remedies is Commerce's own regulatory requirement that parties raise all issues within their administrative case briefs. . . . This requirement works in tandem with the exhaustion requirement and promotes the same twin purposes of protecting administrative agency authority and promoting judicial efficiency.").

By failing to raise at the administrative level their arguments about *PET Films* and Commerce's policy concerning surrogate information tainted by subsidies, Plaintiffs deprived Commerce of the opportunity to address those issues and make a "determination, finding, or conclusion." 19 U.S.C. § 1516a(b)(1). This is especially important here where Plaintiffs' new arguments implicate Commerce's gap-filling, policy-making discretion. For the court to review properly Commerce's exercise of that discretion, Commerce must "cogently explain why it has exercised its discretion in a given manner." *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 48 (1983). Commerce, though, had no reason to provide detailed explanations to arguments that were never made. The statute requires Commerce to address "relevant arguments, made by interested parties." 19 U.S.C. § 1677f(i)(3)(A). As the excerpt quoted above from Plaintiffs' rebuttal brief makes clear, Plaintiffs focused their arguments *solely* on proposed interpretations of Aditya's financial statements. Commerce fully addressed Plaintiffs' arguments about how to interpret the Aditya financial statements. There was simply no reason for Commerce to do more, especially when operating under the challenges imposed by tight statutory deadlines. Plaintiffs failed to raise any issues about *PET Films* or Commerce's policy of requiring reference to a "specific subsidy program." *See Decision Memorandum for Frozen Fish from Vietnam* at 4–5. As a result, Commerce did not have the opportunity to "apply its expertise," potentially "rectify administrative mistakes," or "compile a record adequate for judicial review." *Carpenter*, 452 F. Supp. 2d at 1374–75. Requiring exhaustion of administrative remedies on these new arguments is therefore appropriate. The court will not consider Plaintiffs' new arguments regarding Commerce's exclusion of the Aditya financial statements. The court will instead sustain Commerce's decision.

IV. CONCLUSION

One final note should be made. The issue here arose because Commerce had limited data points for the financial ratio calculations. There were initially only two potential surrogate companies, Aditya and Kanoria, with the exclusion of Aditya leaving Commerce with one. It is unfortunate for Plaintiffs that the elimination of Aditya left only Kanoria's information. However, the burden of creating an adequate record ultimately falls upon Plaintiffs. *See QVD Food Co. v. United States*, 658 F.3d 1318, 1324 (Fed. Cir. 2011) ("[T]he burden of creating an adequate record lies with [interested parties] and not with Commerce.") (internal quotation marks and citation omitted).

To conclude, Commerce's decision to exclude Aditya's financial statements from its financial ratio calculation is reasonable on this administrative record. Plaintiffs' motion for judgment on the agency record is denied. Judgment will be entered accordingly.

Dated: November 30, 2011
New York, NY

/s/ Judith M. Barzilay
JUDITH M. BARZILAY, SENIOR JUDGE