U.S. Customs and Border Protection

Slip Op. 12–59

FISCHER S.A. COMERCIO, INDUSTRIA AND AGRICULTURA AND CITROSUCO NORTH AMERICA, INC., Plaintiffs, v. UNITED STATES, Defendant, and FLORIDA CITRUS MUTUAL, DUDA PRODUCTS, INC., CITRUS WORLD, INC., and SOUTHERN GARDENS CITRUS PROCESSING CORPORATION (D/B/A SOUTHERN GARDENS), Defendant-Intervenors.

Before: Richard W. Goldberg,
Senior Judge
Court No. 10–00281
PUBLIC VERSION

[Plaintiffs' Motion for Judgment on the Agency Record under USCIT Rule 56.2 is granted in part and denied in part.]

Dated: April 30, 2012

Robert G. Kalik and *Chelsea Savoy Severson*, Kalik Lewin, of Washington, D.C., for plaintiffs. Of counsel on the brief was *John Joseph Galvin*, Galvin & Mlawski, of New York, NY.

Patryk J. Drescher, Commercial Litigation Branch, Civil Division, U.S. Department of Justice, of Washington, D.C., for defendant. With him on the brief were *Tony West*, Assistant Attorney General, *Jeanne E. Davidson*, Director, and *Franklin E. White*, Assistant Director. Of counsel on the brief was *Whitney Rolig*, International Trade Administration, U.S. Department of Commerce, of Washington, D.C.

Matthew Thomas McGrath and *Stephen William Brophy,* Barnes, Richardson & Colburn, of Washington, D.C., for defendant-intervenors Florida Citrus Mutual Company and Citrus World, Inc.

OPINION

Goldberg, Senior Judge:

INTRODUCTION

Plaintiffs Fischer S.A. Comercio, Industria and Agricultura ("Fischer") and Citrosuco North America, Inc. (collectively "Plaintiffs" or "Fischer") brought an action to contest the final results of the U.S. Department of Commerce's ("Commerce") antidumping duty determination. Plaintiffs challenge Commerce's decisions to include and exclude certain costs and expenses in the final results of the third administrative review of the antidumping duty order on Certain

Orange Juice from Brazil. *See Certain Orange Juice from Brazil*, 75 Fed. Reg. 50,999 (Dep't Commerce Aug. 18, 2010) (the "Final Results").

For the reasons discussed below, Plaintiffs' motion is granted in part and denied in part. The Court remands the Final Results to Commerce for reconsideration of its decision to include currency translation when calculating Fischer's constructed value and its decision to apply its zeroing methodology when calculating Fischer's dumping margin. The Court affirms Commerce's decisions with respect to the remaining issues.

BACKGROUND

Fischer is a Brazilian company that produces orange juice concentrate that it exports to the United States. In 2005, Commerce published the preliminary determination of sales at less than fair value (LTFV) and notice of suspension of liquidation of all entries of subject merchandise entered on or subsequent to that date. *See Certain Orange Juice from Brazil*, 70 Fed. Reg. 49,557 (Dep't Commerce Aug. 24, 2005) (preliminary determination). In 2006, Commerce published an antidumping duty order on certain orange juice from Brazil. *Certain Orange Juice from Brazil*, 71 Fed. Reg. 12,183 (Dep't Commerce Mar. 9, 2006) (antidumping duty order).

In 2009, Commerce initiated the third administrative review of the antidumping duty order on Certain Orange Juice from Brazil. *Initiation of Antidumping and Countervailing Duty Administrative Reviews and Request for Revocation in Part*, 74 Fed. Reg. 19,042 (Dep't Commerce Apr. 27, 2009) (initiation). Pursuant to this review, Fischer provided the information requested in Commerce's questionnaires. Fischer reported that it used the U.S. dollar as its "functional currency," but that Brazilian law required it to present its financial statements in reais, the Brazilian currency. Fischer submitted that its accounting practices follow the Brazilian Generally Accepted Accounting Principles (GAAP). Fischer also noted that its income and expenses are reported on an accrual basis, rather than a cash basis.[1] Finally, Fischer explained that although it is part of a larger corporate group, that group does not produce consolidated financial statements. Consequently, Fischer's unconsolidated financial statements are the highest level of financial reporting available.

In 2010, Commerce published the preliminary results of the antidumping administrative review. *Certain Orange Juice from Brazil*, 75 Fed. Reg. 18,794 (Dep't Commerce Apr. 13, 2010) ("preliminary re-

[1] Accrual accounting records expenses as they are incurred. In contrast, cash accounting records expenses when the funds are actually paid.

sults"). In the preliminary results, Commerce determined that Plaintiffs' dumping margin was 5.26 percent. On August 18, 2010, Commerce published its Final Results, adopting the 5.26 percent dumping margin that it calculated in the preliminary determination. *Certain Orange Juice from Brazil*, 75 Fed. Reg. 50,999 (Dep't Commerce Aug. 18, 2010) (the "Final Results").

JURISDICTION AND STANDARD OF REVIEW

This Court has jurisdiction pursuant to section 201 of the Customs Court Act of 1980, 28 U.S.C. § 1581(c) (2006).

This Court must "uphold Commerce's determination unless it is 'unsupported by substantial evidence on the record, or otherwise not in accordance with law.'" *Micron Tech., Inc. v. United States*, 117 F.3d 1386, 1393 (Fed. Cir. 1997) (quoting 19 U.S.C. § 1516a(b)(1)(B)(i) (1994)). When reviewing agency determinations, findings, or conclusions for substantial evidence, this Court determines whether the agency action is reasonable in light of the entire record. *See Nippon Steel Corp. v. United States*, 458 F.3d 1345, 1350–51 (Fed. Cir. 2006).

DISCUSSION

Under the current antidumping law, Commerce must impose antidumping duties "on imported merchandise that is being sold, or is likely to be sold, in the United States at less than fair value to the detriment of a domestic industry." *Micron Tech., Inc. v. United States*, 243 F.3d 1301, 1303 (Fed. Cir. 2001) (citing 19 U.S.C. § 1673). The "dumping margin," which is the amount of the duty to be imposed, "is the amount by which the price charged for the subject merchandise in the home market (the 'normal value') exceeds the price charged in the United States (the 'U.S. price')." *Id.* (citing 19 U.S.C. §§ 1673, 1677(25)(A)). Where, as here, the foreign producer sells directly to an affiliated purchaser in the United States, Commerce must calculate a constructed export price (CEP) to use as the U.S. price for purposes of comparison. 19 U.S.C. § 1677a(b). Because Fischer imports through its U.S. affiliate Citrosuco, Commerce calculated a CEP for all sales at issue in this appeal.

Fischer produces only for export to the United States and does not sell goods in its home market. Thus, there is no "normal value" of goods in the home market or in any third country for Commerce to compare with the U.S. price. In this situation, Commerce calculates a "constructed value" of goods in the home market to compare with the U.S. price. 19 U.S.C. § 1677b(a)(4). A calculation of constructed value requires that Commerce determine "the actual amounts incurred and realized by the specific exporter . . . for selling, general, and administrative expenses in connection with the production and sale of the

foreign like product." *Id.* § 1677b(e)(2)(A). Commerce also must calculate the costs "normally . . . based on the records of the exporter" if those records "reasonably reflect the costs associated with the production and sale of the merchandise." *Id.* § 1677b(f)(1)(A). Commerce must "consider all available evidence on the proper allocation of costs." *Id.* The statute does not provide specific guidance on the calculation of financial expenses. Therefore, Commerce has broad discretion to devise a method for calculating "general expenses." *Am. Silicon Techs. v. United States*, 334 F.3d 1033, 1037 (Fed. Cir. 2003).

Fischer raises five issues on appeal: (1) whether Commerce improperly accounted for unrealized exchange rate variations in calculating Fischer's constructed value; (2) whether Commerce improperly included intercompany interest expenses from Fischer's financial expense calculation; (3) whether Commerce improperly excluded intercompany income in calculating Fischer's constructed value; (4) whether Commerce improperly included estimated expenses in calculating Fischer's general and administrative expenses; and (5) whether Commerce improperly applied "zeroing" in calculating Fischer's weighted average dumping margin.

I. Commerce improperly accounted for unrealized exchange rate variations in calculating Fischer's constructed value

Fischer argues that Commerce improperly included unrealized currency translation in Fischer's constructed value. According to Fischer, these currency translations were provided in Fischer's financial statements only to comply with Brazilian law, and were never actually incurred or realized. Brazilian law mandates that Fischer include in its financial statement a presentation of what the difference in value of certain accounts would be if the amounts recorded in those specific accounts were translated from U.S. dollars to Brazilian reais. Fischer contends that the inclusion of this currency translation was unlawful because it was not an actual cost that was "incurred and realized," as 19 U.S.C. §1677b(e)(2)(A) requires.[2]

The Government asserts that Commerce may include both interest expenses and foreign exchange gains and losses in its financial expense ratio. *Nucor Corp. v. United States*, 33 CIT ___, 612 F. Supp. 2d 1264, 1297 (2009) (holding that the company's net foreign exchange gain was "part of the company's overall net financing expense" and could reasonably be included in cost of production calculations).

However, *Nucor* is inapposite. In *Nucor*, the company's intentional

[2] If this currency translation had not been included as a production cost, Fischer's dumping margin would be *de minimus* and disregarded under 19 C.F.R. § 351.106.

"*cash management decisions*" caused its foreign exchange gains and losses. 612 F. Supp. 2d at 1296. Those gains and losses were "not inherent in [Nucor's] manufacturing and sales operations," but came about because Nucor strategically chose to conduct business in several currencies. *Id.* at 1296. Nucor's strategic cash management decisions included whether to borrow in a foreign or domestic currency, whether to require immediate payment, and whether to enter into foreign currency contracts. *Id.* at 1297. In each of these strategic decisions, Nucor was "in control of whether or not to expose itself to the risk of gain or loss from fluctuating exchange rates." *Id.* Therefore, the court held that Commerce correctly included the foreign exchange gains and losses in its cost of production calculations. *Id.*

Here, in contrast, Fischer has chosen *not* "to expose itself to" the risks of currency fluctuations. *Id.* at 1297. Fischer adopted the U.S. dollar as its functional currency and conducts all of its business in U.S. dollars. However, in order to follow Brazilian financial reporting law, Fischer translates its accounts from U.S. dollars into Brazilian reais to report what the difference would have been, *if* it had conducted business in reais. In contrast to *Nucor*, Fischer does not "control whether or not to expose itself to the risk of gains or losses in such rates"[3] because Fischer conducts all of its business in the U.S. dollar. *Id.*

Therefore, the variations caused by currency translation to reais for reporting purposes are not "the actual amounts incurred and realized." 19 U.S.C. § 1677b(e)(2)(A). As a result, Commerce's inclusion of unrealized currency translation in Fischer's constructed value calculation violates the express language of Section 773(e)(2)(A) of the Tariff Act of 1930, 19 U.S.C. § 1677b(e)(2)(A). Because the inclusion of unrealized expenses is not in accordance with law, the Court remands this issue to Commerce to recalculate Fischer's constructed value in accordance with this Opinion and Order.

II. Commerce properly included intercompany interest expenses in Fischer's financial expense calculation

Fischer borrowed a sum of money from its U.S. affiliate, Citrosuco. Fischer argues that Commerce should have excluded the interest expenses that Fischer incurred from this loan when Commerce calculated Fischer's cost of production. Commerce's standard policy is to use a company's highest level of consolidated financial statements to calculate a foreign company's constructed value. When companies produce a consolidated financial statement, Commerce normally ex-

[3] To the contrary, by adopting U.S. dollar as its functional currency, Fischer appears to have tried to eliminate its exposure to such currency fluctuations.

cludes intercompany borrowings in order to construct a true and accurate representation of a company's interest expenses. Without citing any authority, Fischer argues that, although it does not produce a consolidated financial statement, Commerce should follow the underlying principle that intercompany transactions be removed because Fischer and Citrosuco are affiliated.

However, Commerce determines what constitutes a "company" for purposes of calculating dumping margins. *Queen's Flowers de Colom. v. United States*, 21 CIT 968, 971, 981 F. Supp. 617, 622 (1997). Commerce's discretion to group or define companies arises out of the "basic purposes of the statute—determining current margins as accurately as possible." *Id.* at 972, 981 F. Supp. at 622. "Where consolidated audited financial statements do not exist and are not easily prepared," it is appropriate for Commerce "to base the interest expense calculation on the audited financial statements of [only] the respondent." *Mid Continent Nail Corp. v. United States*, Slip Op. 10–47, 2010 Ct. Int'l Trade LEXIS 48, *27 (CIT May 4, 2010). In *Mid Continent*, Commerce's decision to use only the respondent's financial statements, when the group of affiliated companies did not produce a consolidated financial statement, was upheld "because it was based on the financial statements of [the individual company], which produced the merchandise." *Id.* at *29.

Although affiliated with Citrosuco, Fischer produces an individual financial statement. Commerce followed its standard policy of using the company's highest level of consolidated financial statements. Commerce based its calculations on Fischer's financial statements because there was no higher level of consolidation within the group of affiliated companies. Further, Commerce's decision that the loan was an "arm's length" transaction is supported by substantial evidence because of the interest payment involved.[4] Therefore, Commerce's decision to use only Fisher's financial statements is reasonable and supported by substantial evidence and the Court upholds Commerce's decision.

III. Commerce properly excluded intercompany income in calculating Fischer's constructed value

Fischer argues that if Commerce includes intercompany interest expenses in Fischer's constructed value (discussed earlier in Issue II), then Commerce must also include the income earned on intercom-

[4] To determine whether a transaction—in this case a loan from one company to another—is "arm's length," Commerce may evaluate whether interest is charged in association with the loan. If interest is charged, then the parties are likely dealing with each other at "arm's length." However, if interest is not charged, then the parties are likely closely affiliated, and this would not be considered an "arm's length" transaction.

pany transactions. Fischer is referring to "income" resulting from the forgiveness of loan interest. However, the forgiven interest made the associated loan a non-arm's length transaction because that loan no longer bore a market-based interest rate.

Commerce properly determined that forgiven interest should be disregarded pursuant to the "arm's length" test of 19 U.S.C. § 1677b(f)(2). This statute states that:

> A transaction directly or indirectly between affiliated persons may be disregarded if, in the case of any element of value required to be considered, the amount representing that element does not fairly reflect the amount usually reflected in sales of merchandise under consideration in the market under consideration. If a transaction is disregarded under the preceding sentence and no other transactions are available for consideration, the determination of the amount shall be based on the information available as to what the amount would have been if the transaction had occurred between persons who are not affiliated.

Id. Thus, Commerce properly declined to include the forgiven interest as income because forgiven interest is not associated with an arm's length transaction.

The Court upholds Commerce's decision to disregard the forgiven interest from Fischer's constructed value calculation because it is supported by substantial evidence.

IV. Commerce properly included estimated expenses in calculating Fischer's general and administrative expenses

Fischer argues that it had only estimated, but had not yet paid, the costs of planting new citrus trees and other expenses. Thus, Fischer claims that Commerce improperly included these expenses because they were not yet realized. Commerce must use "actual amounts incurred and realized by the specific exporter or producer" when calculating a company's constructed value. 19 U.S.C. § 1677b(e)(2)(A). Commerce must base its calculation upon a producer's records if those records are kept in accordance with the GAAP of the exporting country and do not distort the company's true cost. *Id.* § 1677b(f)(1)(A).

The Government asserts that Commerce complied with the statutory requirements. Commerce based its calculations on Fischer's records, and those records were kept in accordance with Brazilian GAAP and did not distort Fischer's costs. Dec. Mem. at 33. Fischer reports its expenses upon an accrual—rather than cash—basis. Un-

der accrual accounting, an estimate of an expense should be accrued and therefore reported in the income statement if the expense is probable and an estimate of the amount can be determined. A taxpayer may choose either the accrual or cash method of accounting. However, once the taxpayer has chosen its method of accounting, it cannot easily switch between the two systems because of the discrepancies for any given year. *See Anderson v. U.S. Sec'y of Agric.*, 30 CIT 1742, 1750–51, 462 F. Supp. 2d 1333, 1340 (2006).

Fischer reported that it followed the accrual accounting method, and this method is in accordance with Brazilian GAAP. This method requires that estimated costs and income be reported when the payment or income is probable and the amount can be determined. Although the expenses were an estimate and had not been paid, the cost was probable and determinable. Commerce properly included the cost in its calculations because Fischer had reported the estimated cost following its chosen accounting method.

Because this decision is supported by substantial evidence the Court upholds Commerce's decision.

V. Commerce must change or explain its inconsistent policy with respect to zeroing

In the administrative review, Commerce followed its "zeroing" methodology when calculating Fischer's weighted-average dumping margin. The Court of Appeals for the Federal Circuit ("Federal Circuit") recently reconsidered the reasonableness of Commerce's policy of zeroing in administrative reviews. In *Dongbu Steel Co. v. United States*, the court questioned Commerce's inconsistent practice of zeroing in administrative reviews, but not zeroing in investigations. 635 F.3d 1363, 1373 (Fed. Cir. 2011). The court held that it was arbitrary for Commerce to interpret the antidumping statute to prohibit zeroing in original investigations while interpreting it to permit zeroing in administrative reviews. *Id.*; *see also* 19 U.S.C. § 1677(35) (charging Commerce with calculating the "dumping margin" in both investigations and administrative reviews). The court reasoned that "[a]lthough 19 U.S.C. § 1677(35) is ambiguous with respect to zeroing and Commerce plays an important role in resolving this gap in the statute, Commerce's discretion is not absolute." 635 F.3d at 1373. Thus, the court remanded the case for Commerce to either satisfactorily "explain its reasoning" for the inconsistent interpretation or to "choose a single consistent interpretation of the statutory language" in both phases of the proceeding. *Id.*

In a subsequent case also addressing the zeroing issue, the Federal Circuit specifically noted that "[w]hile Commerce did point to differences between investigations and administrative reviews, it failed to

address the relevant questions—why is it a reasonable interpretation of the statute to zero in administrative reviews, but not in investigations?" *JTEKT Corp. v. United States*, 642 F.3d 1378, 1384 (Fed. Cir. 2011).

Thus, the Court remands Commerce's determination and directs Commerce to reconsider this issue in accordance with the decisions of the Federal Circuit. *See also Union Steel v. United States*, 35 CIT ___, 804 F. Supp. 2d 1356, 1367 (2011) (concluding that, despite earlier cases approving of the use of zeroing, it is now appropriate to "direct Commerce to provide the explanation contemplated by the Court of Appeals in *Dongbu* and *JTEKT Corp*").

CONCLUSION AND ORDER

For the foregoing reasons, the Plaintiffs' Motion for Judgment on the Agency Record is granted in part and denied in part. The Court **AFFIRMS** Commerce's decisions on issues II, III, and IV. The Court **REMANDS** Commerce's decisions on issues I and V. The Court **REMANDS** the Final Results to Commerce for reconsideration of its decision to include currency translation when calculating Fischer's constructed value and its decision to apply its zeroing methodology when calculating Fischer's dumping margin, and such proceedings shall be consistent with the opinions of this Court and the Federal Circuit.

Upon consideration of all papers and proceedings herein, it is hereby

ORDERED that the final determination of the United States Department of Commerce, published as *Certain Orange Juice from Brazil*, 75 Fed. Reg. 50,999 (Dep't Commerce Aug. 18, 2010) (the "Final Results"), be, and hereby is, AFFIRMED IN PART and REMANDED IN PART to Commerce for redetermination as provided in this Opinion and Order; it is further

ORDERED that Plaintiffs' Rule 56.2 Motion for Judgment on the Agency Record be, and hereby is, GRANTED IN PART and DENIED IN PART as provided in this Opinion and Order; it is further

ORDERED that Commerce, on remand, shall reconsider its decision to apply its zeroing methodology and change that decision or, alternatively, provide an explanation for its inconsistent construction of 19 U.S.C. § 1677(35) with respect to antidumping duty investigations and administrative reviews; it is further

ORDERED that Commerce, on remand, shall reconsider its decision to include Fischer's exchange rate translation in its constructed value calculations; it is further

ORDERED that Commerce shall redetermine Plaintiffs' weighted-average dumping margins, as appropriate, complying with this Opinion and Order; and it is further

ORDERED that Commerce shall have ninety days from the date of this Opinion and Order in which to file its redetermination upon remand ("Second Remand Redetermination"), which shall comply with all directives in this Opinion and Order; that the Plaintiffs shall have thirty days from the filing of the Second Remand Redetermination in which to file comments thereon; and that Commerce shall have thirty days from the filing of Plaintiffs' comments to file comments.

Dated: April 30, 2012
New York, New York

/s/ Richard W. Goldberg
RICHARD W. GOLDBERG
Senior Judge

Slip Op. 12–64

US MAGNESIUM LLC, Plaintiff, v. UNITED STATES, Defendant, and PSC VSMPO-AVISMA CORP. and VSMPOTIRUS, US INC., Defendant-Intervenors.

Before Richard W. Goldberg, Senior Judge
Court No. 11–00076
PUBLIC VERSION

[Plaintiff's Motion for Judgment on the Agency Record is denied.]

Dated: May 16, 2012

Stephen A. Jones, King & Spalding LLP, of Washington, D.C., for plaintiff.

Peter L. Sultan, Attorney, Office of the General Counsel, U.S. International Trade Commission, of Washington, D.C.; *James M. Lyons*, General Counsel; and *Andrea C. Casson*, Assistant General Counsel, for defendant.

John M. Gurley and *Diana Dimitriuc-Quaia*, Arent Fox LLP, of Washington, D.C., for defendant-intervenors.

OPINION & ORDER

Goldberg, Senior Judge:

Introduction

Plaintiff US Magnesium LLC ("US Magnesium") contests the U.S. International Trade Commission's ("the Commission") negative determination in the sunset review of the antidumping duty order on *Magnesium Metal from the Russian Federation*. *Magnesium from China and Russia*, USITC Pub. 4214, Inv. Nos. 731-TA-1071–1072 (Feb. 2011) (Sunset Review Determination), published in the *Federal Register* at 76 Fed. Reg. 11,813 (ITC Mar. 3, 2011).

Background

In 2005, the Commission determined that imports of magnesium metal from Russia and China were causing material injury to the domestic industry. *Magnesium from China and Russia*, USITC Pub. 3763, Inv. Nos. 731-TA-1071–1072 (Apr. 2005) (Final); *Magnesium from China and Russia*, 70 Fed. Reg. 19,969 (ITC Apr. 15, 2005). Based on the affirmative final determinations by the Commission and the United States Department of Commerce ("Commerce"), Commerce issued antidumping duty orders on magnesium metal from Russia and China. *Notice of Antidumping Duty Order: Magnesium Metal from the People's Republic of China*, 70 Fed. Reg. 19,928 (Dep't Commerce Apr. 15, 2005); *Notice of Antidumping Duty Order: Magnesium Metal from the Russian Federation*, 70 Fed. Reg. 19,930 (Dep't Commerce Apr. 15, 2005).

In 2010, the antidumping duty orders were reviewed pursuant to the five-year sunset review requirement of section 751(c) of the Tariff Act of 1930, 19 U.S.C. § 1675(c) (2006). The Commission declined to cumulate the subject imports from China and Russia because it concluded that they were subject to different conditions of competition. The Commission based this conclusion on the fact that: (1) imports from Russia are primarily pure magnesium, whereas the scope of the order with respect to China is limited to alloy magnesium; (2) trends in the capacity, production, and shipments of the two countries' industries differ; (3) there is a raw material shortage affecting the Russian industry; and (4) the Chinese and Russian industries show different export trends.

The Commission also concluded that the circumstances warranted revocation of the antidumping duty order with respect to magnesium metal from Russia. The Commission based this conclusion on the fact that: (1) there has been a decline in the capacity, production, and shipments of the Russian magnesium industry since the original investigations; (2) raw material shortages affect the Russian producers; and (3) the Russian industry's production has been redirected toward its home market. The Commission determined that these factors limit the availability and amount of magnesium that the Russian industry is able to ship to the United States.

Based on the foregoing, the Commission concluded that revocation would not be likely to lead to the continuation or recurrence of material injury to the domestic industry in the reasonably foreseeable future. Specifically, the Commission found that revocation was: (1) unlikely to lead to subject imports from Russia entering the United States in significant volumes within a reasonably foreseeable time; (2) unlikely to lead to significant underselling by the subject imports

of the domestic like product, or to significant price depression or suppression, within a reasonably foreseeable time; and (3) unlikely to have a significant impact on the domestic industry. Accordingly, the Commission revoked the antidumping duty order with respect to Russia.

US Magnesium brought this appeal, challenging the Commission's determinations in the sunset review.

Jurisdiction and Standard of Review

This Court has jurisdiction pursuant to section 201 of the Customs Court Act of 1980, 28 U.S.C. § 1581(c) (2006).

This Court upholds the Commission's determinations 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). The Commission has "discretion to make reasonable interpretations of the evidence and to determine the overall significance of any particular factor in its analysis." *Goss Graphics Sys., Inc. v. United States*, 22 CIT 983, 1005, 33 F. Supp. 2d 1082, 1100 (1998), *aff'd*, 216 F.3d 1357 (Fed. Cir. 2000). "[E]ven if it is possible to draw two inconsistent conclusions from evidence in the record, such a possibility does not prevent [the Commission's] determination from being supported by substantial evidence." *Nippon Steel Corp. v. United States*, 458 F.3d 1345, 1352 (Fed. Cir. 2006) (citing *Am. Silicon Techs. v. United States*, 261 F.3d 1371, 1376 (Fed. Cir. 2001)).

Thus, this Court determines whether the agency's determinations are "reasonable and supported by the record as a whole, even if some evidence detracts from the Commission's conclusion." *Id.* at 1352.

Discussion

US Magnesium challenges: (I) the Commission's decision not to cumulate the subject imports from Russia and China; and (II) the revocation of the order with respect to Russia as unsupported by substantial evidence. For the following reasons, US Magnesium's arguments fail.

I. The Commission's decision not to cumulate subject imports from China and Russia is supported by substantial evidence

In sunset reviews, the Commission has discretion to cumulate subject imports from different countries if certain conditions are met:

> the Commission may cumulatively assess the volume and effect of imports of the subject merchandise from all countries with respect to which reviews under [19 U.S.C. section 1675(b) or (c)] were initiated on the same day, if such imports would be likely

> to compete with each other and with domestic like products in the United States market. The Commission shall not cumulatively assess the volume and effects of imports of the subject merchandise in a case in which it determines that such imports are likely to have no discernible adverse impact on the domestic industry.

19 U.S.C. § 1675a(a)(7). The Commission has discretion not to cumulate even if the statutory factors are satisfied, provided that it has a reasoned basis for doing so that is supported by substantial evidence. *Nucor Corp. v. United States*, 601 F.3d 1291, 1293 (Fed. Cir. 2010). Because the Commission may cumulate subject imports if they are likely to compete with each other and compete with domestic like products, the Commission may consider differing conditions of competition in its cumulation analysis. *Id.* at 1296.

To determine whether to cumulate the subject imports from China and Russia, the Commission considered: (1) whether the subject imports from China or Russia were likely to have a discernible adverse impact on the domestic industry; (2) whether there is a likelihood of a reasonable overlap of competition among imports of magnesium from China and Russia and the domestic like product; and (3) other considerations, including the similarities and differences in the likely conditions of competition under which the subject imports are likely to compete in the U.S. market.

The Commission determined that subject imports from China and Russia were likely to have a discernible adverse impact on the domestic industry. The Commission also determined that there would likely be a reasonable overlap of competition between the subject imports and the domestic like product. However, the Commission's evaluation of other considerations, particularly the differences in the likely conditions of competition, led the Commission to decide not to cumulate the subject imports from China and Russia.

US Magnesium challenges the Commission's decision not to cumulate on various grounds, including that imports of alloy magnesium from Russia were not significant because pure magnesium, which competes against alloy magnesium from China, is relevant to the analysis. US Magnesium also asserts that the Russian alloy magnesium capacity data was unreliable.

US Magnesium further challenges the Commission's determinations, claiming that the Commission failed to acknowledge or discuss significant evidence that detracted from its conclusion. However, the Commission is "'not required to explicitly address every piece of

evidence presented by the parties'" during an investigation. *Nucor Corp. v. United States*, 28 CIT 188, 234, 318 F. Supp. 2d 1207, 1247 (2004) (quoting *USEC Inc. v. United States*, 34 F. App'x 725, 730–31 (Fed. Cir. 2002)). Moreover, provided that "there is adequate basis in support of the Commission's choice of evidentiary weight, [this Court] and [the Federal Circuit], reviewing under the substantial evidence standard, must defer to the Commission." *Nippon Steel*, 458 F.3d at 1359.

Therefore, the Court does not have to examine whether there was substantial evidence that supported a contrary conclusion, but rather, the Court must affirm "agency factual determinations so long as they are reasonable and supported by the record when considered as a whole, *even though there may be evidence on the record which detracts* from the agency's conclusions." *BIC Corp. v. United States*, 21 CIT 448, 451, 964 F. Supp. 391, 396 (1997) (emphasis added).

a. The Commission's determination that Russian pure magnesium and Chinese alloy magnesium are subject to different conditions of competition because of their different principal uses is supported by substantial evidence

US Magnesium argues that the Commission's finding during the sunset review that pure and alloy magnesium are subject to different conditions of competition is inconsistent with the original determination, in which the subject imports from the two countries were cumulated. US Magnesium asserts that the Commission's conclusion is inconsistent with its definition of the domestic like product, its finding that aluminum producers used the two types of magnesium interchangeably, and its finding that imports from China and Russia are fungible.

First, "the purpose of the like product inquiry is to delimit the domestic industry that the Commission will examine in its material injury determination." *BIC Corp.*, 21 CIT at 456, 964 F. Supp. at 400. In this case, the like product is pure and alloy magnesium. However, the court has consistently recognized that "the Commission's inquiry into product substitutability, i.e., to what degree two or more products compete with each other, may differ according to context . . . ." *Id.* at 455–56, 964 F. Supp. at 397–399.

In fact, "like product, cumulation, and causation are functionally different inquiries because they serve different statutory purposes." *Id.* at 455, 964 F. Supp. at 399. Because of this, the different inquiries require a different level of fungibility and "the record may contain substantial evidence that two products are fungible enough to support a finding in one context (e.g., one like product), but not in another

(e.g., cumulation or causation)." *Id.* at 455–56, 964 F. Supp. at 399.

Here, the Commission defined domestic like product to include both pure and alloy magnesium on the basis of six factors: (1) physical characteristics and uses; (2) interchangeability; (3) channels of distribution; (4) customer and producer perceptions of the products; (5) common manufacturing facilities, production processes and production employees; and (6) price. *Views of the Commission*, Conf. Rec. 274 at 8–14.

On the basis of these factors, the Commission determined that there was some overlap in the uses for pure and alloy magnesium, although the principal use of each type of magnesium is different. [1] In addition, the Commission determined that for certain uses, the two types of magnesium are not always interchangeable. *Views of the Commission*, Conf. Rec. 274 at 12.[2] Thus, although there is evidence that there is some overlap in use for the two types of magnesium, there is also evidence that there is limited interchangeability in other uses of magnesium. This is not inconsistent because, as this Court has noted, "a finding of one like product is not synonymous with a finding that two products are highly fungible. *BIC*, 21 CIT at 456, 964 F. Supp. at 400.

Thus, the Commission's determination that the subject imports would compete under different conditions of competition because of their different principal uses and limited interchangeability in certain contexts is supported by substantial evidence.

b. The Commission's determination that Russian pure magnesium and Chinese alloy magnesium are subject to different conditions of competition because of different capacity, production, and shipments trends is supported by substantial evidence

US Magnesium challenges the Commission's determination that Russian pure and alloy magnesium capacity, production, and shipments declined, whereas the Chinese alloy magnesium industry expanded. US Magnesium criticizes the data upon which the Commission made its determination as unreliable and argues that the Commission's reliance on certain data was unreasonable.

This argument is meritless because the Commission received responses to questionnaires from both Chinese and Russian producers that demonstrated precisely what the Commission concluded, i.e.,

[1] Specifically, pure magnesium is used principally in production of aluminum alloys, in iron and steel desulfurization, and in titanium sponge production. On the other hand, alloy magnesium is used principally in structural applications, mostly in castings and extrusions for the automotive industry.

[2] For purposes of making castings, only alloy magnesium can be used.

that there was a large and growing Chinese magnesium industry and a smaller, contracting Russian magnesium industry. "It is the Commission's task to evaluate the evidence it collects during its investigation" and its decisions with respect to "the weight to be assigned a particular piece of evidence . . . lie at the core of that evaluative process." *U.S. Steel Group v. United States*, 96 F.3d 1352, 1357 (Fed. Cir. 1996).

In accordance with the Commission's task, the Commission has "discretion to make reasonable interpretations of the evidence and to determine the overall significance of any particular factor in its analysis." *Goss Graphics*, 22 CIT at 1005, 33 F. Supp. 2d at 1100. In other words, this Court examines whether the Commission's determinations are supported by substantial evidence but does not substitute its analysis of the evidence for the Commission's.

The Commission thoroughly examined and evaluated the evidence presented to it, and there is substantial evidence showing different capacity, production, and shipment trends in the respective countries. Thus, the Commission's determination that Russian pure magnesium and Chinese alloy magnesium are subject to different conditions of competition because of different capacity, production, and shipments trends is supported by substantial evidence.

US Magnesium attempts to undermine the Commission's determination by asserting that the available evidence was unreliable and/or that the Commission was unreasonable for relying upon such evidence and should have relied upon other evidence. US Magnesium fails to point to legal authority to support its claims. Furthermore, as noted, the Commission has discretion not to cumulate subject imports in a five-year review. *Nucor Corp.*, 601 F.3d at 1293. It is clear from the record that the Commission examined a variety of factors in deciding whether to cumulate. Its decision not to cumulate is, in fact, supported by substantial evidence, and it was not unreasonable for the Commission to decide not to cumulate the subject imports. Therefore, the Court upholds the Commission's determination.

II. The Commission's determination that revocation of the antidumping duty order with respect to magnesium from Russia would not be likely to lead to continuation or recurrence of material injury is supported by substantial evidence

The Commission found that, although revocation of the order might lead to some increase in subject imports from Russia, the imports were not likely to enter the United States in significant volumes within a reasonably foreseeable time in the event of revocation because of the constraints on capacity and production, as well as limi-

tations on the availability of raw materials. US Magnesium challenges this finding, arguing that the removal of the order would likely lead Russian producers to increase production and redirect shipments to the U.S.

In its analysis, the Commission must consider whether the subject imports are likely to undersell the domestic product. 19 U.S.C §1675a(a)(3). The Commission used price comparison data that showed that prices for U.S.-produced magnesium products increased over the period of review. However, quarterly price comparisons between the subject imports from Russia and the domestic product showed that Russian imports actually oversold the domestic product.

More importantly, the Commission primarily based its conclusion that the subject imports would not cause price effects upon the fact that there were not likely to be substantial volumes of Russian magnesium entering the U.S. market. As the Commission determined in its cumulation analysis, the changes in capacity, production, and shipment trends make it unlikely that the Russian magnesium industry would import magnesium in significant volumes. The Commission reasonably concluded that the Russian magnesium industry had substantially less magnesium to ship to the United States in the event of the revocation of the order than at the time of the original investigation. Because there would not be significant quantities of the subject imports in the U.S. market, the Commission reasonably concluded that the subject volume and market share would be too small to have significant, adverse effects on domestic magnesium prices.

Much like its arguments relating to the Commission's determination not to cumulate, US Magnesium, without citing any legal authority to bolster its claims, simply asserts that the evidence is unreliable, that the Commission unreasonably relied upon certain evidence, and that the Commission should have examined other evidence.

However, this is insufficient to rebut the fact that there is substantial evidence on the record that supports the Commission's conclusions. As a result, this Court upholds the Commission's determination that revocation of the antidumping duty order with respect to magnesium from Russia would not be likely to lead to continuation or recurrence of material injury.

Conclusion and Order

Upon consideration of Plaintiff's Motion for Judgment on the Agency Record and the memoranda and accompanying materials in support thereof, and the opposition and supporting materials thereto, and upon all the other papers and proceedings had herein, it is hereby

ORDERED that Plaintiff's motion is denied; and it is further
ORDERED that judgment is entered in favor of Defendant.

Dated: May 16, 2012
New York, New York

/s/ *Richard W. Goldberg*
RICHARD W. GOLDBERG
Senior Judge

Slip Op. 12–66

STEVE M. CARL, Plaintiff, v. UNITED STATES SECRETARY OF AGRICULTURE, Defendant.

Before: Leo M. Gordon, Judge
Court No. 11–00271

[Motion to dismiss for lack of subject matter jurisdiction denied; motion to dismiss for failure to state a claim upon which relief may be granted converted to motion for judgment on the agency record.]

Dated: May 24, 2012

Steve M. Carl, *Pro Se*, of Georgetown, SC. With him on the brief was *Steve D. Schwinn*, The John Marshall Law School, of Chicago, Illinois.

Antonia R. Soares, Trial Attorney, International Trade Field Office, Commercial Litigation Branch, Civil Division, of Washington, DC. With her on the brief were *Tony West*, Assistant Attorney General, *Jeanne E. Davidson*, Director, and *Claudia Burke*, Assistant Director. Of counsel on the brief was *Jeffrey Kahn*, Office of the General Counsel, U.S. Department of Agriculture, of Washington, D.C.

MEMORANDUM AND ORDER

Gordon, Judge:

I. Introduction

Plaintiff commenced this action on July 18, 2011, to contest the United States Department of Agriculture's ("USDA") denial of Plaintiff's application for Fiscal Year 2010 benefits under the Trade Adjustment Assistance ("TAA") for Farmers Program, Section 296 of the Trade Act of 1974, as amended, 19 U.S.C. § 2401e (2006).[1] Jurisdiction is predicated on 28 U.S.C. § 1581(d)(4) (2006). Defendant moves to dismiss pursuant to USCIT Rule 12(b)(1) for lack of subject matter jurisdiction, contending that Plaintiff failed to timely commence its action "within sixty days after notice" of the denial. 19 U.S.C. § 2395; *see also Kelley v. Dept. of Labor*, 812 F.2d 1378, 1380 (Fed. Cir. 1987)

[1] Further citations to the Trade Act of 1974, as amended, are to the relevant provision of Title 19 of the U.S. Code, 2006 edition.

(holding sixty-day period is jurisdictional); *Conlin Greenhouses v. U.S. Secretary of Agriculture*, 32 CIT 467 (2008) (dismissing TAA action not filed within sixty days for lack of jurisdiction). Defendant has also moved pursuant to USCIT Rule 12(b)(5) to dismiss Plaintiff's complaint for failure to state a claim upon which relief may be granted. For the reasons set forth below, Defendant's motions are denied.

II. Discussion

Plaintiff carries "the burden of demonstrating that jurisdiction exists." *Techsnabexport, Ltd. v. United States*, 16 CIT 420, 422, 795 F. Supp. 428, 432 (1992) (citing *McNutt v. Gen. Motors Acceptance Corp.*, 298 U.S. 178, 189 (1936)). In deciding a USCIT Rule 12(b)(1) motion to dismiss that does not challenge the factual basis for the complainant's allegations, and when deciding a USCIT Rule 12(b)(5) motion to dismiss for failure to state a claim upon which relief may be granted, the court assumes all factual allegations to be true and draws all reasonable inferences in plaintiff's favor. *See Cedars–Sinai Med. Ctr. v. Watkins*, 11 F.3d 1573, 1583–84 & n.13 (Fed. Cir. 1993); *Henke v. United States*, 60 F.3d 795, 797 (Fed. Cir. 1995) (subject matter jurisdiction); *Gould, Inc. v. United States*, 935 F.2d 1271, 1274 (Fed. Cir. 1991) (failure to state a claim).

A. Subject Matter Jurisdiction

The statute provides that an action challenging the denial of TAA benefits must be commenced "within sixty days after notice" of the denial. 19 U.S.C. § 2395. The sixty-day period is jurisdictional. *Kelley*, 812 F.2d at 1380. As such, the court's 5-day service-by-mail extension, USCIT R. 6(d), does not apply. *See generally*, 4B Charles Alan Wright, Arthur R. Miller, Mary Kay Kane & Richard L. Marcus, *Federal Prac. & Proc.* § 1171 (3d ed. 2012) ("the [service-by-mail extension] has been held not to extend the time permitted for obtaining review of administrative decisions when the decision has been mailed, on the theory that the statutory time elements for review are mandatory and jurisdictional.").

USDA notified Plaintiff of the denial of benefits in a letter dated May 13, 2011, which also informed Plaintiff of his right to request judicial review:

> You may request judicial review of this determination within sixty (60) days of this letter by submitting a request for judicial review via certified mail (return receipt requested) to Clerk's Office, U.S. Court of International Trade, One Federal Plaza, New York, New York 10278–0001. The Office of the Clerk can

> provide instructions for requesting a judicial review and may be reached at (212) 264–2800. You can also visit the Court's website . . . for more information.

Compl. Ex. USDA denial letter (May 13, 2011) ("TAA Denial"). There is nothing in the record indicating when USDA mailed the denial letter to Plaintiff. Plaintiff avers in its amended complaint that it received the letter sometime after May 19, 2011. To commence this action Plaintiff mailed a letter to the court dated July 12, 2012, but not via certified mail (return receipt requested). That omission caused Plaintiff's letter to be deemed filed when received on July 18, 2011. *See* USCIT R. 5(d)(4). Had it been sent via certified mail (return receipt requested) on July 12, 2011, Plaintiff's letter would have been deemed filed when mailed. Id.

Event	Date	60-Day Deadline
Letter	May 13, 2011	July 12, 2011
Mailing	?	?
Receipt	May 19, 2012	July 18, 2011

As the table indicates, Plaintiff's July 18th filing is untimely if measured from the date of the letter, but timely if measured from date of receipt. To identify the appropriate trigger for the 60-day period, the court begins with the Federal Circuit's decision in *Kelley*. In *Kelley* the Federal Circuit addressed the notice requirement of 19 U.S.C. § 2395 when reviewing a TAA decision by the U.S. Department of Labor ("Labor"). Labor had promulgated a regulation that triggered the 60-day period with publication of its TAA determination in the Federal Register. *See* 29 C.F.R. § 90.19. That regulation authorizes Labor to provide constructive notice of its decisions via the Federal Register to the group of workers (three or more) that had applied for TAA. The trial court determined that the constructive notice provision was reasonable, but invalidated the regulation as applied to *pro se* TAA applicants because the court was concerned about the unfairness of requiring them to comb through the Federal Register when the agency had demonstrated that it was not honoring the deadlines for decision-making. *Kelley v. U.S. Dept. of Labor*, 9 CIT 646, 648, 626 F. Supp. 398, 400 (1986) ("Congress could not have intended a *pro se* party to constantly search the Federal Register for the final determination of the Secretary of Labor for months beyond the sixty days within which such determination is due under the statute.").

The Federal Circuit reversed:

> There is no hint in the Trade Act that actual notice is necessary to start the sixty-day limitation period, and utilization of notice in the Federal Register as the triggering event is consistent with the language and structure of the Act. . . .
>
> Here, the trial court acknowledged that the Secretary's interpretation of section 2395(a) is reasonable, but made an exception for *pro se* litigants. . . . [T]he lack of specificity in the statute with respect to the notice requirement does not evidence that Congress intended the result the court reached. Nor does it open the way for the court to overturn the Secretary's regulation as unreasonable. The *pro se* status of appellants does not remove them from the general rule on constructive notice, 29 C.F.R. § 90.19(a).

Kelley, 812 F. 2d at 1380. A couple of important lessons emerge from this decision: First, the TAA notice provision lacks specificity about the type and manner of notice required, meaning that Congress left gaps for the agencies to fill, and second, Labor's gap-filling regulation establishing constructive notice via the Federal Register was reasonable. In this case the first is instructive (although USDA has never rendered a thorough interpretation of the notice provision); the second is irrelevant, at least for USDA, which does not have procedures for providing constructive notice to applicants.

Without a constructive notice mechanism, USDA must provide actual notice to the applicant. USDA, however, seems unsure of its own processes, suggesting that *Kelley* relieves USDA of the burden of providing actual notice. *See* Def.'s Reply in Supp. of Mot. to Dismiss at 4, ECF No. 24 (Mar. 22, 2012). This suggestion is puzzling, however, because USDA has no alternative to actual notice (as Labor does with its publication in the Federal Register). At present there is no means for USDA to provide, or TAA applicants to receive, constructive notice of a denial of benefits. Therefore, actual notice it is.

The critical issue here does not turn on constructive vs. actual notice, but instead on what triggers the 60-day period. When does it begin to run for USDA TAA applicants? Unlike Labor's regulation, which has a clear trigger for the 60-day period—the notice publication date in the Federal Register—USDA's regulation says nothing about the 60-day period, simply referencing the Court's Rules: "Any producer aggrieved by a final agency determination under this part may appeal to the U.S. Court of International Trade for a review of such determination in accordance with its rules and procedures." 7 C.F.R. § 1580.506.

As explained above, USDA notified Plaintiff of the denial of benefits in a letter dated May 13, 2011, which also notified Plaintiff that he may request judicial review "within sixty (60) days of this letter . . . ." Compl. Ex. USDA denial letter (May 13, 2011) ("TAA Denial"). The phrase—"of this letter"—represents a slight change for USDA, which previously advised applicants of their right to seek judicial review within 60 days "'*from the date* of this letter.'" *Conlin*, 32 CIT at 467, n.2 (quoting TAA denial letter) (emphasis added); *Alaniz v. U.S. Secretary of Agriculture*, 30 CIT 1782, 1785 (2006) (quoting TAA denial letter) (emphasis added). More important than USDA's change of language is its somewhat jarring change in litigating position from *Conlin* to the present case. In *Conlin*, USDA specifically argued, and the court acknowledged, that the 60-day trigger is applicant's *receipt* of notice. *Conlin*, 32 CIT at 467, n.2. Plaintiff in *Conlin* proffered the denial letter, dated September 7, 2006, as well as its envelope, which was postmarked October 2, 2006. Plaintiff also alleged it was received on October 3, 2006. Despite clear language in its denial letter, USDA did not argue that September 7, 2006, triggered the 60-day period in which to seek judicial review. Avoiding that difficult position (with the agency's delay in mailing effectively cutting applicant's 60-day period in half), USDA instead argued that applicant's receipt of the notice on October 3, 2006, triggered the 60-day period:

> [A]ny challenge to the USDA's determination must be brought within 60 days *of receiving notice* of that determination. 19 U.S.C. § 2395(a). In this case, Conlin admits it *received notice* of USDA's denial of its petition on October 3, 2006. Pl. Br. 6.

Br. in Supp. of Def.'s Mot. to Dismiss and Resp. to Pls.' Mot. for J. upon the Agency R. at 5, *Conlin*, Court No. 06–00441 (CIT Feb. 14, 2008), ECF No. 27 (emphasis added). The *Conlin* court noted, consistent with what USDA argued, that October 3rd, not September 7th, triggered the sixty-day period. *Conlin* 32 CIT at 467, n.2 (quoting TAA denial letter and 19 U.S.C. § 2395(a)).

Plaintiff wishes to take *Conlin* one step further, arguing that "The plain language [of the statute] means that a denied applicant has sixty days from the date the applicant receives actual notice of the denial from the [USDA], usually in the form of a letter." Pl.'s Resp. to Def.'s Mot. to Dismiss at 4, ECF No. 17. This goes too far. As *Kelley* held, Congress was not that specific about the manner and type of notice the agencies must provide. *See Kelley*, 812 F. 2d at 1380; *cf.* 42 U.S.C. § 2000e-16(c) ("Within ninety days of *receipt of notice* of final action . . . an employee or applicant . . . may file a civil action as

provided in section 2000e-5 of this title . . . .") (emphasis added); 26 U.S.C. § 6320(a)(2)(C) (requiring notice to be "sent by certified or registered mail").

As explained above, *Kelley* clarifies that the agencies administering the TAA program have a measure of gap-filling discretion to define the type and manner of notice provided to applicants. Along with that discretion comes the flexibility to change position. In this action USDA has changed its litigating position, now asserting that the date of the letter triggers an applicant's 60-day period to seek judicial review. Counsel for USDA explains a number of advantages to using the letter date as the trigger, albeit through post hoc rationalizations not provided in USDA's otherwise unadorned application of 19 U.S.C. § 2395. According to counsel, the date of the letter is fixed by objective and visible standards, is easy to determine, is ascertainable by both parties, and is easily applied. Def.'s Reply in Supp. of Mot. to Dismiss at 5–6. Most of this is true, but ease of application depends on whether the notice was mailed contemporaneously with the date of the letter, as well as when the applicant received the letter. As the facts of *Conlin* demonstrate, the letter date may prove arbitrary (as applied) by significantly truncating an applicant's 60-day period, an occurrence in *Conlin* that prompted even USDA to acknowledge that receipt date was proper, at least in that instance.

The date of the letter is a suitable starting point for analyzing the sixty-day deadline, but it does not establish, as USDA envisions, a conclusive trigger for the sixty-day period. In most cases it may resolve the issue of whether suit was timely commenced, but an applicant may nevertheless allege that the date of the letter (as applied) arbitrarily truncates the applicant's sixty-day period, either because the notice was not mailed contemporaneously with the date of the letter (*Conlin*), or the applicant received the notice on a date beyond what would otherwise be a reasonable time for mailing. The onus, however, is on the applicant to make the allegation, and if necessary (*e.g.*, defendant challenges the allegation), proffer and prove the date of mailing (via the envelope's postmark), receipt (via affidavit or testimony), or both, like the applicant in *Conlin*.

USDA, of course, enjoys a general presumption of regularity that official duty has been performed. *See Butler v. Principi*, 244 F.3d 1337, 1340 (Fed. Cir. 2001) ("the doctrine presumes that public officers have properly discharged their official duties."). This "assumption" allocates to plaintiff the burden of proof on the issue of whether USDA performed its official duty by mailing the notice contemporaneously with its date. *Cf.* 21 B Charles A. Wright & Kenneth W.

Graham, Jr., *Federal Prac. & Proc. Evid.* § 5124 (2d ed. 2008) ("Rule 301 does not apply to 'assumptions'—rules for allocating the burden of proof that are often mislabeled as 'presumptions.' ... the best known include: ... the 'assumption' that official duty has been regularly performed."). Nothing on the record in this case indicates when USDA mailed the denial letter to Plaintiff, although Plaintiff has averred that it received the letter sometime after May 19, 2011. This is uncontroverted. Defendant's 12(b)(1) motion assumes that the date of the letter conclusively triggers the 60-day period, making the date of receipt irrelevant. As explained above, however, the letter's date only presumptively triggers the 60-day period.

Given that Defendant's 12(b)(1) motion to dismiss does not controvert Plaintiff's allegation of receipt, the court must assume that factual allegation to be true. *See Cedars-Sinai Medical Center v. Watkins*, 11 F.3d 1573, 1583–84 (Fed. Cir. 1993) ("If a Rule 12(b)(1) motion simply challenges the court's subject matter jurisdiction based on the sufficiency of the pleading's allegations—that is, the movant presents a 'facial' attack on the pleading—then those allegations are taken as true and construed in a light most favorable to the complainant."). Plaintiff received the May 13th denial letter sometime after May 19th, which is at least a six-day lag. Is a six-day lag an unreasonable time for mailing? The court believes that it is. The Rules of the Court of International Trade assume mailing takes five days. USCIT Rule 6(d).[2] That five-day period is a helpful benchmark to determine how long is too long for the agency's mailings, at least as far as evaluating an appropriate trigger for the 60-day period. Recall that the court's five-day extension-by-mail rule does not apply to the 60-day jurisdictional time period. The net effect is that the letter date will always shortchange an applicant some period of time while USDA's denial letter is in the mail. This is permissible, up to a point. The facts of this case identify that point. The six-day lag between the date of the letter and Plaintiff's receipt represents ten percent of Plaintiff's 60-day period in which to seek judicial review. The court believes this is too much erosion for the letter date to be an appropriate trigger in this case. With the date of mailing unknown, the other option is Plaintiff's date of receipt of the notice, which stands uncontroverted as May 19, 2011. Using that measure, Plaintiff timely filed its suit within 60 days. The court will therefore deny Defendant's Rule 12(b)(1) motion to dismiss.

The letter date may well resolve most issues involving the timely commencement of suit, especially when USDA mails the notice con-

[2] This five-day period is generous when compared with the 3-day rule that applies to litigation in Federal District Courts. *See* Fed. R. Civ. P. 6(d).

temporaneously with its date, and the notice is received within five days. The hope though is that as USDA eventually moves toward electronic notice, the issues of mailing, delay, and receipt will prove to be, with this opinion, quaint relics of a simpler time.

B. Motion to Dismiss Pursuant to USCIT R. 12(b)(5)

Together with its USCIT Rule 12(b)(1) motion, Defendant also filed a motion to dismiss Plaintiff's complaint pursuant to USCIT Rule 12(b)(5) for failure to state a claim upon which relief may be granted. Defendant's memorandum in support of its Rule 12(b)(5) motion, Plaintiff's response, and Defendant's reply each focus heavily on the merits of Plaintiff's TAA application. Plaintiff, though, has only had one brief to the government's two. The court would like to hear further from Plaintiff on the merits of its claim and accordingly, will convert Defendant's motion to dismiss pursuant to USCIT Rule 12(b)(5) to a motion for judgment on the agency record pursuant to USCIT Rule 56.1. *See, e.g.*, *Nguyen v. U.S. Secretary of Agriculture*, 31 CIT 187, 187, 471 F. Supp. 2d 1350, 1350–51 (2007) ("Pursuant to its discretion under USCIT R. 12(b), the court has converted Defendant's motion to dismiss for failure to state a claim upon which relief can be granted to a motion for judgment on the agency record pursuant to USCIT R. 56.1").

III. Conclusion

For the foregoing reasons, it is hereby

ORDERED that Defendant's motion to dismiss pursuant to USCIT Rule 12(b)(1) is denied; it is further

ORDERED that Defendant's motion to dismiss pursuant to USCIT Rule 12(b)(5) is converted to a motion for judgment on the agency record pursuant to USCIT Rule 56.1; and it is further

ORDERED that the court will schedule a conference with the parties to discuss the further disposition of this action.

Dated: May 24, 2012
New York, New York

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

Slip Op. 12–67

UNION STEEL MANUFACTURING CO., LTD., Plaintiff, and WHIRLPOOL CORPORATION, Plaintiff-Intervenor, v. UNITED STATES, Defendant, and UNITED STATES STEEL CORPORATION, NUCOR CORPORATION, and HYUNDAI HYSCO, Defendant-Intervenors.

Before: Timothy C. Stanceu, Judge
Consol. Court No. 10–00106

[Remanding a final determination in an administrative review of an antidumping duty order on certain corrosion-resistant carbon steel flat products from the Republic of Korea]

Dated: May 25, 2012

Brady W. Mills, Morris, Manning & Martin, LLP, of Washington, DC, argued for plaintiff Union Steel Manufacturing Co., Ltd. With him on the brief were *Donald B. Cameron*, *Julie C. Mendoza*, *R. Will Planert*, and *Mary S. Hodgins*, of Washington, DC.

Donald B. Cameron, Morris, Manning & Martin, LLP, of Washington, DC, argued for consolidated plaintiff Dongbu Steel Co., Ltd. With him on the brief were *Brady W. Mills*, *Julie C. Mendoza*, *R. Will Planert*, and *Mary S. Hodgins*, of Washington, DC.

William R. Rucker and *Nicolas Guzman*, Drinker Biddle & Reath, LLP, of Chicago, IL, for plaintiff-intervenor.

L. Misha Preheim, 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, and *Claudia Burke*, Senior Trial Counsel, of Washington, DC. 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.

Ellen J. Schneider, Skadden, Arps, Slate, Meagher & Flom LLP, of Washington, DC, argued for defendant-intervenor and consolidated plaintiff United States Steel Corporation. With her on the brief were *Jeffrey D. Gerrish*, *Robert E. Lighthizer*, *Soo-Mi Rhee*, and *Luke A. Meisner*, of Washington, DC.

Timothy C. Brightbill, Wiley Rein LLP, of Washington, DC, argued for defendant-intervenor Nucor Corporation. With him on the brief was *Alan H. Price*, of Washington, DC.

Jarrod M. Goldfeder, Akin Gump Strauss Hauer & Feld LLP, of Washington, DC, argued for consolidated plaintiff and defendant-intervenor Hyundai HYSCO. With him on the brief were *J. David Park* and *Natalia D. Dobrowolsky*, of Washington, DC.

OPINION AND ORDER

Stanceu, Judge:

I. INTRODUCTION

In this consolidated action, four plaintiffs, Union Steel Manufacturing Co., Ltd. ("Union"), Dongbu Steel Co., Ltd. ("Dongbu"), Hyundai HYSCO ("HYSCO"), and United States Steel Corporation ("U.S. Steel"), challenge the final determination ("Final Results") issued by the International Trade Administration, U.S. Department of Commerce ("Commerce" or the "Department") in the fifteenth administra-

tive review of an antidumping duty order on imports of certain corrosion-resistant carbon steel flat products ("CORE" or "subject merchandise") from the Republic of Korea ("Korea") for the period of August 1, 2007 through July 31, 2008 ("POR" or "period of review"). *Certain Corrosion-Resistant Carbon Steel Flat Products from the Republic of Korea: Notice of Final Results of the Fifteenth Admin. Review*, 75 Fed. Reg. 13,490 (Mar. 22, 2010) ("*Final Results*"). Three of these plaintiffs–Union, Dongbu, and HYSCO–are Korean exporters of the subject merchandise and were respondents in the fifteenth administrative review. The remaining plaintiff, U.S. Steel, is a member of the domestic industry. U.S. Steel and HYSCO are also defendant-intervenors in this consolidated case, as is Nucor Corporation ("Nucor"), a member of the domestic industry. Before the court are the USCIT Rule 56.2 motions for judgment on the agency record filed by each plaintiff and two motions by defendant for a voluntary remand on certain claims in this case.

The court determines that: (1) the Department's decision to use financial data pertaining only to the 2008 fiscal year of Union's parent company in determining Union's interest expense ratio cannot be upheld on judicial review; (2) in response to defendant's request for a voluntary remand, the court will order the Department to reconsider the "quarterly-cost methodology" used to apply the "recovery-of-costs" test to the home-market sales of Union and HYSCO and the "indexing" methodology wherever used in the Final Results; (3) on remand, the Department must reconsider the use in the Final Results of the quarterly-cost and indexing methodologies for various other purposes; (4) the Department must reconsider its decision to depart from its normal method for selecting comparison months of normal value sales; (5) in response to defendant's request for a voluntary remand, the court will order the Department to reconsider its decision to compare laminated CORE and non-laminated, painted CORE as "identical" merchandise; (6) in response to defendant's request for a voluntary remand, the court will order that Commerce reconsider the use of the zeroing methodology in the fifteenth review; (7) no relief is available on Dongbu's claim seeking an individually-determined dumping margin; and (8) in response to the defendant's request for a voluntary remand, remand is appropriate on U.S. Steel's challenge to the date of sale used for certain sales by HYSCO through a U.S. affiliate. The court determines, in addition, that any modifications to the weighted-average dumping margins of Union and HYSCO resulting from this remand shall be reflected in the rate applied to Dongbu.

II. BACKGROUND

The court summarizes below the procedural history of the fifteenth administrative review of the order on CORE from Korea and the procedural history of this litigation, both of which are somewhat complex.

Commerce initiated the fifteenth administrative review of the order on CORE from Korea on September 30, 2008, identifying seven Korean exporters of subject merchandise: Dongbu; Dongkuk Industries Co., Ltd. ("Dongkuk"); Haewon MSC Co., Ltd. ("Haewon"); HYSCO; LG Chem, Ltd. ("LG"); Pohang Iron and Steel Co., Ltd/Pohang Coated Steel Co., Ltd. ("POSCO Group"); and Union. *Initiation of Antidumping & Countervailing Duty Admin. Reviews & Requests for Revocation in Part*, 73 Fed. Reg. 56,795 (Sept. 30, 2008). On October 2, 2008, Commerce determined that it would not examine individually each respondent in the review, citing its authority under section 777A of the Tariff Act of 1930 ("Tariff Act" or the "Act"), 19 U.S.C. § 1677f-1(c) (2006), and provided an opportunity for parties to comment on mandatory respondent selection. *Mem. from Int'l Trade Compliance Analyst to the File* 1–2 (Oct. 2, 2008) (Admin. R. Doc. No. 4745) ("*Invitation to Comment on Respondent Selection*"). Dongbu filed such comments on October 21, 2008. *Letter from Dongbu to the Sec'y of Commerce* (Oct. 21, 2008) (Admin. R. Doc. No. 4811) ("*Dongbu's Respondent Selection Comments*").

On December 8, 2008, Commerce determined in a separate memorandum (the "Respondent Selection Memorandum") that it would examine individually only two respondents, Union and HYSCO. *Mem. from Int'l Trade Compliance Analyst to Dir., Office 3 AD/CVD Operations*, at 7 (Dec. 8, 2008) (Admin. R. Doc. No. 4817) ("*Respondent Selection Mem.*"). On June 17, 2009, Commerce announced that it was rescinding the review as to Dongkuk because Dongkuk exported no subject merchandise to the United States during the POR. *Certain Corrosion-Resistant Carbon Steel Flat Products from the Republic of Korea: Notice of Rescission of Antidumping Duty Admin. Review, In Part*, 74 Fed. Reg. 28,664, 28,665 (June 17, 2009). On July 8, 2009, Commerce determined that it would examine the POSCO Group individually as a voluntary respondent under section 782 of the Tariff Act, 19 U.S.C. § 1677m. *Mem. from Program Manager to Office Dir., Office 3 AD/CVD Operation* (July 8, 2009) (Admin. R. Doc. No. 4974).

Commerce issued the preliminary results of the fifteenth review ("Preliminary Results") on September 8, 2009, preliminarily assigning weighted-average dumping margins of 0.43% to HYSCO, 0.16% to the POSCO Group, 3.94% to Union, and, as a simple "average" of the

only non-*de-minimis* margin of the selected respondents, 3.94% to the non-selected respondents, which were Dongbu, Haewon, and LG. *Certain Corrosion-Resistant Carbon Steel Flat Products from the Republic of Korea: Notice of Prelim. Results of the Antidumping Duty Admin. Review*, 74 Fed. Reg. 46,110, 46,114 (Sept. 8, 2009) ("*Prelim. Results*"). On December 16, 2009, Commerce issued memoranda to Union, HYSCO, and the POSCO Group announcing the Department's decision that, for purposes of margin calculations, certain costs would be calculated using four quarterly weighted averages rather than one weighted average for the entire POR and that the Department was departing from its normal method of determining comparison months for normal value. *See, e.g.*, *Mem. from Accountant to Dir.*, *Office of Accounting (Dec. 16, 2009) (Admin. R. Doc. No. 5166) ("Union's Post-Prelim. Analysis Mem."). On March 22, 2010, Commerce issued the Final Results, which assigned weighted-average dumping margins of 3.29% to HYSCO, 0.01% to the POSCO Group (a de minimis margin), 14.01% to Union, and, as a simple average of the non-de-minimis margins of the selected respondents, 8.65% to the non-selected respondents. Final Results, 75 Fed. Reg. at 13,491.*

Union, Dongbu, HYSCO, and U.S. Steel each challenged the Final Results, and the court consolidated these cases on May 13, 2010. Order (May 13, 2010), ECF No. 44. Defendant has requested a voluntary remand as to four claims in this consolidated litigation: (1) Union's claim challenging the Department's comparing "painted CORE in the same category as laminated CORE," Def.'s Resp. to Pls.' & Def.-intervenors' Mots. for J. upon the Agency R. 46–49 (Feb. 11, 2011), ECF No. 86 ("Def.'s Resp."); (2) U.S. Steel's claim challenging the Department's using the "shipment date," rather than a later "invoice date," as the date of sale for certain sales by HYSCO, *id.* at 59–60; (3) Union and HYSCO's claim challenging the Department's "cost-recovery methodology," Def.'s Mot. for Partial Voluntary Remand 1 (June 21, 2011), ECF No. 130 ("Def.'s June Remand Mot."); and (4) Union's claim challenging the Department's using the zeroing methodology in this administrative review, Def.'s Mot. for Partial Voluntary Remand (Aug. 24, 2011), ECF No. 141 ("Def.'s Aug. Remand Mot.").

III. DISCUSSION

The court exercises jurisdiction over this case according to section 201 of the Customs Courts Act of 1980 ("Customs Courts Act"), 28 U.S.C. § 1581(c) (2006). Under this jurisdictional provision, the court reviews actions commenced under section 516A of the Tariff Act, 19 U.S.C. § 1516a(a)(2)(B)(iii), including an action contesting the De-

partment's issuance, under section 751 of the Tariff Act, 19 U.S.C. § 1675(a), of the final results of an administrative review of an antidumping duty order. In reviewing the final results, the court must hold unlawful any finding, conclusion or determination that is not supported by substantial evidence on the record, or that is otherwise not in accordance with law. *See* Tariff Act, § 516A, 19 U.S.C. § 1516a(b)(1)(B)(i).

A. Commerce Must Reconsider its Interest Expense Ratio Calculation

In an administrative review, Commerce determines a dumping margin for entries of subject merchandise by comparing the normal value and the export price or constructed export price. 19 U.S.C. §§ 1675(a)(2), 1677(35)(A). Under § 773(b)(1) of the Tariff Act, 19 U.S.C. § 1677b(b)(1), Commerce, when calculating normal value, in certain circumstances may exclude from the calculation home-market sales it determines to have been made at prices below the cost of production ("COP").[1] In § 1677b(b)(3), Congress directed that Commerce calculate COP as the sum of three categories of costs, defined as follows: (1) "the cost of materials and of fabrication or other processing of any kind employed in producing the foreign like product, during a period which would ordinarily permit the production of that product in the ordinary course of business," *id.* § 1677b(b)(3)(A); (2) "an amount for selling, general, and administrative expenses based on actual data pertaining to production and sales of the foreign like product by the exporter in question," *id.* § 1677b(b)(3)(B); and (3) packing and other expenses for placing the foreign like product in condition for shipment, *id.* § 1677b(b)(3)(C). In this case, Commerce decided to include also interest expenses, *i.e.*, financing costs, as a component of COP, in accordance with its practice. Issues & Decision Mem., A-580–816, ARP 07–08, at 42–43 (Mar. 15, 2010) (Admin. R. Doc. No. 5249) ("*Decision Mem.*"). Union does not challenge this decision before the court. Instead, Union's claim challenges the data on which Commerce

[1] Section 773(b)(1) of the Tariff Act of 1930 ("Tariff Act") provides, in pertinent part, that:

> Whenever the administering authority has reasonable grounds to believe or suspect that sales of the foreign like product under consideration for the determination of normal value have been made at prices which represent less than the cost of production of that product, the administering authority shall determine whether, in fact, such sales were made at less than the cost of production. If the administering authority determines that sales made at less than the cost of production–
>
> (A) have been made within an extended period of time in substantial quantities, and
>
> (B) were not at prices which permit recovery of all costs within a reasonable period of time,
>
> such sales may be disregarded in the determination of normal value.

19 U.S.C. § 1677b(b)(1) (2006).

determined the interest expenses, and the "general and administrative" ("G&A") expenses, pertaining to the production and sale of the foreign like products.

Considering interest and G&A expenses to be period costs, Commerce determined these expenses according to financial statements. *Id.* Commerce calculated Union's G&A expense ratio using Union's financial statement for fiscal year 2008 and calculated Union's interest expense ratio using the consolidated financial statement of Union's parent, Dongkuk Steel Mills Co. Ltd. ("DSM"), for fiscal year 2008.[2] *Id.* at 43. Because the fiscal year of DSM and that of Union are the calendar year, Br. in Supp. of the Mot. of Union Steel for J. upon the Agency R. 3 (Sept. 10, 2010), ECF No. 58 ("Union's Br."), these financial statements did not correspond temporally with the POR (August 1, 2007 to July 31, 2008). After calculating Union's G&A and interest expense ratios using 2007 fiscal year financial statements in the Preliminary Results, Commerce announced in the "Issues and Decisions Memorandum" it incorporated into the Final Results ("Decision Memorandum") that, in agreement with comments on the Preliminary Results submitted by petitioners, it had "revised Union's COP to include G&A and financial expense ratios based on the 2008 fiscal year financial statements." *Decision Mem.* 42. Because DSM's interest expenses were substantially greater in 2008 than in 2007, the change could be expected to result in the exclusion of more home-market sales as "below-cost" sales under § 1677b(b)(1), and apparently contributed to the increase in Union's margin from the Preliminary Results (3.94%) to the Final Results (14.01%). *Prelim. Results*, 74 Fed. Reg. at 46,114; *Final Results*, 75 Fed. Reg. at 13,491.[3]

Union claims that the use of the 2008 financial statements was unlawful because the interest expenses incurred in 2008 "were aberrational and do not reasonably reflect Union's actual data pertaining to the production and sale of the subject merchandise during the

[2] The International Trade Administration, U.S. Department of Commerce ("Commerce" or the "Department") determines general and administrative ("G&A") and interest expenses by first calculating "ratios" for G&A and interest expenses based on data in a respondent's financial statements. The numerator of the G&A expense ratio is the respondent's full-year G&A expenses, and the numerator for the interest expense ratio is the respondent's full-year net financial expenses. *See*, *e.g.*, *Letter from Union to the Sec'y of Commerce* D-36-D-37 (Feb. 5, 2009) (Admin. R. Doc. No. 4845). The denominator for both ratios is the respondent's full-year cost of goods sold. *Id.* Commerce uses these ratios to calculate per-unit G&A and interest expenses by multiplying each ratio by the total cost to manufacture the particular foreign like product for which Commerce is calculating COP. *Id.*

[3] Although Union challenges both the interest and the G&A expense ratios, this claim is directed mainly at the interest expense ratio. The G&A ratio decreased slightly when Commerce changed from the 2007 to the 2008 financial statements. *Mem. from Accountant to Dir., Office of Accounting* 2 (Mar. 15, 2009) (Admin. R. Doc. No. 5260) ("*COP Analysis Mem.*").

POR." Union's Br. 9. Union asserts that in 2008, after the close of the POR, DSM incurred "substantial and extraordinary foreign exchange losses," *id.* at 10, that resulted from the 2008 global financial crisis and that were reflected on DSM's 2008 financial statement, *id.* at 9–10. Specifically, Union contends that the 2008 financial crisis coincided with a rapid loss in the value of the Korean won, which led to DSM's recognizing extraordinarily large foreign-currency transaction and translation[4] losses at the end of 2008. *Id.* at 8–11. Union argues that Commerce instead should have used the 2007 statements to compute COP for sales in 2007 and the 2008 statements to compute COP for sales in 2008, *id.* at 13, or, alternatively, calculated "a blended G&A and interest rate using financial statements for 2007 and 2008 based on the relative portions of the home market reporting period in each fiscal year," *id.* at 14. Union also argues that the "home market reporting period" includes the "90/60 day 'window' period outside of the POR proper," referring to the months in which Commerce, under its regulations, 19 C.F.R. § 351.414(e)(2) (2010), searches for a sale of the foreign like product if no such sale is found in the months in which the sale of the subject merchandise occurred. Union's Br. 12. Union submits that the 2007 statements overlapped more of the POR than did the 2008 statements when the window period is considered in the analysis. *Id*.

Union raised essentially the same arguments before Commerce, arguing, *inter alia*, that "using the 2008 financial statements would significantly distort the calculation of Union's interest expense." *Letter from Union to the Sec'y of Commerce* 1–2 (Jan. 27, 2010) (Admin. R. Doc. No. 5219) ("*Union's Rebuttal Br.*"). Referencing the large increase in 2008 foreign currency transaction and translation losses, Union argued that the "amount of such losses was not determinable . . . until the end of 2008 and thus could not possibly have been taken into account by Union in setting its prices during the period of review . . . ." *Id*. at 2. Union argued, further, that "[i]ncluding these exchange losses in Union's COP for the POR would be particularly egregious in this case because . . . most of the depreciation in the Korean Won during 2008 took place from August through December 2008, *i.e.*, in the months *after* the close of the POR." *Id.* at 7. Union argued that "[f]oreign exchange transaction and translation losses attributable to

[4] Union explains the "transaction" and "translation" categories as follows:

> Translation losses are the result of restating obligations that are denominated in a foreign currency into Korean Won as of December 31, so the exchange rate on December 31 determines the amount of loss or gain. Transaction losses are also impacted by changes in exchange rates that occur between the time Union buys/sells on credit goods or services whose prices are denominated in a foreign currency.

Pl. Union Steel's Reply Br. 4 n.3 (Apr. 4, 2011), ECF No. 121.

the depreciation of the Korean won *after the close of the POR* cannot, under any definition, be considered part of the 'actual costs' incurred in producing and selling Union's home market merchandise during the POR." *Id.* at 8 (quoting 19 U.S.C. § 1677b(b)(3)(B)). According to Union, these circumstances warranted the Department's using a "blended rate" to calculate G&A and interest, for instance, by combining the 2007 and 2008 financial data using a weighted average. *Id.* at 5. Union also noted that Commerce had previously used a "blended rate" from the financial statements of the two fiscal years covered by a POR, citing the results of an administrative review of an antidumping duty order pertaining to CORE and cut-to-length steel plate from Canada ("*CTL Plate from Canada 93/94*"). *Id.* at 5 (citing *Certain Corrosion-Resistant Carbon Steel Flat Products & Certain Cut-to-Length Carbon Steel Plate From Canada; Final Results of Antidumping Duty Admin. Reviews*, 61 Fed. Reg. 13,815, 13,829 (Mar. 28, 1996)).

A comparison of DSM's 2007 and 2008 financial statements supports Union's contention that, primarily due to certain foreign-currency-related losses, the Department's change to the 2008 statement produced a financial expense ratio more than five times that derived from the 2007 statement. *Letter from Union to the Sec'y of Commerce* exhibit D-29, at 8–9 (Aug. 26, 2009) (Admin. R. Doc. No. 5005) ("*DSM's Financial Statement*");[5] *Mem. from Accountant to Dir., Office of Accounting* attachment 3 (Mar. 15, 2009) (Admin. R. Doc. No. 5260) ("*COP Analysis Mem.*"). DSM's income statement shows a number of variations between 2008 and 2007 in the expenses underlying the financial ratio, but the variations that were largest, by far, were DSM's net losses of 305,946,498 million Korean won in the "foreign currency transaction" category and 332,899,437 million Korean won in the "foreign currency translation" category. DSM's Financial Statement 8–9; *Union's Rebuttal Br.* exhibit 1.[6] By comparison, DSM's net loss for these two categories combined, as shown in the 2007 financial statement, was only 15,869,036 million Korean won. *DSM's Financial Statement* 8. All other financial expense categories accounted for only

[5] In its memorandum calculating the financial expense ratio, Commerce bracketed as business proprietary information the data from the financial statement of Dongkuk Steel Mills Co. Ltd. ("DSM"). *COP Analysis Mem.* attachment 3. But the financial statements are now public information, Union having disclosed them in the public version of its August 26, 2009 questionnaire response. *Letter from Union to the Sec'y of Commerce* exhibit D-29 (Aug. 26, 2009) (Admin. R. Doc. No. 5005) ("*DSM's Financial Statement*").

[6] The exhibit Union prepared for its rebuttal brief before Commerce indicates that "Unit= 1,000 KRW [Korean Won]." *Letter from Union to the Sec'y of Commerce* exhibit 1 (Jan. 27, 2010) (Admin. R. Doc. No. 5219) ("*Union's Rebuttal Br.*"). This appears to be error because the document to which Union cites for this exhibit, DSM's financial statement, indicates the same figures but indicates "unit: million KRW." *DSM's Financial Statement* 8.

12% of DSM's 2008 net financial expenses. *COP Analysis Mem.* attachment 3.[7] The record also supports Union's contention that the Korean won depreciated precipitously after the close of the POR. Exhibits to Union's rebuttal brief before Commerce show that the Korean won was valued in U.S. dollars at $0.001069 on January 1, 2008, $0.000989 on July 31, 2008, the final day of the POR, but at $0.000728 on December 31, 2008, the final day of the year, which meant a post-POR decline of approximately 26%. *Union's Rebuttal Br.* exhibit 2. Similarly, these exhibits show that the Korean won was valued at 0.119 Japanese yen on January 2, 2008, 0.107 Japanese yen on July 31, 2008, and 0.072 Japanese yen on December 31, 2008. *Id.* exhibit 3.

In the Final Results, Commerce based its use of the 2008 statements to calculate G&A and interest expenses on what it described as its "typical" or "standard" practice of using the financial statements that most closely correspond to the POR. For G&A expense, Commerce stated that it has a standard practice of using "'the full-year G&A expense and cost of goods sold reported in the company's unconsolidated, audited fiscal year financial statements for the fiscal year that most closely corresponds to the period of investigation or period of review.'" *Decision Mem.* 42–43 (quoting the Department's "Antidumping Manual," Ch. 9, at 7, *available at* http://ia.ita.doc.gov/admanual).[8] With respect to the interest rate ratio, the Decision Memorandum states that "the Department typically calculates a company's net financial expenses ratio by using the 'full-year net financial expenses and costs of goods sold reported in the consolidated, audited fiscal year financial statements for the period that most closely corresponds'" to the POR. *Id.* at 43 (quoting Antidumping Manual, Ch. 9, at 7). The Decision Memorandum adds that "[t]he Department consistently applies those principles in its administrative proceedings" and that "[in] virtually all past cases, the Department has determined which financial statements most closely correspond to the POR by examining which financial statements overlap the POI [period of investigation]/POR by the greatest number of months." *Id.* Observing that the "2008 financial statements overlapped seven months of the POR, whereas the 2007 financial state-

[7] The Department's calculation of the financial expense ratio shows that the numerator of this ratio, "Net Financial Expenses," is comprised of several categories other than gains and losses on foreign currency transactions and translations: "Net Interest Expense," valuation and transaction gains and losses from financial derivatives, and "Short Term Interest Income." *COP Analysis Mem.* attachment 3. These categories, in aggregate, amount to net expenses of 86,778,305 million Korean won, or approximately 12% of DSM's net financial expenses in 2008, which was 725,624,240 million Korean won.

[8] The Department's website for the "Antidumping Manual" states that "[t]his manual cannot be cited to establish [Department of Commerce] practice."

ments overlapped only five months of the POR," Commerce concluded that the 2008 financial statements were the "more appropriate basis for the G&A and financial expense ratios." *Id.*

After citing the alleged practice, Commerce rejected the arguments Union advanced against the use of only the 2008 financial statements to determine interest and G&A expenses. It characterized Union as arguing that "reliance upon 2008 fiscal year financial statements led to distortions in the margin calculation because it could not have factored into its home market prices post-period of review events, such as year-end adjustments and changes in net foreign currency transactions and translations." *Id.* at 44. Commerce rejected Union's argument, so construed, by stating, *inter alia*, that "Union fails to substantiate its assumption that it was completely unaware of pending end-of-fiscal year 2008 adjustments when setting home market prices during the POR." *Id.* In response to Union's argument that the decrease in the value of the won caused massive, unexpected foreign exchange losses, Commerce conceded that "the decline in the value of the Korean Won occurred more rapidly in the post POR period of 2008" but stated that "this in of itself is not conclusive." *Id.* Commerce explained that a departure from its "practice" was not warranted because "[t]he financial expense ratio is influenced by many factors, not simply the movement of exchange rates" and because "[n]ormally, large multinational companies like DSM try to minimize the risk associated with exchange rate changes by hedging their exposure to any one foreign currency." *Id.* at 44–45. Finally, Commerce rejected Union's suggestion that Commerce combine the 2008 and 2007 financial statement data using a blended rate. Commerce distinguished the facts of the prior case in which it had used a blended rate, *CTL Plate from Canada 93/94*, by noting that the POR in that case was eighteen months, covering the majority of two fiscal years. *Id.* at 45. Commerce concluded that "[a]bsent similar circumstances in this case, the Department has reasonably determined that a departure from its normal practice of selecting the single set of fiscal year financial statements that most closely correspond to the POR is not warranted." *Id.*

The Department's decision to use only the 2008 DSM financial statement to determine Union's interest expenses was unlawful for two reasons. First, Commerce failed to consider an important aspect of the question before it, which was whether determining Union's interest expense ratio solely on the basis of data in that financial statement produced the most accurate result. A basic purpose of the antidumping statute is the accurate determination of dumping mar-

gins. *See Rhone Poulenc, Inc. v. United States*, 899 F.2d 1185, 1191 (Fed. Cir. 1990). In this case, Commerce was obligated to make a reasoned decision when choosing among data sources, mindful of its obligation to obtain the most accurate result "based on actual data pertaining to production and sales of the foreign like product . . . ." 19 U.S.C. § 1677b(b)(3)(B). The court cannot identify within the Decision Memorandum an indication that Commerce had as its objective achieving the most accurate margin through the choice of data for measuring interest expenses during the POR. Instead, Commerce reasoned that using the 2008 financial statements accords with its practice and that Union had not met a burden of showing that Commerce must depart from this practice. *See Decision Mem.* 45 (concluding that "the Department has reasonably determined that a departure from its normal practice of selecting the single set of fiscal year financial statements that most closely correspond to the POR is not warranted"). When addressing Union's suggestion that Commerce combine the 2008 and 2007 financial statements, Commerce refused to do so not out of a concern for accuracy but due to factual differences between the present case and *CTL Plate from Canada 93/94*, in which Commerce used a blended rate for a respondent's G&A and interest expenses. *Id.* (refusing to modify its calculation "[a]bsent similar circumstances in this case," *i.e.*, a POR that overlapped the majority of two fiscal years). On remand, Commerce must reconsider its decision to determine Union's interest expense using only the 2008 DSM statement, addressing specifically the issue of whether that method, compared to available alternatives, produced the most accurate dumping margin for Union.

In omitting any discussion of the question of accuracy as it pertains to the obligation to use actual data on interest expenses, Commerce failed to address a significant concern raised by Union before Commerce: that the 2008 DSM financial statement was affected by aberrational foreign exchange losses stemming from exchange rate changes that occurred after the close of the POR and therefore was unrepresentative of Union's actual interest expense during the POR. *Union's Rebuttal Br.* 8. A remand is appropriate when Commerce fails to address all "significant concerns" that parties raise in administrative briefing. *SKF USA Inc. v. United States*, 630 F.3d 1365, 1374 (2011). Here, Union argued specifically that "[f]oreign exchange transaction and translation losses attributable to the depreciation of the Korean won *after the close of the POR* cannot, under any definition, be considered part of the 'actual costs' incurred in producing and selling Union's home market merchandise during the POR." *Union's*

Rebuttal Br. 8; *see* 19 U.S.C. § 1677b(b)(3)(B) (requiring that G&A expenses be "based on actual data pertaining to production and sales of the foreign like product"). Congress intended that Commerce use data pertaining to costs "during the period of investigation or review," as is confirmed by the Statement of Administrative Action that accompanied enactment of section 773 of the Tariff Act, 19 U.S.C. § 1677b(b), as part of the Uruguay Round Agreements Act. *Uruguay Round Agreements Act, Statement of Administrative Action*, H.R. Doc. No. 103–316, Vol. 1, at 832 (1994), *reprinted in* 1994 U.S.C.C.A.N. 4040, 4170 ("The determination of cost recovery is based on an analysis of actual weighted-average prices and costs during the period of investigation or review . . .").

The Decision Memorandum pays scant, if any, attention to Union's argument that DSM's 2008 financial statement contained post-POR data that was not representative of Union's actual costs of producing and selling merchandise during the POR. While acknowledging that "Union also contends that reliance upon 2008 fiscal year financial statements led to distortions in the margin calculation," the document characterizes Union's argument as being based on Union's inability to "factor[] into its home market prices post-period of review events, such as year-end adjustments and changes in net foreign currency transactions and translations." *Decision Mem.* 44. Rejecting this aspect of Union's argument, Commerce stated that "Union fails to substantiate its assumption that it was completely unaware of pending end-of-fiscal year 2008 adjustments when setting home market prices during the POR." *Id.* While conceding the fact that "the decline in the value of the Korean Won occurred more rapidly in the post POR period of 2008," Commerce responded by asserting that "[t]he financial expense ratio is influenced by many factors, not simply the movement of exchange rates" and that "[n]ormally, large multinational companies like DSM try to minimize the risk associated with exchange rate changes by hedging their exposure to any one foreign currency." *Id.* Neither of these statements addressed Union's contention that the 2008 DSM statement was unrepresentative of Union's "actual data." On remand, Commerce must address this contention.

A second reason for a remand is the Department's justifying the use of DSM's 2008 financial statement on an incorrect premise: that the Department has a consistent practice of using the single financial statement corresponding to the largest portion the POR. As observed in a case involving the previous (fourteenth) administrative review of this order, *Union Steel v. United States*, 35 CIT __, __, 755 F. Supp. 2d 1304, 1311 (2011), "the so-called 'practice' is subject to exceptions" and

"[w]hat Commerce describes as its practice is at most a preference for using the financial statement most closely corresponding to the POR, a preference that Commerce does not observe when it finds sufficient reason to use a different financial statement or statements." The court is unable to agree with the statement in the Decision Memorandum that this "practice" has been consistently followed. *Decision Mem.* 43.

In the fourteenth administrative review of the order on Korean CORE, for which the period of review was August 1, 2006 through July 31, 2007, Commerce also determined it appropriate to calculate Union's G&A and interest expense ratios using the financial statements corresponding with the final seven months of the POR, *i.e.*, the 2007 statements. Upon judicial review, this Court upheld the Department's determination. *Union Steel*, 35 CIT at __, 755 F. Supp. 2d at 1309. Union made several arguments in that case that it also makes here: that Commerce should choose the earlier financial statements based on the greater correspondence with the home-market reporting period (the period of review as expanded by the 90/60-day window period) rather than the period of review, that Commerce should not use data affected by events occurring after the close of the period of review, including a 2007 year-end adjustment for foreign currency transaction gains and losses that Union argued it could not possibly factor into its home-market pricing, and that Commerce, if not using only the earlier (2006) statements, should calculate the ratios by combining data from the financial statements for both fiscal years. *Id.* at __, 755 F. Supp. 2d at 1309–12. Rejecting Union's arguments, the court concluded, first, that the choice of the 2007 statements over the 2006 statements based on a greater correspondence with the period of review was permissible on the record in that case and that the other approach Union advocated, the use of a combination of statements for both fiscal years, did not offer, on that record, clear advantages over use of financial statements for the single fiscal year most closely corresponding to the period of review such that Commerce's approach must be found unreasonable. *Id.* at __, 755 F. Supp. 2d at 1312. Unpersuaded by Union's argument that Union could not factor year-end currency transaction gains and losses into its prices during the period of review, this Court reasoned that "[a]lthough Union may have a legitimate interest in being able to predict how Commerce will apply the Tariff Act to its sales and set prices accordingly, that interest, in the entire circumstances of this case, is not sufficient to compel Commerce to use the 2006 financial statements." *Id.* at __, 755 F. Supp. 2d at 1310. The record in this case differs markedly from that upon which the Department's choice in the fourteenth review was

upheld. Here, the interest cost ratio derived from the 2008 financial statement of DSM reflects a five-fold increase from the interest cost ratio derived from the 2007 statement and appears to have been affected significantly by currency-related losses that coincided with a massive post-POR decline in the value of the Korean won.

In summary, Commerce must reconsider its decision to base Union's interest expense ratio entirely on data obtained from DSM's 2008 financial statement. In doing so, Commerce must consider the relative merits of alternate methods of determining the interest expense ratio in the interest of obtaining the most accurate dumping margin and also must give adequate consideration to Union's objection that, due to post-POR depreciation of the Korean won, the interest cost ratio obtained solely from those data was not representative of the actual interest expense that Union incurred during the POR.

The court does not identify with respect to the G&A expense ratio, also challenged by Union, the same legal infirmities it identified with respect to the interest ratio. Because the Decision Memorandum jointly addresses the two issues, and because Commerce must reconsider its decision on the interest expense issue, the court defers any ruling on whether or not the G&A expense ratio as determined in the Final Results is in accordance with law. Commerce may reconsider its determination of the G&A expense ratio in its remand redetermination.

The court does not find merit in arguments U.S. Steel advances in opposition to a remand on the interest expense issue. U.S. Steel argues, first, that the record does not show that the 2008 financial crisis was "responsible for either the decline in the value of the won or Union's increased foreign exchange losses." Mem. in Opp'n to Pls.' Mots. for J. on the Agency R. filed by Def.-Intervenor United States Steel Corp. 12 (Feb. 11, 2011), ECF No. 105 ("U.S. Steel's Opp'n"). The Department, however, did not reach a finding that the interest expense data in DSM's 2008 financial statement were unaffected by the steep decline in the exchange rate of the Korean won occurring after the close of the POR. The record contains evidence of a steep post-POR decline in the value of the won and evidence of DSM's large foreign exchange losses in late 2008; whether the global financial crisis was at the root of the won depreciation and DSM's post-POR exchange losses during that time period is a tangential question.

U.S. Steel next argues that Commerce correctly rejected Union's argument because factors other than unpredictable currency fluctuations–such as DSM's substantial increases in sales and costs of goods sold from 2007 to 2008–affected DSM's foreign currency transaction

and translation losses. *Id.* at 13. Nucor makes a similar argument. Resp. Br. of Nucor Corp. 47 (Feb. 11, 2011), ECF No. 92 ("Nucor's Resp."). As discussed above, however, the record shows that the foreign-currency-related losses were the most important factor affecting the Department's calculation of DSM's 2008 net financial expenses, with all other financial expense categories accounting for only 12% of DSM's 2008 net financial expenses. *COP Analysis Mem.* attachment 3.

U.S. Steel points to evidence in DSM's financial statement that DSM had far greater liability for notes payable in foreign currencies during 2008 than in 2007. U.S. Steel's Opp'n 13–14 (citing *DSM's Financial Statement* 55). This argument does not address the shortcomings in the Department's decision, which offered blanket adherence to a claimed practice to support the choice of using only the 2008 DSM statement and lacked adequate reasoning as to why that choice was superior to the alternatives on the record.

U.S. Steel argues, further, that "there is not a shred of evidence to suggest that the activities giving rise to the increased transaction and translation gains and losses occurred after the end of the POR." *Id.* at 14. In so arguing, U.S. Steel seems to posit that the post-POR won depreciation did not affect the Department's calculation of the interest expense ratio, even though that calculation was based solely on DSM's 2008 financial statement. U.S. Steel appears to base its argument on a factual finding which, as noted above, the Department did not reach and for which U.S. Steel itself cites no evidence of record.

U.S. Steel also takes issue with Union's calling the foreign currency transaction and translation losses "extraordinary," arguing that such losses are common to all businesses and were not treated as exceptional on DSM's financial statement. *Id.* at 14 (citing Union's Br. 11). As the court has observed, the record contained evidence of DSM's substantial foreign currency exchange losses in 2008 relative to 2007 and evidence of the steep post-POR decline in the value of the Korean won. Commerce did not find that the losses in question, however characterized in DSM's financial statement, were typical for DSM.

Finally, U.S. Steel argues that Union's engaging in currency hedging contracts shows that Union anticipated the late-2008 currency fluctuations and modified its pricing to adjust for anticipated losses. *Id.* at 15. The record shows that Union engaged in one "currency swap" on June 18, 2008 and another on July 9, 2008, each in the amount of $3,000 (U.S.). *DSM's Financial Statement* 45. If these currency swaps suggest anything as to whether Union anticipated the decline of the Korean won, it is that Union was caught unaware:

had Union anticipated that decline, presumably it would have hedged more aggressively. Nor do these contracts suggest anything about Union's pricing activity.

Defendant-intervenor Nucor also defends the Department's determination. Nucor argues that financial expenses are "period costs . . . accrued in year-end adjustments" and that "[c]ompanies project these types of expenses, and can make pricing decisions based on those projections, throughout the year." Nucor's Resp. 46. This argument does not address the question of whether Commerce permissibly used the 2008 DSM financial statement, and only that statement, to calculate the interest expense ratio despite the post-POR depreciation of the won that appeared to affect the interest expense data shown therein. Nucor also argues that Union is incorrect that "the aberrational foreign currency exchange and translation losses were incurred after the POR" because "there was a fairly steady decline in the value of the Korean won through 2008." *Id.* at 47. Nucor's argument mischaracterizes the record evidence. Although some depreciation of the won took place from January through July 2008, the record shows that depreciation was far more pronounced in the remaining five months of 2008. *Union's Rebuttal Br.* exhibit 2 (showing a decline of approximately 7.5% against the U.S. dollar from January 1, 2008 through July 31, 2008 and a decline of 26% from July 31, 2008 through December 31, 2008); *id.* exhibit 3 (showing a decline of approximately 11% against the Japanese yen from January 2 through July 31, 2008 and a decline of 49% from July 31, 2008 through December 31, 2008).

B. In Response to Defendant's Request for a Voluntary Remand, the Court Will Require Commerce to Reconsider the Quarterly-Cost Method of Applying the "Recovery-of-Costs" Test to Home-Market Sales of Union and HYSCO and the Indexing Methodology Wherever Used

As discussed previously, section 773(b) of the Tariff Act allows Commerce, in certain circumstances, to disregard comparison-market sales made at less than COP when determining normal value. 19 U.S.C. § 1677b(b) (the "below-cost" test). Commerce may disregard such sales only if the sales "have been made within an extended period of time in substantial quantities" and "were not at prices which permit recovery of all costs within a reasonable period of time." *Id.* § 1677b(b)(1). With respect to the latter requirement, the Tariff Act, in section 773(b)(2)(D), expressly limits the Department's discretion to

exclude from the normal value determination comparison-market sales that were made at less than the cost of production. Section 773(b)(2)(D) provides that:

> If prices which are below the per unit cost of production at the time of sale are above the weighted average per unit cost of production for the period of investigation or review, such prices shall be considered to provide for recovery of costs within a reasonable period of time.

Id. § 1677b(b)(2)(D). Union and HYSCO claim that Commerce failed to determine weighted-average per-unit costs of production of individual foreign like products using the one-year POR as the averaging period and, therefore, did not comply with the recovery-of-costs test imposed by this provision. More broadly, both plaintiffs claim that the Department's calculating an element of COP, manufacturing costs, using less than period-wide average costs (a methodology to which the parties refer as the "quarterly-cost methodology") violated section 773(f)(1)(A) of the Tariff Act, 19 U.S.C. § 1677b(f)(1)(A). Under this provision, "[c]osts shall normally be calculated based on the records of the exporter or producer of the merchandise, if such records . . . reasonably reflect the costs associated with the production and sale of the merchandise." Union's Br. 15–34; Mem. in Supp. of the Mot. of Pl. Hyundai HYSCO for J. on the Agency R. 7–33 (Sept. 10, 2010), ECF No. 64 ("HYSCO's Mem.").

In the fifteenth review, Commerce calculated COP using four quarterly weighted-average cost calculations. *Decision Mem.* 21. In so doing, Commerce did not effectuate the recovery-of-costs test and the below-cost test according to its usual method, under which it determines per-unit weighted-average costs by using the POR as the averaging period. In addition to determining costs on a quarterly basis, the methodology Commerce used in the fifteenth review applied a multi-step "indexing" method to the respondents' data on the cost of steel coil substrate, a significant input in the production of CORE. *Union's Post-Prelim. Analysis Mem.* 3–5; *Decision Mem.* 24. As described in the Decision Memorandum, "the Department indexed the quarterly material costs to a common period cost level, thereby neutralizing the effect of the significant cost changes for the input between quarters." *Decision Mem*. 23. Next, Commerce "calculated a period of review weighted-average per unit cost," and "[f]inally, the weighted-average per unit cost for the period of review for the substrate input was indexed back to the appropriate quarter to keep the weighted-average per unit costs consistent with the main input's significantly changing price levels occurring between quarters." *Id*.

The Department grounded its decision to use an indexed quarterly-cost methodology in part on its findings that, for Union and HYSCO, there were significant changes–exceeding 25%–in the quarterly average cost of manufacture of the five most-frequently sold products (each identified by an individual "Control Number," or "CONNUM") in the U.S. and home markets during the POR. *Id.* at 17 ("A change in costs that exceeds 25 percent, even if it was only between two quarters of the POR, is significant enough to create distortion when using a single annual average cost methodology."). Commerce also based its decision on a finding that there was evidence of reasonable correlation between the cost changes and the sales prices during the quarterly cost periods. *Id.* at 18–19.

In describing the change from the Department's normal methodology, the Decision Memorandum states that "the Department usually compares a respondent's sales prices against a single weighted-average cost of production for the period of review to determine whether sales were made at less than costs of production and whether the sales prices permit recovery of all costs within a reasonable period of time." *Id.* at 21. It concludes, however, that departure from the normal methodology is warranted "where, as here, cost and price averages calculated over the entire period do not permit proper comparison." *Id.* Commerce reasoned that

> [w]hen costs change significantly, and prices follow such cost changes, using an unadjusted annual average cost in performing the recovery of cost test will result in virtually all sales during the highest cost periods passing the recovery of costs test simply due to the timing of the sale in relation to the cost change cycle.

Id. at 23.

Defendant requests a voluntary remand on the Department's using the quarterly-cost methodology to satisfy the recovery-of-costs test of 19 U.S.C. § 1677b(b)(2). Def.'s June Remand Mot. Defendant cites a decision of this Court, *SeAH Steel Corp. v. United States*, 35 CIT __, __, 764 F. Supp. 2d 1322, 1331–35 (2011), which disallowed the Department's applying an indexed quarterly-cost-based methodology to determine which home-market sales did not satisfy the recovery-of-costs test. Def.'s June Remand Mot. 3 (informing the court that "Commerce wishes to reconsider its cost-recovery methodology as applied to Union Steel and HYSCO in light of the Court's decision in *SeAH*, and potentially apply the reasoning in *SeAH* to the facts of this record"). In *SeAH*, this Court concluded that the Department's indexed quarterly methodology as applied in that case "violates the plain language of the cost recovery statute" and directed Commerce,

on remand, to conduct the cost-recovery analysis using the unindexed weighted-average per-unit cost of production for the entire period of review. *SeAH*, 35 CIT at __, 764 F. Supp. 2d at 1331.[9] Although requesting a remand on the use of indexed quarterly costs for the "cost-recovery methodology," Commerce requests that relief be "denied with respect to all issues except the . . . cost-recovery methodology." Def.'s June Remand Mot. Proposed Order; *see* Oral Tr. 8 (July 13, 2011), ECF No. 142. Thus, defendant would have the court not order remand on, and instead affirm, the Department's use of quarterly costs for other purposes. During oral argument, defendant clarified that it requests a remand so that Commerce may reconsider the use of a quarterly-cost methodology for recovery-of-costs purposes and the indexing methodology for the steel substrate input "wherever it was used." Oral Tr. 158–59. Under the remand order the court is issuing, Commerce will be required to reconsider both of these aspects of the Final Results. As discussed below, the court concludes that reconsideration of the use of the indexed quarterly-cost methodology for other purposes in the Final Results is appropriate as well.

C. Commerce Must Reconsider the Quarterly-Cost Methodology and the Indexing Methodology as Used for the Various Different Purposes in the Final Results

As mentioned earlier, the Decision Memorandum discloses that Commerce applied its indexed quarterly-cost methodology in conducting both the below-cost test and the recovery-of-costs test. *Decision Mem.* 21. The Decision Memorandum refers generally to the use of a single methodology in performing both those tests as well as constructed value ("CV") determinations[10] and difference-in-

[9] Other decisions of this Court have ruled on issues broadly related to the question of averaging periods. *See Pastificio Lucio Garofalo, S.p.a. v. United States*, 35 CIT __, 783 F. Supp. 2d 1230 (2011) (upholding the decision to use quarterly costs, instead of semi-annual costs); *SeAH Steel Corp. v. United States*, 34 CIT __, __, 704 F. Supp. 2d 1353, 1364 (2010) (declining to disallow the use of quarterly cost averaging periods but remanding for further explanation on use for recovery-of-costs test); *Habas Sinai Ve Tibbi Gazlar v. United States*, 33 CIT __, __, 1371 625 F. Supp. 2d 1339, 1371 (2009) (remanding for further explanation of decision not to use quarterly costs); *Nucor Corp. v. United States*, 33 CIT __, __, 612 F. Supp. 2d 1264, 1337 (2009) (granting a voluntary remand for reconsideration of decision not to use quarterly costs).

[10] Constructed value ("CV") is defined, in relevant part, as follows.

> [T]he constructed value of imported merchandise shall be an amount equal to the sum of—
>
> (1) the cost of materials and fabrication or other processing of any kind employed in producing the merchandise, during a period which would ordinarily permit the production of the merchandise in the ordinary course of business;
>
> (2) [providing four options for calculating amounts for selling, general, and administrative expenses, and for profits]; and

merchandise ("DIFMER") adjustments. *Id.* at 14. When read as a whole, the Decision Memorandum suggests that Commerce chooses a single cost methodology (*e.g.*, either its normal POR-wide cost methodology or a shorter-period cost methodology) to fulfill all four of these purposes.

Union and HYSCO challenged the use of the indexed quarterly-cost methodology generally and thereby did not limit their challenges to the Department's use of this methodology to conduct the recovery-of-costs test. Defendant's remand request refers to the recovery-of-costs test and to indexing wherever used but does not specifically request a remand on the use of the quarterly methodology (as opposed to the use of indexing) for the other purposes, *i.e.*, the below cost test, CV, and DIFMER. The court concludes that it is appropriate to order a remand so that the Department will reconsider the indexed quarterly-cost methodology wherever it was used in the Final Results.

The Department's discussion in the Decision Memorandum of the reasons supporting use of an indexed quarterly-cost methodology in the Final Results refers to all four applications, *i.e.*, the below-cost test, the recovery-of-costs test, CV, and DIFMER. *See id*. The document does not present reasons why different averaging periods or cost methodologies would be appropriate for each of those four applications. To the contrary, with respect to identifying below-cost sales and determining which sales satisfy the recovery-of-costs test, Commerce stated that it considered the use of the methodology for both purposes to be necessary "to address significant variations in the cost of a major input that dramatically changed the per-unit cost of manufacturing during the period of review" and thereby prevent distortions. *Id*. at 22 ("If we were to adjust for the distortion in performing the below-cost test, but fail to adjust for the distortion in performing the recovery of costs test, it would lead to similarly distorted results."). Moreover, the Decision Memorandum, as well as defendant's oral explanation of its remand request, associate the quarterly-cost methodology with the indexing methodology. *Id.* at 24 ("The Department's use of indices . . . was necessary to comply with statute's requirement of weighted-average costs for the period for the cost recovery test . . ."); *Union's Post-Prelim. Analysis Mem.* 4 (stating that "an average cost of production database, where each CONNUM contains the indexed annual average substrate coil cost . . . was used in the sales-below-cost and CV calculations"). At oral argument, the parties

(3) the cost of all containers and coverings of whatever nature, and all other expenses incidental to placing the subject merchandise in condition packed ready for shipment to the United States.

19 U.S.C. § 1677b(e).

did not represent to the court that the Final Results did not apply indexing in each of the four applications of the quarterly-cost methodology, expressing some uncertainty on the question. Oral Tr. 159.

In summary, the Decision Memorandum mentioned all four applications of the quarterly-cost methodology in a unified context and did not present reasons why the Department would consider addressing the four applications inconsistently. As defendant clarified at oral argument, the Department seeks a remand order permitting reconsideration of the indexing methodology for steel coil substrate wherever that methodology is used. The Decision Memorandum itself justifies the indexing methodology as a corollary of the quarterly-cost methodology. A piecemeal remand order that confines the required reconsideration of the quarterly-cost methodology to the recovery-of-costs test would appear to be inconsistent with the scope of the remand order sought on the indexing methodology and also be inconsistent with the overall approach taken in the Decision Memorandum. Therefore, the court considers it prudent to direct that Commerce, on remand, reconsider its use of the quarterly-cost methodology, as well as the use of the indexing methodology for steel coil substrate, wherever those methodologies were used in the Final Results. If, on remand, the Department determines it appropriate to apply inconsistent approaches, it should explain its reasons for doing so.

D. On Remand, Commerce Must Redetermine Whether it Is Appropriate to Depart from the Normal Method of Determining the Contemporaneous Month

Consistent with its ordinary practice, Commerce in the Final Results compared the export price or constructed export price in an individual sales transaction of subject merchandise to a weighted average of the normal values for a single month determined to be contemporaneous with that individual transaction (the "contemporaneous month"). *Decision Mem.* 19–20; *see* 19 C.F.R. § 351.414(b)(3) (setting forth the "average-to-transaction" method), (e) (limiting the averaging of normal values to the contemporaneous month). Commerce departed from its normal method, however, in determining the contemporaneous month. A Department regulation provides that "[n]ormally, the Secretary [of Commerce] will select as the contemporaneous month the first of the following which applies," listing first the calendar month during which the U.S. sale was made so long as a sale of the foreign like product was made during that month, then the "most recent of the three months prior to the month of the U.S. sale in which there was a sale of the foreign like product," and, finally,

"the earlier of the two months following the month of the U.S. sale in which there was a sale of the foreign like product." 19 C.F.R. § 351.414(e)(2). The regulation is often identified as the "90/60-day window period" regulation. Union and HYSCO challenge the Department's deviating from the usual method as reflected in the regulation.

In the Final Results, Commerce did not apply the "normal" method of the 90/60-day window period regulation, concluding that it was not appropriate to compare U.S. sales with home-market sales occurring outside of the quarter in which the U.S. sale occurred. Instead, Commerce determined that "it is appropriate in this case to match sales only within the same quarter." *Decision Mem.* 21. Union claims that the Department's deviating from the normal method for identifying the contemporaneous month impermissibly produced a less accurate dumping margin by reducing the number of matches and, accordingly, increasing the Department's resort to constructed value.[11] Union's Br. 30–31.

Commerce stated in the Decision Memorandum that "when applying the alternative cost averaging methodology due to significantly changing costs, the Department has in the past eliminated the '90/60' day window period . . . . That is, the sales 'contemporaneity' period was modified to conform with the shortened cost averaging period." *Decision Mem.* 20. Commerce explained that "as costs are calculated over shorter periods, it directly limits the periods of time over which sale prices can reasonably be matched," *id.* at 15, and that "[w]hen significant cost changes have occurred during the POR . . . we find that price-to-price comparisons should be made within the shorter cost averaging period to lessen the margin distortions caused by changes in sales price which result from significantly changing costs," *id.* at 20. Thus, the Department's decision to use a non-standard method of determining the contemporaneous month was solely a consequence of the decision to apply a non-standard quarterly-cost methodology. Commerce itself now questions aspects of the quarterly-cost methodology as applied in the fifteenth review. Because the court is ordering reconsideration of the quarterly-cost methodology as used in the Final Results, the court also will order Commerce to reconsider its associated decision to depart from the normal method of determining the contemporaneous month that is described in 19 C.F.R. § 351.414(e)(2).

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[11] HYSCO also argues that the Department's method of determining the contemporaneous month in the Final Results was unlawful but states, further, that more of its sales were compared as "identical" under the Department's method (referring, apparently, to the combined use of the quarterly-cost methodology and the change in the contemporaneous month methodology) than would have been the case had the regulation been applied. Resp. to Request from Ct. 1–2 (July 18, 2011), ECF No. 133.

E. Commerce Must Reconsider its Decision to Compare Laminated CORE and Non-Laminated, Painted CORE as Identical Merchandise

The antidumping 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 comparison-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." 19 U.S.C. § 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 fifteenth review, as it had in previous reviews of the order on CORE from Korea, Commerce determined that Union's laminated CORE was "identical in physical characteristics with" painted, non-laminated CORE for purposes of § 1677(16)(A). *Decision Mem.* 28–30. In doing so, Commerce rejected the proposal Union made during the fifteenth review that Commerce treat laminated CORE as a separate type category of products for model-match purposes. *Id.* Union challenges the Department's decision, arguing that there are obvious physical differences separating its laminated CORE from painted CORE and that, as a result, substantial evidence on the record does not support a finding that these two groups of products are "identical." Union's Br. 35–39. In its response to Union's USCIT Rule 56.2 motion, defendant requests a voluntary remand so that Commerce may reconsider its decision on the model-match issue. Def.'s Resp. 46–49. In their responses to Union's motion, defendant-intervenors argue that Commerce properly compared laminated CORE with painted, non-laminated CORE as identical merchandise. Nucor's Resp. 49–57; U.S. Steel's Opp'n 58–60.

In requesting a voluntary remand, defendant cites *Union Steel v. United States*, 35 CIT __, 753 F. Supp. 2d 1317 (2011), in which this Court, reviewing the final results of the thirteenth review of the order on CORE from Korea, disallowed the comparison for model-match

purposes of Union's painted, non-laminated CORE with Union's laminated CORE as products "identical in physical characteristics" within the meaning of § 1677(16). This Court held it unlawful for Commerce to compare the two groups of products as identical merchandise absent a finding, supported by substantial evidence (held not to exist on the record in that case), that the physical differences between the two product groups are minor and not commercially significant. *Union Steel*, 35 CIT at __, 753 F. Supp. 2d at 1322–23. The Department's remand redetermination in that case was filed subsequent to the February 11, 2011 date of defendant's request for a voluntary remand on the model-match issue in this litigation. In that remand redetermination, the Department concluded that record evidence in the thirteenth administrative review supported revising the physical characteristics classifications of the Department's model-match methodology to create a separate type category for laminated CORE products. *Final Results of Redetermination Pursuant to Remand* (Apr. 11, 2011), ECF No. 143 (Court No. 08–00101). Commerce reached the same conclusion in litigation contesting the final results of the fourteenth administrative review. *Final Results of Redetermination Pursuant to Remand* (July 15, 2011), ECF No. 115 (Court No. 09–00130).

The court will order that Commerce, on remand, reconsider its decision denying Union's request for a change in the model-match methodology. Consistent with the holding in *Union Steel*, 35 CIT at __, 753 F. Supp. 2d at 1322, Commerce on remand may not compare as identical merchandise Union's sales of the painted and non-laminated CORE with Union's sales of laminated CORE absent a finding, supported by substantial evidence on the record, that the physical differences distinguishing the two product groups are minor and not commercially significant.

F. Remand is Appropriate on the Department's Use of the Zeroing Methodology

Commerce applied its "zeroing" methodology to calculate Union's weighted-average dumping margin in the fifteenth review. Applying this methodology, Commerce determined a dumping margin for each sale of subject merchandise and then converted each negative margin to a zero margin before calculating a weighted-average percentage margin. *See Decision Mem.* 3 (stating that "[t]hese so called 'transactions with negative margins' are simply non-dumped transactions" and explaining that "[as] no dumping margins exist with respect to sales where [normal value] is equal to or less than export price or constructed export price, the Department will not permit these non-dumped transactions to offset the amount of dumping found with respect to other sales").

Referring to the fact that the Department does not currently use the zeroing methodology for investigations of sales at less than fair value, Union argues that the use of the zeroing methodology in the fifteenth review signifies that the Department unlawfully "interprets the exact same statutory language," *i.e.*, the statutory provision defining "dumping margin," 19 U.S.C. § 1677(35)(A), "to mean different things in reviews and investigations, which is contrary to basic rules of statutory construction." Union's Br. 39. Although initially defending the Department's use of zeroing in its response, Def.'s Resp. 49–52, and continuing to maintain that controlling precedent allows zeroing in administrative reviews, Def.'s Aug. Remand Mot. 3, defendant now requests a voluntary remand on the zeroing issue "in light of the apparent uncertainty caused by *JTEKT*, and in the interest of judicial economy and prompt resolution of this litigation," Def.'s Aug. Remand Mot. 3 (citing *JTEKT Corp. v. United States*, 642 F.3d 1378, 1383–85 (Fed. Cir. 2011)).

In two 2011 decisions, *JTEKT Corp.* and *Dongbu Steel Co. v. United States*, 635 F.3d 1363 (Fed. Cir. 2011), the U.S. Court of Appeals for the Federal Circuit ("Court of Appeals") questioned the legality of the Department's construction of 19 U.S.C. § 1677(35) and declined to affirm the judgments of the Court of International Trade upholding the use of zeroing. *See Dongbu*, 635 F.3d at 1371–73; *JTEKT Corp.*, 642 F.3d at 1383–85. In each decision, the Court of Appeals held that the final results of an administrative review in which zeroing was used must be remanded for an explanation by Commerce explaining the Department's 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 __, __, 800 F. Supp. 2d 1316, 1325 (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 __, __, 780 F. Supp. 2d 1357, 1362–63 (2011); *Union Steel v. United States*, 35 CIT __, __, 804 F. Supp. 2d 1356, 1367–69 (2011); *see also Union Steel v. United States*, 35 CIT __, 823 F. Supp. 2d 1346 (2012) (affirming remand results that contained a more recent construction of the antidumping statute under which Commerce concluded that the zeroing methodology is permissibly applied in an antidumping administrative review).

As defendant acknowledges, the Decision Memorandum explains the Department's construction of § 1677(35) as applied to investigations and reviews using a rationale essentially the same as the one

the Court of Appeals rejected in *JTEKT Corp. Decision Mem.* 4–6; Def.'s Aug. Remand Mot. 3 ("Commerce's explanation for applying zeroing in the administrative review before the Court here mirrors that in the determination remanded by the court of appeals in *JTEKT*."). 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." *Decision Mem* 5.[12] The Court of Appeals concluded in *JTEKT Corp.* that the Department's explanation "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 court will direct that Commerce, on remand, either modify its decision to apply the zeroing methodology in the fifteenth review or, alternatively, provide an explanation that satisfies the requirements the Court of Appeals imposed in *Dongbu* and *JTEKT Corp.*

G. The Court Denies Relief on Dongbu's Claim Seeking an Individually-Determined Dumping Margin Because Dongbu Failed to Exhaust its Administrative Remedies

The Final Results assign individual weighted-average dumping margins to Union, HYSCO, and the POSCO Group. *Final Results*, 75 Fed. Reg. at 13,491. The POSCO Group received a *de minimis* margin

[12] The entire discussion on the statutory construction issue reads as follows:

> The 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, 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* [*i.e.*, the decision to stop zeroing in investigations] 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 & Decision Mem., A-580–816, ARP 07–08, at 5 (Mar. 15, 2010) (Admin. R. Doc. No. 5249).

(0.01%). *Id.* As discussed previously, the Final Results assigned the remaining three respondents, including plaintiff Dongbu, a "Review-Specific Average Rate" of 8.65%, calculated as a simple average of the margins assigned to Union (14.01%) and HYSCO (3.29%). *Id.* Dongbu claims that the Department's decision not to assign it an individually-determined dumping margin was not authorized by section 777A of the Tariff Act, 19 U.S.C. § 1677f-1(c), and seeks a remand order compelling the Department to examine its sales individually. Br. in Supp. of the Mot. of Dongbu Steel for J. upon the Agency R. 8–14 (Sept. 10, 2010), ECF No. 66 ("Dongbu's Br."). The court denies relief on this claim because Dongbu did not pursue an individually-determined margin as a voluntary respondent and thereby failed to exhaust its administrative remedies.

On October 2, 2008, two days after initiating the review, Commerce issued a memorandum stating that "[a]fter careful consideration of our current resources, we believe that it would not be practicable in this administrative review to examine all producers/exporters of subject merchandise for whom a review has been requested" and that "[in] light of our resource constraints, the Department intends to limit the number of companies it examines in this review." *Invitation to Comment on Respondent Selection.* The memorandum attached proprietary U.S. import data from U.S. Customs and Border Protection ("CBP") pertaining to subject merchandise of Korean CORE producers and announced that Commerce was setting aside a period of seven calendar days "for interested parties to raise issues regarding the use of CBP data for respondent selection in this review." *Id.* at 2.

In response to the Department's October 2, 2008 memorandum, Dongbu advocated its own selection as a mandatory respondent in a submission filed October 21, 2008. *Dongbu's Respondent Selection Comments*. Dongbu argued that the Department should examine at least the four producers with the largest volume of exports of subject merchandise. *Id.* at 2. It pointed out that Commerce had examined four companies–Dongbu, Union, the POSCO Group, and HYSCO–in the tenth, eleventh, twelve and fourteenth administrative reviews of the order and initially had selected these same four respondents for individual examination in the thirteenth review, ultimately reviewing three because one request for review was withdrawn. *Id.* at 2–3.

Referring to the seven exporters/producers for which it initiated the review, Commerce stated in the Respondent Selection Memorandum that "it would not be practicable . . . to examine individually all exporters/producers of subject merchandise for whom a review has been initiated." *Respondent Selection Mem.* 6. Citing its resource constraints, Commerce further stated that "we believe it is practi-

cable to limit examination to two of these companies." *Id.* Commerce selected Union and HYSCO because these two companies, during the POR, were the largest two producers/exporters and were "responsible for the majority of the imports of subject merchandise into the United States." *Id.*

In its case brief before the Department, Dongbu did not challenge the Department's decision not to examine it individually. In its complaint before the court, Dongbu claimed that "Commerce's determination not to individually examine and calculate a company-specific dumping margin for Dongbu is not supported by substantial evidence and is otherwise not in accordance with law." Compl. ¶ 9 (Mar. 30, 2010), ECF No. 2 (Court No. 10–00109) ("Dongbu's Compl."). As relief on this claim, Dongbu requested "that the Court remand this matter to Commerce to calculate a company-specific dumping margin for Dongbu based on Dongbu's own data." *Id.* Prayer for Relief.

The court denies relief on Dongbu's claim seeking an individually-determined margin because Dongbu failed to exhaust its administrative remedies and because no recognized exception to the exhaustion requirement applies on the facts of this case. Section 301 of the Customs Courts Act provides with respect to cases brought under section 516A of the Tariff Act that "the Court of International Trade shall, where appropriate, require the exhaustion of administrative remedies." 28 U.S.C. § 2637(d). In several prior cases involving claims challenging the Department's refusal to determine individual margins, this Court has required that the claimant have exhausted administrative remedies by pursuing "voluntary respondent" status under section 782 of the Tariff Act. *Schaeffler Italia S.r.l. v. United States*, 35 CIT __, __, 781 F. Supp. 2d 1358, 1364 (2011); *Asahi Seiko Co. v. United States*, 35 CIT __, __, 755 F. Supp. 2d 1316, 1326–27 (2011); *Asahi Seiko Co. v. United States*, 34 CIT __, 751 F. Supp. 2d 1335 (2010); *see also Zhejiang Native Produce & Animal By-Products Import & Export Corp. v. United States*, 33 CIT __, __, 637 F. Supp. 2d 1260, 1264–65 (2009) (discussing voluntary respondent status in the context of exhaustion but holding that the futility exception applied in that case). According to these cases, a respondent, in order to exhaust administrative remedies, must pursue the statutory process for receiving an individually-determined margin before challenging before the court the Department's decision not to assign an individual margin to it. There is no dispute that, on this record, Dongbu failed to take the necessary actions to pursue status as a voluntary respondent. Having declined to pursue the remedy Congress provided it as an interested party not selected as a mandatory respondent, Dongbu may not obtain relief on its claim before the court.

Paragraph (1) of subsection 777A(c) of the Tariff Act requires that Commerce, as a general rule, "shall determine the individual weighted average dumping margin for each known exporter and producer of the subject merchandise." 19 U.S.C. § 1677f-1(c)(1). An exception to this rule is contained in paragraph (2) of subsection (c):

> [if] it is not practicable to make individual weighted average dumping margin determinations under paragraph (1) because of the large number of exporters or producers involved in the investigation or review, the administering authority may determine the weighted average dumping margins for a reasonable number of exporters or producers by limiting its examination to–
>
> > (A) a sample of exporters, producers, or types of products that is statistically valid based on the information available to the administering authority at the time of selection, or
> > (B) exporters and producers accounting for the largest volume of the subject merchandise from the exporting country that can be reasonably examined.

Id. § 1677f-1(c). In support of its motion for judgment on the agency record, Dongbu argues that the Department unlawfully determined seven respondents to be a "large number of respondents" within the meaning of § 1677f-1(c)(2) and that, as a result, Commerce acted without authority in limiting respondents. Dongbu's Br. 10.[13] In its reply brief, Dongbu argues that Commerce unlawfully construed the statutory term "large number of respondents" to mean "any number of exporters/producers larger than two." Reply Br. of Pl. Dongbu Steel Co., Ltd. 8 (Apr. 4, 2011), ECF No. 118 ("Dongbu's Reply").

A respondent not selected for individual examination under section 777A potentially can receive an individual margin according to section 782(a) of the Tariff Act, which provides that Commerce, upon limiting the number of respondents according to section 777A, "shall establish an . . . individual weighted average dumping margin for any exporter or producer not initially selected for individual examination" if two conditions are met. 19 U.S.C. § 1677m(a); *see* 19 C.F.R. § 351.204(d). First, an exporter or producer seeking its own margin must submit "the information requested from exporters or producers selected for examination" by the same deadlines that apply to the

[13] In its reply, Dongbu Steel Co., Ltd. ("Dongbu") conceded that "the pool of potential mandatory respondents at the time Commerce made its respondent selection determination was seven" and thus "it is more accurate to refer to the total pool of potential respondents as seven," rather than six, as Dongbu claimed in its initial memorandum. Reply Br. of Pl. Dongbu Steel Co., Ltd. 8 n.2 (Apr. 4, 2011), ECF No. 118; Br. in Supp. of the Mot. of Dongbu Steel for J. upon the Agency R. 10 (Sept. 10, 2010), ECF No. 66.

selected respondents. 19 U.S.C. § 1677m(a)(1). Second, "the number of exporters or producers who have submitted such information [cannot be] so large that individual examination of such exporters or producers would be unduly burdensome and inhibit the timely completion of the investigation." *Id.* § 1677m(a)(2).

Dongbu addresses several arguments to the exhaustion question presented by this case. It argues, first, that "applying a strict interpretation of the exhaustion requirement" would further neither of the "twin purposes of exhaustion," which Dongbu identifies as "protecting administrative authority and promoting judicial efficiency." Dongbu's Reply 5 (internal quotations omitted). Dongbu argues that requiring exhaustion "will not protect Commerce's agency authority. To the contrary, declining to address the merits will permit Commerce to *exceed* its lawful agency authority . . . ." *Id.* The court must reject this circular argument. Were the court to waive exhaustion on the premise that the claim is meritorious, the exhaustion requirement would be rendered meaningless.

As to the second purpose for the exhaustion requirement posited by Dongbu, judicial efficiency, Dongbu argues that requiring exhaustion will not promote judicial efficiency because "[h]ad Dongbu raised this issue more precisely in its comments or in a case brief, it would not have obviated the need for judicial review." *Id.* at 6. This is essentially an indirect way of arguing that the court should excuse Dongbu's failure to seek voluntary respondent status on the ground that objecting to the Department's respondent selection decision, as stated in the Respondent Selection Memorandum, would have been futile, an argument that Dongbu also raises directly. But the futility exception is not warranted on the record before the court. The Respondent Selection Memorandum did not foreclose entirely the prospect that the Department would revisit the issue of whether resources would be available should voluntary respondent status be sought, citing specifically the voluntary respondent provision of the statute and stating that "[i]f there is a change in circumstances at the Department, and if there is a voluntary submission of the requested information that complies with all other deadlines and requirements for filing, we may re-examine this matter." *Respondent Selection Mem.* 7 (citing 19 U.S.C. § 1677m(a)). The Respondent Selection Memorandum did cast serious doubt on whether Commerce would accept voluntary respondents, but the mere fact that relief was unlikely is insufficient as a ground to waive the exhaustion requirement. The futility exception to the exhaustion requirement is a narrow one, requiring parties to demonstrate that they "'would be required to go through obviously useless motions in order to preserve their rights.'" *Corus Staal BV v.*

United States, 502 F.3d 1370, 1379 (Fed. Cir. 2007) (quoting *Bendure v. United States*, 554 F.2d 427, 431 (Ct. Cl. 1977)). Although Dongbu's chance of receiving voluntary respondent status may have appeared doubtful at the time Commerce issued the Respondent Selection Memorandum, the memorandum, when read as a whole, did not state as a certainty that voluntary respondent status would be unavailable.[14]

Dongbu argues that "Commerce's statutory interpretation of 19 U.S.C. § 1677f-1(c)(2) is settled and was consistently followed by Commerce during the time of the administrative review at issue in this case," and thus that it "would have been futile for Dongbu to raise the issue again after Commerce made its original decision limiting the number of mandatory respondents to two producers/exporters." Dongbu's Reply 11. In arguing that the futility exception applies, Dongbu relies on the opinion in *Dongbu Steel Co. v. United States*, 34 CIT __, __, 677 F. Supp. 2d 1353, 1362 (2010) *rev'd on other grounds*, 635 F.3d at 1371–73, which included *dicta* to the effect that the futility exception would have excused the plaintiff's failure to challenge the zeroing methodology before the Department when defendant had conceded that there was no possibility of the Department's altering its methodology had such a challenge been raised. In contrast, the review at issue in this case afforded Dongbu a more than *de minimis* chance of receiving an individual margin had Dongbu sought voluntary respondent status.

Dongbu also argues that its argument satisfies the factors of the "pure legal question" exception to the exhaustion requirement, which Dongbu characterizes as follows: (1) the new argument raised must be "purely legal in nature"; (2) the inquiry to resolve that argument may not require "further agency involvement nor additional fact finding or opening up the record;" and "the inquiry shall neither create undue delay nor cause expenditure of scare party time and resources." Dongbu's Reply 7. Submitting that each factor is satisfied, Dongbu argues that its claim presents the purely legal issue of "whether Commerce's implicit construction of 19 U.S.C. § 1677f-1(c)(2) such that any number of exporters/producers larger than two was a 'large number of exporters or producers' with the meaning of that term in the statute is in accordance with law." *Id.* at 8. The court disagrees with Dongbu's characterizing the claim as presenting only

[14] As it turns out, Commerce later accepted a voluntary respondent. When announcing in July 2009 that it would determine an individual margin for the POSCO Group, Commerce gave as a reason that "there has been a change in circumstances with respect to resource constraints." *Mem. from Program Manager to Office Dir., Office 3 AD/CVD Operation*, 1–2 (July 8, 2009) (Admin. R. Doc. No. 4974). Commerce noted that the POSCO Group "voluntarily submitted a timely response to the Department's questionnaire." *Id.* at 1.

the pure legal question of the Department's construction of § 1677f-1(c)(2). Dongbu's claim, in essence, is that the Final Results were contrary to law because Commerce did not determine therein an individual margin for Dongbu. *See* Dongbu's Compl. ¶ 9 (challenging "Commerce's determination not to individually examine and calculate a company-specific dumping margin for Dongbu . . . "). Commerce may or may not have misconstrued § 1677f-1(c)(2) in issuing the Respondent Selection Memorandum, but, on the record facts of this case, Dongbu still could have pursued a remedy after that memorandum was issued. Commerce made a final decision not to determine an individual margin for Dongbu upon issuance of the Final Results, prior to which Dongbu never gave the Department the opportunity to rule on the issue of whether Dongbu should be assigned an individual margin as a voluntary respondent. Resolving that issue would have involved more than the pure legal question of the construction of § 1677f-1(c)(2). *See* 19 U.S.C. § 1677m(a)(2) (requiring a factual determination on whether examination of voluntary respondents would be unduly burdensome and inhibit timely completion).[15]

In summary, Dongbu failed to exhaust its administrative remedies when it declined to pursue voluntary respondent status according to 19 U.S.C. § 1677m(a). Neither the futility exception nor the pure legal question exception applies in the circumstances of this case. The court, therefore, will deny relief on the claim challenging the Department's refusal to determine an individual margin for Dongbu.

H. Commerce Must Reconsider the Date of Sale for HYSCO's Sales Through its U.S. Affiliate

For sales by HYSCO through its U.S. affiliate, Hyundai HYSCO USA, Inc. ("HYSCO USA"), Commerce used as the date of the sale the date the subject merchandise was shipped from Korea to HYSCO USA, rather than the later date on which HYSCO USA issued an invoice to an unaffiliated purchaser. *Decision Mem.* 30. U.S. Steel claims that this decision violated the Department's regulations and was unsupported by record evidence. Mem. in Supp. of Consolidated

[15] The court is also unpersuaded by the related argument Dongbu made at oral argument, which was that Dongbu should be able to challenge independently a respondent selection decision made in a memorandum issued prior to the final results of the review because that decision caused injury distinct from that caused by the Department's not determining a respondent's individual margin. Oral Tr. 19 (July 13, 2011), ECF No. 142. Dongbu cited "the time and expense of actually participating fully in the review," submitting responses on the mere prospect that Commerce might determine an individual margin under section 782 of the Tariff Act. *Id.* On the facts presented by this case, Dongbu was required to seek voluntary respondent status in order to exhaust administrative remedies because that is the specific remedy Congress provided to a respondent in Dongbu's situation. *See* 19 U.S.C. § 1677m(a).

Pl. United States Steel Corp.'s Mot. for J. on the Agency R. Under Rule 56.2, at 10–20 (Sept. 10, 2010), ECF No. 62 ("U.S. Steel's Mem."). Defendant requests a voluntary remand on this issue. Def.'s Resp. 59–60. The court will order a remand.

According to HYSCO's questionnaire responses, HYSCO sold subject merchandise during the POR to HYSCO USA, which sold that merchandise to unaffiliated customers. *Letter from HYSCO to the Sec'y of Commerce* A-1 (Feb. 12, 2009) (Admin. R. Doc. No. 4850) ("*HYSCO's Section A Resp.*"). For such sales, HYSCO shipped the merchandise to the United States with HYSCO USA serving as the importer of record and taking title to the merchandise, but not taking physical possession. *Id.* at A-22. When the merchandise arrived, HYSCO USA issued an invoice to the ultimate customer. *Id.* HYSCO explained that HYSCO USA's "[n]egotiations with customers can continue through the entire sales process," and that, for U.S. sales, the quantity term is subject to change "until the merchandise is shipped from HYSCO's factory, and price can change up until [HYSCO USA] issues its invoice to the unaffiliated U.S. customer." *Id.* at A-23–24.

For the Preliminary Results, Commerce determined the dates of sale for HYSCO's U.S. sales using the dates that HYSCO USA shipped the subject merchandise. U.S. Steel's Mem. 6. U.S. Steel challenged that decision in its case brief before Commerce, arguing that the date of sale should have been the date that HYSCO USA issued an invoice to the unaffiliated U.S. customer because it was not until that date that the price, one of the material terms of sale, was final. *Decision Mem.* 30. Commerce rejected this argument in the Decision Memorandum, reasoning that its regulations allow it to use a date of sale other than the date of invoice when such other date "better reflects the date on which the exporter or producer establishes the material terms of sale," *see* 19 C.F.R. § 351.401(i),[16] and that "HYSCO provided documentation showing the booking of the sale price and quantity, *i.e.* the material terms of sale, on the date of shipment, before issuing an invoice to the customer." *Decision Mem.* 30. The documentation referenced by Commerce was "HYSCO's April 10, 2008, supplement[al] questionnaire response." *Id.* at 30 n.53.

[16] This regulation provides in full:

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

19 C.F.R. § 351.401(i) (2010).

Defendant having requested a voluntary remand as to the challenged decision, the court will order Commerce to reconsider its determination of the date of sale for HYSCO's U.S. sales made through HYSCO USA.

I. Commerce Must Recalculate the Rate Assigned to Dongbu to Incorporate Any Adjustments Resulting from Judicial Review

As discussed previously, Commerce assigned to Dongbu a margin of 8.65% as "a simple average percentage margin (based on the two reviewed companies with an affirmative deposit rate) . . . ." *Final Results*, 75 Fed. Reg. at 13,491 n.2. Dongbu seeks the benefit of any modifications to the margins assigned on remand to the two individually-examined respondents, Union (which received a 14.01% margin in the Final Results) and HYSCO (3.29% in the Final Results), that may result from this litigation. Dongbu's Br. 14–15 (in which Dongbu "requests that any relief granted by the Court and resulting adjustments to the individual weighted average dumping margins for Union and HYSCO be incorporated into the revised review specific average and be applied to Dongbu"). The court determines that any changes made on remand to the margins assigned to Union and HYSCO should be reflected in any assessment and deposit rate applied to Dongbu.

In the Preliminary Results, Commerce preliminarily assigned to Dongbu a "Review-Specific Average Rate" of 3.94%, which was "based on the margins calculated for those companies that were selected for individual review, excluding de minimis margins or margins based entirely on adverse facts available." *Prelim. Results*, 74 Fed. Reg. at 46,114, 46,114 n.8. This preliminary rate was based only on the rate of Union because the other two selected respondents received preliminary *de minimis* margins in the Preliminary Results. *Id.* at 46,114. Dongbu did not file a case brief before Commerce challenging this or any other Commerce decision.

In the Final Results, Commerce applied to Dongbu a rate of 8.65%. *Final Results*, 75 Fed. Reg. at 13,491. This rate was a simple average of the rates of Union (14.01%) and HYSCO (3.29%). *Id.* at 13,491. In its complaint, Dongbu challenged the 8.65% margin applied to Union, claiming that this margin was "overstated" for eight reasons: (1) the Department's application of the quarterly-cost methodology; (2) the Department's abandoning the 90/60-day window period regulation; (3) the Department's using 2008 fiscal year financial statements to calculate Union's G&A and interest expenses; (4) the Department's model-match methodology as it pertained to laminated and non-laminated, painted CORE; (5) the Department's zeroing methodology;

(6) "Commerce's decision to include Union's overrun sales in the calculation of normal value"; (7) "Commerce's decision to make an adjustment to HYSCO's cost-of-production under the major input rule"; and (8) "Commerce's decision to treat HYSCO's interest revenue . . . as a post-sale price adjustment instead of as a selling expense . . . ." Dongbu's Compl. ¶ 7.

Dongbu narrowed this challenge in its memorandum in support of its motion for judgment on the agency record, stating that its challenge was based on "the reasons discussed in the briefs concurrently filed by Union Steel and HYSCO" and that it sought as relief on this claim an order that Commerce recalculate Dongbu's dumping margin using the rates applicable to Union and HYSCO after any relief awarded pursuant to "the separate court actions filed by Union and HYSCO with respect to the *Final Results*." Dongbu's Br. 14–15. As Dongbu limited its claim to the arguments raised by Union and HYSCO, the court considers that Dongbu has abandoned the sixth, seventh, and eighth reasons listed in the complaint because neither Union nor HYSCO included these arguments in their memoranda to the court.

Based on the five reasons listed in Dongbu's complaint, the court determines that Dongbu potentially is entitled to the requested relief. The margin the Final Results applied to Dongbu was derived from the margins of the selected respondents and bore no connection to Dongbu's POR sales. The court considers it appropriate that any changes to the margins of the selected respondents be reflected in the derivative margin applied to Dongbu. The court notes, however, that the Department's recalculation of the rate applicable to Dongbu also must incorporate any modifications to the rate applied to HYSCO as a result of U.S. Steel's claim, discussed above. If Dongbu is to receive the benefit of any reductions in the weighted-average dumping margins of Union or HYSCO, as a matter of consistency it also should be affected by increases in those margins.

Defendant and defendant-intervenor U.S. Steel do not address Dongbu's claim in their responses. Defendant-intervenor Nucor argued that Dongbu failed to exhaust administrative remedies on this claim because Dongbu failed to raise it "in any case or rebuttal brief to the Department," Nucor's Resp. 11 n.2, but Nucor abandoned this position at oral argument, Oral Tr. 88.[17] Thus, neither defendant-intervenor now is in opposition to Dongbu's receiving the potential remedy it seeks with respect to possible revisions to the margins of

[17] The following colloquy took place at oral argument:
The Court: So are you not opposed to their getting the benefit if those other margins should change?

Union and HYSCO. Because the arguments raised by Union and HYSCO were raised before the agency, the court declines to deny relief *sua sponte* on grounds related to the exhaustion requirement.

IV. CONCLUSION AND ORDER

In conclusion, the court determines that remand is required in response to several claims brought in this consolidated action. Relief is appropriate on the challenge to the decision to use only the 2008 fiscal year financial statement of DSM to determine Union's interest expense ratio, the decision to use the quarterly-cost methodology and cost indexing for the recovery-of-costs test, the below-cost test, and the other applications in the Final Results, the decision not to determine the comparison months using the normal 90/60-day window period prescribed by regulation, the decision to compare laminated CORE to non-laminated, painted CORE as identical products, the decision to use the zeroing methodology in this administrative review, and the determination of the date of sale for sales by HYSCO through HYSCO USA. No relief is appropriate on Dongbu's challenge to the Department's declining to determine an individual margin for Dongbu. Finally, the assessment and deposit rates applied to Dongbu, which were derived from the individual margins of Union and HYSCO, must reflect any adjustments made to those two margins upon remand. Therefore, upon due consideration, it is hereby

ORDERED that the final determination of the International Trade Administration, U.S. Department of Commerce ("Commerce"), in *Certain Corrosion-Resistant Carbon Steel Flat Products from the Republic of Korea: Notice of Final Results of the Fifteenth Admin. Review*, 75 Fed. Reg. 13,490 (Mar. 22, 2010) ("Final Results"), be, and hereby is, REMANDED for redetermination; it is further

ORDERED that Commerce must issue a redetermination ("Remand Redetermination") in accordance with this Opinion and Order that is in all respects supported by substantial evidence, in accordance with law, and supported by adequate reasoning; it is further

ORDERED that, on remand, Commerce must reconsider its determination of an interest expense ratio for plaintiff Union Steel Manufacturing Co., Ltd. ("Union") using only the financial statements of Union's parent company for fiscal year 2008, and, in so doing, also may reconsider its determination of a ratio for Union's general and administrative expenses; it is further

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> Male Speaker [counsel for Nucor]: Yeah, Your Honor, in our view they reserve their remedy through their actions so I don't think we – we would agree that they would receive a margin . . . .

Oral Tr. 88.

ORDERED that Defendant's Motion for Partial Voluntary Remand, as filed on June 21, 2011, ECF No. 130, regarding the "quarterly-cost methodology" be, and hereby is GRANTED IN PART and DENIED IN PART; it is further

ORDERED that, on remand, Commerce must reconsider its quarterly-cost methodology and its indexing methodology, and all applications of these methodologies, in the Final Results; it is further

ORDERED that, on remand, Commerce must reconsider the decision not to follow the method prescribed by regulation 19 C.F.R. § 351.414(e), otherwise known as the "90/60-day window period," for identifying the contemporaneous month for purposes of comparing U.S. sales to monthly average comparison-market prices pursuant to the average-to-transaction comparison method; it is further

ORDERED that Commerce, on remand, must reconsider the decision to compare laminated CORE with painted, non-laminated CORE as identical products under 19 U.S.C. § 1677(16)(A); it is further

ORDERED that Defendant's Motion for Partial Voluntary Remand, as filed on August 24, 2011, ECF No. 141, be, and hereby is, GRANTED IN PART and DENIED IN PART; it is further

ORDERED that Defendant's Motion for Leave to File Response to Plaintiffs' Notice of Supplemental Authority, filed March 1, 2012, ECF No. 152, be and hereby is, GRANTED, and that Defendant's Response to Plaintiffs' Notice of Supplemental Authority be, and hereby is, deemed filed on March 1, 2012; it is further

ORDERED that, on remand, Commerce must reconsider its decision in the Final Results to apply its zeroing methodology and must either modify 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; it is further

ORDERED that, on remand, Commerce must reconsider the date of sale for U.S. sales by Hyundai HYSCO ("HYSCO") sold through Hyundai HYSCO USA, Inc.; it is further

ORDERED that, on remand, Commerce must redetermine the weighted-average dumping margins of Union and HYSCO as necessary and must redetermine the margin, *i.e.*, the assessment and deposit rates, that will be applied with respect to subject merchandise of Dongbu Steel Co., Ltd. based on any adjustments made to the weighted-average dumping margins of Union or HYSCO as a result of the Remand Redetermination; and it is further

ORDERED that Commerce shall file the Remand Redetermination within ninety (90) days from the date of this Opinion and Order, that each plaintiff, plaintiff-intervenor, and defendant-intervenor shall file any comments on the Remand Redetermination within forty-five (45) days from the date on which the Remand Redetermination is

filed, and that defendant shall file any response to those comments within thirty (30) days from the date on which the last comment is filed.

Dated: May 25, 2012
New York, New York

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

Slip Op. 12–68

AMANDA FOODS (VIETNAM) LIMITED, et al., Plaintiffs, UNITED STATES, v. Defendant, and AD HOC SHRIMP TRADE ACTION COMMITTEE and THE DOMESTIC PROCESSORS, Defendant-Intervenors.

Before: Donald C. Pogue,
Chief Judge
Consol. Court No. 09–00431[1]

[Affirming the Department of Commerce's final results of administrative review as modified by remand redetermination]

Dated: May 30, 2012

Matthew J. McConkey and *Jeffery C. Lowe*, Mayer Brown LLP, of Washington, DC, for Plaintiff Amanda Foods (Vietnam) Ltd.

John J. Kenkel and *J. Kevin Horgan*, DeKieffer & Horgan, of Washington, DC, for Consolidated Plaintiff Viet Hai Seafood Co., Ltd.

Matthew R. Nicely and *David S. Christy, Jr.*, Thompson Hine LLP, of Washington, DC, for Consolidated Plaintiffs Bac Lieu Fisheries Joint Stock Co.; Ca Mau Seafood Joint Stock Co.; Cadovimex Seafood Import-Export and Processing Joint-Stock Co.; Cafatex Fishery Joint Stock Corp.; Cuulong Seaproducts Co.; Danang Seaproducts Import Export Corp.; Minh Hai Export Frozen Seafood Processing Joint-Stock Co.; Minh Hai Joint-Stock Seafoods Processing Co.; Ngoc Sinh Private Enter.; Nha Trang Seaproduct Co.; Phu Cuong Seafood Processing and Import-Export Co., Ltd.; Sao Ta Foods Joint Stock Co.; Soc Trang Seafood Joint Stock Co.; UTXI Aquatic Products Processing Corp.

Robert G. Gosselink and *Jonathan M. Freed*, Trade Pacific PLLC, of Washington, DC, for Consolidated Plaintiff Cam Ranh Seafoods Processing Enter. Co.

Joshua E. Kurland, Trial Attorney, Commercial Litigation Branch, Civil Division, U.S. Department of Justice, of Washington, DC, for Defendant. With him on the briefs were *Stuart F. Delery*, Acting Assistant Attorney General, *Jeanne E. Davidson*, Director, and *Patricia M. McCarthy*, Assistant Director. Of counsel on the briefs was Jonathan M. Zielinski, Senior Attorney, Office of the Chief Counsel for Import Administration, U.S. Department of Commerce, of Washington, DC.

Andrew W. Kentz, *Jordan C. Kahn*, and *Nathaniel M. Rickard*, Picard Kentz & Rowe LLP, of Washington, DC, for Defendant-Intervenor Ad Hoc Shrimp Trade Action Committee.

[1] This action was consolidated with Court Nos. 09–00434, 0900435, 09–00438, and 09–00446. Order at 2, Feb. 9, 2010, ECF No. 36.

Elizabeth J. Drake, *Geert M. De Prest*, and *Wesley K. Caine*, Stewart and Stewart, of Washington, DC, and *Edward T. Hayes*, Leake & Andersson, LLP, of New Orleans, LA, for Defendant-Intervenor the Domestic Processors.

OPINION

Pogue, Chief Judge:

INTRODUCTION

This case[2] is again before the court following a voluntary remand ordered by *Amanda Foods (Vietnam) Ltd. v. United States*, 35 CIT __, 807 F. Supp. 2d 1332, 1350 (2011) ("*Amanda Foods IV*"). *Amanda Foods IV* directed the Department of Commerce ("Commerce" or "the Department") to reconsider the calculation of the all-others rate for the sixteen[3] remaining cooperative, non-individually investigated respondents ("all-others rate"). Upon remand, Commerce reopened the record to obtain, from these cooperative respondents, count-size specific Quantity and Value Questionnaire ("Q&V Questionnaire") data. After determining that the record, supplemented by this Q&V data, contained no indication of dumping by these cooperative, non-individually investigated respondents, Commerce assigned these respondents a rate equal to an average of the weighted-average dumping margins for the individually investigated respondents. *Final Results of Redetermination Pursuant to Court Remand*, A-552–802, ARP 07–08 (Mar. 29, 2012), at 6–9, Remand R. Pub. Doc. 18, *available at* http://ia.ita.doc.gov/remands/11–155.pdf (last visited May 21, 2012) ("*Remand Results*").[4]

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[2] This case concerns the third administrative review of the antidumping duty ("AD") order covering certain frozen warmwater shrimp from the Socialist Republic of Vietnam ("Vietnam"). *See Certain Frozen Warmwater Shrimp From the Socialist Republic of Vietnam*, 74 Fed. Reg. 47,191 (Dep't Commerce Sept. 15, 2009) (final results and final partial rescission of antidumping duty administrative review) ("*AR3 Final Results*"), and accompanying Issues & Decision Memorandum, A-552–802, ARP 07–08 (Sept. 8, 2009), Admin. R. Pub. Doc. 303, *available at* http://ia.ita.doc.gov/frn/summary/VIETNAM/E9–22188–1.pdf ("*AR3 I & D Mem.*") (adopted in *AR3 Final Results*, 74 Fed. Reg. at 47,191–92).

[3] There were twenty-five separate rate respondents in the third administrative review. *AR3 Final Results*, 74 Fed. Reg. at 47,196. Two respondents, Can Tho Agricultural and Animal Products Import Export Co. and Grobest & I-Mei Industries (Vietnam) Co., Ltd., did not challenge the *AR3 Final Results*. Consolidated Plaintiff Viet Hai Seafood Co., Ltd., received a zero rate in the AR3 Final Results, id. at 47,196, and did not challenge that determination. Finally, on March 8, 2012, the court signed a stipulation of dismissal for six of the Consolidated Plaintiffs: Coastal Fisheries Development Corp.; Investment Commerce Fisheries Corp.; Nha Trang Fisheries Joint Stock Co.; Thuan Phuoc Seafoods and Trading Corp.; Viet Foods Co., Ltd.; and Vinh Loi Import Export Co. Stipulation of Dismissal, Mar. 8, 2012, ECF No. 80.

[4] The rate calculated for the sixteen remaining Plaintiffs was 0.26% or *de minimis*. *Remand Results* at 8–9.

Two Defendant-Intervenors, the Ad Hoc Shrimp Trade Action Committee ("AHSTAC") and a group of Domestic Processors, challenge the *Remand Results*.

The court has jurisdiction over this action pursuant to § 516A(a)(2)(B)(iii) of the Tariff Act of 1930, as amended, 19 U.S.C. § 1516a(a)(2)(B)(iii) (2006)[5] and 28 U.S.C. § 1581(c) (2006).

For the reasons explained below, the court affirms the *Remand Results*.

BACKGROUND

Plaintiffs are cooperative, non-individually investigated respondents in the third administrative review of the AD order covering certain frozen warmwater shrimp from Vietnam. In the proceedings leading to the *AR3 Final Results*, Commerce, pursuant to 19 U.S.C. § 1677f-1(c)(2), limited the number of individually investigated respondents to the three respondents accounting for the largest volume of subject merchandise, and each such respondent received a *de minimis* rate.[6] *AR3 Final Results*, 74 Fed. Reg. at 47,194–95. When the Department limits the number of individually investigated respondents, it must establish an all-others rate for those respondents who were not individually investigated. In doing so, the Department takes guidance from 19 U.S.C. § 1673d(c)(5).[7] *See id.* at 47,195. When setting the all-others rate for the third administrative review, Commerce interpreted 19 U.S.C. § 1673d(c)(5) to discourage the use of *de minimis* rates in calculating the all-others rate. Consequently, because the only rates on the record of the third administrative review were the individually investigated respondents' *de minimis* rates, Commerce assigned the cooperative, non-individually investigated

[5] All subsequent citations to the Tariff Act of 1930 will be to Title 19 of the U.S. Code, 2006 edition.

[6] Pursuant to 19 U.S.C. § 1677f-1(c)(2), Commerce may, under certain conditions, limit the number of individually investigated respondents when it is not practicable to individually investigate all respondents.

[7] 19 U.S.C. § 1673d(c)(5) reads:

> Method for determining estimated all-others rate
>
> (A) General rule
>
> For purposes of this subsection and section 1673b(d) of this title, the estimated all-others rate shall be an amount equal to the weighted average of the estimated weighted average dumping margins established for exporters and producers individually investigated, excluding any zero and de minimis margins, and any margins determined entirely under section 1677e of this title.
>
> (B) Exception
>
> If the estimated weighted average dumping margins established for all exporters and producers individually investigated are zero or de minimis margins, or are determined entirely under section 1677e of this title, the administering authority may use any reasonable method to establish the estimated all-others rate for exporters and producers not individually investigated, including averaging the estimated weighted average dumping margins determined for the exporters and producers individually investigated.

respondents a rate based on the "most recent rate calculated for the non-selected companies in question, unless we calculated in a more recent segment a rate for any company that was not zero, *de minimis*, or based entirely on [facts available]." *Id.* at 47,195.[8]

However, after the release of the *AR3 Final Results*, in response to a challenge to the *AR2 Final Results*, the court issued a series of opinions rejecting Commerce's methodology for calculating the all-others rate when all individually investigated respondents receive zero or *de minimis* rates. *See Amanda Foods (Vietnam) Ltd. v. United States*, 33 CIT __, 647 F. Supp. 2d 1368 (2009) (remanding the *AR2 Final Results* to Commerce) ("*Amanda Foods I*"); *Amanda Foods (Vietnam) Ltd. v. United States*, 34 CIT __, 714 F. Supp. 2d 1282 (2010) (reviewing the remand redetermination conducted pursuant to *Amanda Foods I* and ordering a second remand) ("*Amanda Foods II*"); *Amanda Foods (Vietnam) Ltd. v. United States*, 35 CIT __, 774 F. Supp. 2d 1286 (2011) (reviewing the remand redetermination conducted pursuant to *Amanda Foods II* and affirming the *AR2 Final Results*) ("*Amanda Foods III*").

The facts of the action challenging the *AR2 Final Results* were similar to those now before the court: Plaintiffs were cooperative, non-individually investigated respondents challenging Commerce's assignment of an all-others rate derived from prior reviews when all individually investigated respondents received a zero or *de minimis* rate. In *Amanda Foods I*, the court observed that the individually investigated respondents' zero or *de minimis* rates, when considered in the light of other recent investigations of shrimp producers and exporters from Vietnam, constituted "evidence indicating that the responding separate rate Plaintiffs may also no longer be engaged in dumping." *Amanda Foods I*, 33 CIT at __, 647 F. Supp. 2d at 1380. Therefore, because there was not "sufficient evidence on the record which could justify ignoring the evidence in favor of assigning a *de minimis* rate to Plaintiffs and which would support as reasonable the alternative rate chosen," *id.* at 1381, the court remanded the case to Commerce to "either assign the Plaintiffs the weighted average rate of the mandatory respondents, or else . . . provide justification . . . for using another rate," *id.* at 1382.

[8] The methodology that Commerce employed to calculate the all-others rate in the third administrative review was consistent with the methodology it employed in the second administrative review of this AD order. *See Certain Frozen Warmwater Shrimp from the Socialist Republic of Vietnam*, 73 Fed. Reg. 52,273, 52,274–75 (Dep't Commerce Sept. 9, 2008) (final results and final partial rescission of AD duty administrative review) ("*AR2 Final Results*").

In its remand redetermination following *Amanda Foods I*, Commerce continued to defend its methodology, arguing that 19 U.S.C. § 1673d(c)(5) "articulates a preference that the Department avoid zero, *de minimis* rates or rates based entirely on facts available when it determines the appropriate dumping margins for cooperative uninvestigated respondents." *Amanda Foods II*, 34 CIT at __, 714 F. Supp. 2d at 1287 (internal quotation marks omitted). While the court in *Amanda Foods II* agreed with Commerce that § 1673d(c)(5)(A) expresses such a preference, *id.* at 1291, the court found unreasonable Commerce's reading of that preference into § 1673d(c)(5)(B), *id.* at 1291–92. The court found Commerce's reading unreasonable because it contravened the explicit statutory language that listed averaging of zero and *de minimis* rates as the sole example of a reasonable methodology for calculating the all-others rate when all individually investigated respondents receive such rates. *Id.* at 1292 ("By categorically excluding the mandatory respondents' zero and *de minimis* margins in calculating the separate rate, the methodology used on remand was unreasonable"). On these grounds, the court again remanded this issue to Commerce.

In its remand redetermination following *Amanda Foods II*, Commerce changed its methodology and chose to average the *de minimis* rates of the individually investigated respondents to arrive at the all-others rate. *Amanda Foods III*, 35 CIT at __, 774 F. Supp. 2d at 1289–90. Commerce confirmed the accuracy of this rate by reopening the record to obtain, from the cooperative, non-individually investigated respondents, responses to supplementary Q&V Questionnaires detailing all sales during the period of review on a shrimp count-size specific basis. *Id.* Using the Q&V Questionnaire data, Commerce compared the count-size specific sales to the count-size specific weighted-average normal value of the mandatory respondents and concluded that the record did not show any evidence of dumping. *Id.* Satisfied that the rate determined by averaging the zero and *de minimis* margins of the individually investigated respondents was corroborated by the supplementary evidence, Commerce assigned that average rate as the all-others rate. *Id.* at 1290. In affirming Commerce's methodology, the court held that

> [Commerce] has applied a methodology specifically contemplated in the AD statute as a reasonable approach under similar circumstances and has reasonably corroborated the resulting rates with supplemental record evidence that a reasonable mind could accept as sufficient to support its conclusion — that the

> average of the mandatory respondents' zero and *de minimis* rates yields rates that are not unreasonably reflective of Plaintiffs' actual pricing behavior.

Id. at 1292 (citation omitted).

Because *Amanda Foods I, II and III* called into question the methodology Commerce used in calculating the all-others rate in the third administrative review, Commerce requested a voluntary remand to reconsider the *AR3 Final Results*. The court granted Commerce's request. *Amanda Foods IV*, 35 CIT at __, 807 F. Supp. 2d at 1350.

STANDARD OF REVIEW

"The court will sustain the Department's determination upon remand if it complies with the court's remand order, is supported by substantial evidence on the record, and is otherwise in accordance with law." *Jinan Yipin Corp. v. United States*, 33 CIT __, 637 F. Supp. 2d 1183, 1185 (2009) (citing 19 U.S.C. § 1516a(b)(1)(B)(i)).

DISCUSSION

The court will consider, separately and in turn, the arguments of each Defendant-Intervenor challenging the *Remand Results*.

I. AHSTAC

AHSTAC argues, principally, that the methodology employed by Commerce in the *Remand Results* is contrary to the statutorily mandated methodology for calculating a dumping margin. Def't-Intervenor Ad Hoc Shrimp Trade Action Comm.'s Reply to Pl.'s Comments on Final Results of Redetermination Pursuant to Court Remand at 2, ECF No. 91 ("AHSTAC's Reply Br."). However, as AHSTAC notes "this Court affirmed the methodology in AR2 over AHSTAC's objections." AHSTAC's Reply Br. at 3. As the court has considered and rejected AHSTAC's arguments once, *see Amanda Foods III*, 35 CIT at __, 774 F. Supp. 2d at 1290 n.9 & 1291 n.11, it remains unpersuaded by the reiteration of these same arguments.

AHSTAC also argues that the withdrawal of six respondents from the litigation is evidence of dumping by the remaining cooperative, non-individually investigated respondents. AHSTAC's Reply Br. at 3. But AHSTAC presents no evidence to support such an inference. On the other hand, the rates assigned to the individually investigated respondents, after review, are potentially representative of the respondents as a whole. *See Amanda Foods I*, 33 CIT at __, 647 F. Supp. 2d at 1381. It follows that, absent other evidence, the court will not require Commerce to draw an inference of dumping solely from the withdrawal of these six Plaintiffs.

Nor will the court, in a case where all the remaining parties have cooperated, require Commerce to apply an adverse inference, as AHSTAC suggests it should do. *See* AHSTAC Reply Br. at 3 (citing 19 U.S.C. § 1677e(b)). All twenty-two of the cooperative, non-individually investigated respondents, who were initially Plaintiffs in this case, were fully cooperative in the third administrative review. The six Plaintiffs that withdrew neither refused nor failed to submit requested information; rather, they sought, and were granted, a voluntary dismissal by stipulation pursuant to the court's rules. *See* Stipulation of Dismissal, ECF No. 80. Nor has AHSTAC put forward any evidence or argument that the sixteen remaining Plaintiffs have acted uncooperatively, thereby justifying the application of an adverse inference against them. As the court discussed in *Amanda Foods I*, where "Commerce has not stated that any of the Plaintiffs were non-cooperative . . . 19 U.S.C. § 1677e does not provide a basis for the Department's use of [adverse inferences] with respect to the cooperating companies in the present case." *Amanda Foods I*, 33 CIT at __, 647 F. Supp. 2d at 1382. The court abides by no different standard in this regard.

II. The Domestic Processors

The Domestic Processors argue that the method Commerce used to corroborate the *de minimis* all-others rate for cooperative, non-selected respondents does not meet the reasonableness threshold required by 19 U.S.C. § 1673d(c)(5)(B). *See* Responsive Comments on Results of Redetermination Pursuant to Court Remand on Behalf of the Domestic Processors at 1, ECF No. 90 ("Domestic Processors' Reply Br.").[9]

The Domestic Processors' challenge fails because it conflates the two steps of the methodology Commerce used to determine the all-others rate in the *Remand Results*. In step one of this methodology, Commerce determines the all-others rate using the statutorily recommended methodology of averaging the weighted-average dumping margins of the individually investigated respondents. In step two, Commerce corroborates the accuracy of this methodology by comparing the Q&V Questionnaire data on a count-size specific basis with the count-size specific normal value of the individually investigated respondents. Thus, when the Domestic Processors state that "these

[9] In particular, the Domestic Processors assert that (1) the Q&V Questionnaire data is unreliable because it is inconsistent with CBP entry data; (2) the count-size specific average unit values may be distorted because Commerce did not specify how count-size was to be reported; and (3) the average unit values may be distorted because Commerce did not provide instructions for how values should be reported. Domestic Processors' Reply Br.at 1, 4–5, 6–7.

Q+V data do not appear to be reliable and sufficient to support a finding that there is no evidence of dumping by these respondents during the POR, and therefore assignment of *de minimis* margins *on the basis of this data* is unreasonable," Domestic Processors' Reply Br. at 1 (emphasis added), they are incorrectly identifying the function of the data and methodology upon which the all-others rate is based, as well as what makes such data and methodology reasonable.[10] That the Domestic Processors' statement is incorrect follows from the reasoning behind the court's holding in *Amanda Foods III*, i.e., that averaging the weighted-average dumping margins of the individually investigated respondents is a reasonable methodology for setting the all-others rate for cooperative, non-individually investigated respondents.[11]

Pursuant to 19 U.S.C. § 1673d(c)(5)(B) Commerce "may use any reasonable method to establish the estimated all-others rate for exporters and producers not individually investigated, *including* averaging the estimated weighted average dumping margins determined for the exporters and producers individually investigated." (emphasis added). In this statute, "including" serves to "place, list, or rate as a part or component of a whole or of a larger group, class, or aggregate." *Webster's Third New International Dictionary* 1143 (2002); *see also Black's Law Dictionary* 831 (9th ed. 2009) ("The participle *including* typically indicates a partial list . . . ."). Thus, the statute, while permitting any reasonable methodology, expressly places the methodology of averaging zero and *de minimis* rates among the larger group of reasonable methodologies. According to the statute, this methodology is presumptively reasonable.

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[10] The same reasoning is reflected in the Domestic Processors' two other challenges based on count-size and average unit value. *See* Domestic Processor' Reply Br. at 6 ("Such matches that have not been subject to basic comparability controls cannot form a reasonable basis for the conclusion that there is no evidence that separate rate respondents engaged in dumping during the period of review. *Hence*, the assignment of *de minimis* margins for separate rate respondents is not supported by substantial evidence . . . ." (emphasis added)); *id.* at 8 ("Commerce erred in not taking into account the differences between the basis upon which values are reported for mandatory respondents and the separate rate respondents, and therefore the estimated margins arrived at in the Remand Results are not accurate and cannot serve as a substantial basis for Commerce's conclusions that there is no evidence of dumping such that the assignment of the *de minimis* margins is reasonable.").

[11] "[T]he statute explicitly contemplates averaging the zero and *de minimis* rates received by individually investigated respondents as a reasonable methodology for assigning an estimated 'all others rate' in cases where all rates calculated for individually investigated respondents are zero or *de minimis*." *Amanda Foods III*, 35 CIT at __, 774 F. Supp. 2d at 1291.

This reasoning is bolstered by the Statement of Administrative Action for the Uruguay Round Agreements Act,[12] which notes that averaging the *de minimis* rates is the expected methodology when all individually investigated respondents receive a zero or *de minimis* rate:

> The expected method in such cases will be to weight-average the zero and *de minimis* margins and margins determined pursuant to the facts available, provided that volume data is available. However, if this method is not feasible, or if it results in an average that would not be reasonably reflective of potential dumping margins for non-investigated exporters or producers, Commerce may use other reasonable methods.

Uruguay Round Agreements Act, Statement of Administrative Action, H.R. Doc. No. 103–316, vol. 1, at 873 (1994), *reprinted in* 1994 U.S.C.C.A.N. 4040, 4201 ("SAA"); *see also Amanda Foods II*, 34 CIT at __, 714 F. Supp. 2d at 1291–92.

In addition, a presumption of reasonableness is sensible in light of the overall statutory scheme. When Commerce chooses to limit the number of individually investigated respondents pursuant to 19 U.S.C. § 1677f-1(c)(2), it is choosing to review the individually investigated respondents as potentially representative of all respondents in the review. When calculating the all-others rate pursuant to the general rule, the all-others rate "shall be an amount equal to the weighted average of the estimated weighted average dumping margins established for exporters and producers individually investigated . . . ." 19 U.S.C. § 1673d(c)(5)(A). Thus, in general, the all-others rate is based on the rates of the individually investigated respondents. While zero and *de minimis* rates are excluded from this calculation, *see* 19 U.S.C. § 1673d(c)(5)(A), when all individually investigated respondents receive zero or *de minimis* rates — i.e., pursuant to the exception at § 1673d(c)(5)(B) — there is no *a priori* justification for considering the individually investigated respondents unrepresentative of all respondents. Rather, as the court noted in Amanda Foods I:

> All parties agree that the mandatory respondents are presumed to be representative of the respondents as a whole; consequently, the average of the mandatory respondents' rates may be relevant to the determination of a reasonable rate for the separate

[12] Pursuant to 19 U.S.C. § 3512, "The statement of administrative action . . . shall be regarded as an authoritative expression by the United States concerning the interpretation and application of the Uruguay Round Agreements and this Act in any judicial proceeding in which a question arises concerning such interpretation or application."

> rate respondents. More particularly, that the mandatory respondents in the current review were found not to be engaged in dumping was evidence indicating that the responding separate rate Plaintiffs may also no longer be engaged in dumping.

Amanda Foods I, 33 CIT at __, 647 F. Supp. 2d at 1380. In other words, when setting an all-others rate pursuant to 19 U.S.C. § 1673d(c)(5)(A), the rates of the individually investigated respondents are presumed to be substantial evidence of the rate for all other respondents, and such presumption is equally applicable when determining the all-others rate pursuant to § 1673d(c)(5)(B).

Averaging the zero and *de minimis* rates of the individually investigated respondents is a reasonable methodology for calculating the all-others rate because it relies upon the margins of the individually investigated respondents. Thus, the all-others rate is neither set nor justified by comparison of the Q&V Questionnaire data to the normal value of the individually investigated respondents. Rather, the truncated dumping analysis Commerce conducted using the Q&V Questionnaire data only serves to confirm the results of an otherwise reasonable methodology. Unless some evidence indicates otherwise, the average of the weighted-average dumping margins for the individually investigated respondents is a reasonable all-others rate because it is based on substantial evidence in the form of the rates of the individually investigated respondents.

The Domestic Processors do not challenge the methodology for arriving at the all-others rate, they challenge the methodology by which Commerce *confirmed* the appropriateness of that rate. *See Amanda Foods III*, 35 CIT at __, 774 F. Supp. 2d at 1291 ("Commerce confirmed the reasonableness of using this approach with supplementary evidence."). By reopening the record and collecting Q&V Questionnaire data, Commerce sought to ensure that the average of *de minimis* rates would be "reasonably reflective of potential dumping margins for non-investigated exporters or producers . . . ." SAA, H.R. Doc. No. 103–316 at 873, 1994 U.S.C.A.N.N at 4201. What data Commerce collected confirmed the appropriateness of the statutorily permitted methodology.

The Domestic Processors, in contrast, have not presented evidence to undermine that finding. The evidence they have presented does not indicate that the dumping margin assigned was inaccurate, it only suggests that a more thorough process of confirmation was possible. Without presenting evidence that undermines the reasonableness of the all-others rate assigned, the Domestic Processors' arguments are

insufficient to call into question the reasonableness of a methodology explicitly presumed reasonable under the statute.

Thus, the court reiterates its finding in *Amanda III* that

> [Commerce] has applied a methodology specifically contemplated in the AD statute as a reasonable approach under similar circumstances and has reasonably corroborated the resulting rates with supplemental record evidence that a reasonable mind could accept as sufficient to support its conclusion — that the average of the mandatory respondents' zero and *de minimis* rates yields rates that are not unreasonably reflective of Plaintiffs' actual pricing behavior.

Amanda Foods III, 35 CIT at __, 774 F. Supp. 2d at 1292 (citation omitted).

CONCLUSION

For the foregoing reasons, and consistent with the court's opinion in *Amanda Foods III*, 35 CIT at __, 774 F. Supp. 2d at 1292, the Department's determinations in the *AR3 Final Results*, 74 Fed. Reg. at 47,191, as amended by the *Remand Results*, are AFFIRMED.

Judgment will be entered accordingly.

Dated: May 30, 2012
New York, New York

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