U.S. Customs and Border Protection

Slip Op. 12–160

GOLD EAST PAPER (JIANGSU) CO., LTD., NINGBO ZHONGHUA PAPER CO., LTD., GLOBAL PAPER SOLUTIONS, PT PINDO DELI PULP AND PAPER MILLS, and PAPER MAX LTD., Plaintiffs, v. UNITED STATES, Defendant, and APPLETON COATED LLC, NEWPAGE CORP., S.D. WARREN COMPANY D/B/A SAPPI FINE PAPER NORTH AMERICA, and UNITED STEEL, PAPER AND FORESTRY, RUBBER, MANUFACTURING, ENERGY, ALLIED INDUSTRIAL AND SERVICE WORKERS INTERNATIONAL UNION AFL-CIO-CLC, Defendant-Intervenors.

Court No. 10–00368
PUBLIC

[Denying Plaintiffs' Motion for Judgment on the Agency Record, and sustaining U.S. International Trade Commission's final threat of material injury determination]

Dated: December 21, 2012

Daniel L. Porter, Curtis, Mallet-Prevost, Colt & Mosle LLP, of Washington, D.C., argued for Plaintiffs. With him on the brief were *James P. Durling*, *Matthew P. McCullough*, and *Ross Bidlingmaier*, of the same firm, and *Stephen E. Wieker*, Winston & Strawn LLP, of Washington, D.C.

David B. Fishberg, Office of the General Counsel, U.S. International Trade Commission, of Washington, D.C., argued for Defendant. With him on the brief were *Marc A. Bernstein*, Office of the General Counsel, *James M. Lyons*, General Counsel, and *Andrea C. Casson*, Assistant General Counsel for Litigation.

Eric. P. Salonen, Stewart and Stewart, of Washington, D.C., argued for Defendant-Intervenors. With him on the brief were *Terence P. Stewart* and *Philip A. Butler*, of the same firm, and *Gilbert B. Kaplan* and *Brian E. McGill*, King & Spalding LLP, of Washington, D.C.

OPINION

RIDGWAY, Judge:

In this action, the plaintiffs – three foreign producers of certain coated paper, and two U.S. importers of that merchandise (hereinafter, the "Foreign Producers")[1] – contest the unanimous final determination of the U.S. International Trade Commission ("Commission" or "ITC") that imports of such coated paper that are sold in the United

[1] The plaintiff firms encompass U.S. importers of certain coated paper suitable for high-quality print graphics using sheet-fed presses ("coated paper") that participated in the

States for less than fair market value and subsidized by the Governments of the People's Republic of China ("PRC") and Indonesia posed a threat of material injury to the U.S. domestic industry. *See* Complaint ¶ 1; Certain Coated Paper Suitable for High-Quality Print Graphics Using Sheet-Fed Presses from China and Indonesia, Inv. Nos. 701-TA-470–471 and 731-TA-1169–1170 (Final), USITC Pub. 4192 at 1 (Nov. 2010).[2] The Commission's determination led the U.S. Department of Commerce to issue antidumping and countervailing duty orders covering imports of the subject merchandise from the PRC and from Indonesia.[3]

Pending before the Court is Plaintiffs' Motion for Judgment on the Agency Record. In that motion, the Foreign Producers assert that the Commission's affirmative final threat of material injury determination is not supported by substantial evidence, and is otherwise not in

agency proceedings, as well as several foreign producers of coated paper that participated in the agency proceedings through their corporate affiliates, Asian Pulp and Paper, Ltd. (China) and Asia Pulp and Paper, Ltd. (Indonesia) (collectively, "APP"). *See* Complaint ¶ 3; Certain Coated Paper Suitable for High-Quality Print Graphics Using Sheet-Fed Presses from China and Indonesia, Inv. Nos. 701-TA470–471 and 731-TA-1169–1170 (Final), USITC Pub. 4192 at 3 (Nov. 2010).

The plaintiff producers represented by APP – which were among the respondents in the underlying Commission investigation – include Chinese producers Gold East Paper (Jiangsu) Co., Ltd. and Ningbo Zhonghua Paper Co., Ltd., as well as Indonesian producer PT Pindo Deli Pulp and Paper Mills. *See* Complaint ¶ 3; Certain Coated Paper Suitable for High-Quality Print Graphics Using Sheet-Fed Presses from China and Indonesia, Inv. Nos. 701-TA-470–471 and 731-TA-11691170 (Final), USITC Pub. 4192 at 3 (Nov. 2010).

The plaintiff U.S. importers are Global Paper Solutions and Paper Max Ltd. *See* Complaint ¶ 3.

[2] The Commission's final determinations on "material injury" and "threat of material injury" in both the antidumping and countervailing duty investigations – together with the public version of the Commission's views (cited herein as "Final Views") and the public version of the report of the Commission's staff (cited herein as "Staff Report") – are published as Certain Coated Paper Suitable for High-Quality Print Graphics Using Sheet-Fed Presses from China and Indonesia, Inv. Nos 701-TA-470–471 and 731-TA-1169–1170 (Final), USITC Pub. 4192 (Nov. 2010), P.R. Doc. 243.

The confidential version of the Commission's views, in turn, is cited as "Conf. Final Views"; and the confidential version of the Staff Report is cited as "Conf. Staff Report." Note that the pagination of the public versions of the Commission's Final Views and the Staff Report differ from the confidential versions of those documents.

[3] *See* Certain Coated Paper Suitable for High-Quality Print Graphics Using Sheet-Fed Presses From the People's Republic of China: Amended Final Affirmative Countervailing Duty Determination and Countervailing Duty Order, 75 Fed. Reg. 70,201 (Dep't Commerce Nov. 17, 2010); Certain Coated Paper Suitable For High-Quality Print Graphics Using Sheet-Fed Presses From Indonesia: Countervailing Duty Order, 75 Fed. Reg. 70,206 (Dep't of Commerce Nov. 17, 2010); Certain Coated Paper Suitable for High-Quality Print Graphics Using Sheet-Fed Presses From the People's Republic of China: Amended Final Affirmative Determination of Sales at Less Than Fair Value and Antidumping Order, 75 Fed. Reg. 70,203 (Dep't Commerce Nov. 17, 2010); Certain Coated Paper Suitable for High-Quality Print Graphics Using Sheet-Fed Presses From Indonesia: Antidumping Duty Order, 75 Fed. Reg. 70,205 (Dep't Commerce Nov. 17, 2010).

accordance with law. *See generally* Respondent Plaintiffs' Brief in Support of Their Motion for Judgment on the Agency Record ("Pls.' Brief"); Respondent Plaintiffs' Reply Brief in Support of Their Motion for Judgment on the Agency Record ("Pls.' Reply Brief").[4]

The Commission and Defendant-Intervenors – three domestic producers of coated paper, and a labor union (hereinafter the "Domestic Producers")[5] – oppose the Foreign Producers' motion and maintain that the Commission's determination should be sustained in all respects. *See generally* Defendant's Memorandum in Opposition to Motion of Plaintiffs for Judgment on the Agency Record ("Def.'s Brief"); Defendant-Intervenors' Response in Opposition to Plaintiffs' Motion for Judgment on the Agency Record ("Def.-Ints.' Brief").

Jurisdiction lies under 28 U.S.C. § 1581(c) (2006).[6] For the reasons set forth below, Plaintiffs' Motion for Judgment on the Agency Record must be denied.[7]

I. *Background*

The nation's international trade laws require that antidumping and countervailing duties be imposed upon imported merchandise in cases of dumping (*i.e.*, where merchandise "is being, or is likely to be, sold in the United States at less than . . . fair value") and in cases where the merchandise is the product of an improper subsidy (*i.e.*, where "a countervailable subsidy is being provided with respect to the . . . merchandise") – but only when the dumping or subsidies result in "material injury or the threat of material injury" to a domestic industry. *See* 19 U.S.C. §§ 1671, 1673.

In cases where dumping is alleged, the U.S. Department of Commerce is charged with determining whether the imported merchan-

[4] Because the administrative record in this action includes confidential information, the parties filed both public and confidential versions of all briefs. Citations to briefs are to the public versions whenever possible, and except as specified. Citations to the confidential version of a brief are prefaced with "Conf."

[5] Defendant-Intervenors – petitioners in the underlying agency investigation – include Appleton Coated LLC, NewPage Corporation, and S.D. Warren Company d/b/a Sappi Fine Paper North America, as well as the United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied Industrial and Service Workers International Union. *See* Complaint ¶ 5; Final Views at 3.

[6] All citations to federal statutes are to the 2006 edition of the United States Code.

[7] The Foreign Producers did not brief the issues raised in Counts One and Five of their Complaint. *See* Complaint ¶¶ 11–13 (Count One) (disputing the Commission's domestic "like product" determination); *id*. ¶¶ 8, 23–24 (Count Five) (alleging "Improper Congressional Interference" in Commission investigation at issue). The claims set forth in those two counts are therefore waived. *See*, *e.g.*, *SmithKline Beecham Corp. v. Apotex Corp.*, 439 F.3d 1312, 1319–20 (Fed. Cir. 2006) (explaining, *inter alia*, that it is "well established that arguments not raised in the opening brief are waived"); *Novosteel SA v. United States*, 284 F.3d 1261, 1273–74 (Fed. Cir. 2002) (same).

dise "is being, or is likely to be" dumped. *See* 19 U.S.C. § 1673d(a)(1). Similarly, where prohibited subsidies are alleged, Commerce determines whether the imported merchandise is the beneficiary of a "countervailable subsidy." *See* 19 U.S.C. § 1671d(a)(1).

In both antidumping and countervailing duty cases, the role of the Commission, in turn, is to make the requisite "injury" determination – that is, to determine whether the alleged dumping or subsidies result in "material injury or the threat of material injury" to the domestic industry at issue. *See* 19 U.S.C. §§ 1671d(b)(1), 1673d(b)(1). Material injury is defined as "harm which is not inconsequential, immaterial, or unimportant." 19 U.S.C. § 1677(7)(A).

To make an affirmative determination of material injury, the Commission must conclude that imports are having an adverse impact on the domestic industry *at present*. 19 U.S.C. § 1677(7)(C). In contrast, to reach an affirmative determination of threat of material injury, the Commission must conclude (in relevant part) that "further dumped or subsidized imports are imminent" and that "material injury by reason of imports would occur unless an [antidumping or countervailing duty] order is issued . . . ." 19 U.S.C. § 1677(7)(F)(ii). In reaching a determination on "threat of material injury," the Commission is to analyze certain statutory threat factors before making its final decision. *See* 19 U.S.C. § 1677(7)(F)(i) (listing threat factors). Whether evaluating "material injury" or "threat of material injury," the Commission must consider the effect of the volume of imports on the domestic industry, the effect of imports on domestic prices, and whether there is likely injury to the domestic industry caused by imports. *See* 19 U.S.C. §§ 1677(7)(B)(i), 1677(7)(F)(i).

The record of the agency proceeding here documents the Commission's consideration of the domestic industry's allegations of "material injury" and "threat of material injury" in both the antidumping and countervailing duty investigations, covering the period January 2007 through June 2010 (the "period of investigation"). The Commission organized its final views by separately addressing volume, price effects, and the impact of the subject imports. *See* Final Views at 26–39. As to each topic, the Commission first considered the allegations of present material injury, then the threat of material injury. *See* Final Views at 26–39.

Ultimately, based on the record compiled before it, the Commission reached a negative final determination on "material injury," concluding that there was no present material injury to the domestic coated

paper industry. *See* Final Views at 26.[8] However, the Commission concluded that – in light of its findings on likely subject import volume, likely price effects, and the likely impact of subject imports on the domestic industry – imports of coated paper from the PRC and Indonesia would increase in the imminent future and that material injury due to such imports would occur absent imposition of antidumping and countervailing duties. Final Views at 38–39. The Commission therefore reached an affirmative final determination on "threat of material injury," concluding – unanimously – that imports of coated paper from the PRC and Indonesia threatened the domestic industry. *See* Certain Coated Paper Suitable For High-Quality Print Graphics Using Sheet-Fed Presses From China and Indonesia: Determinations, 75 Fed. Reg. 70,289 (ITC Nov. 17, 2010); *see also* Final Views at 3.

The Commission's affirmative determination on threat of material injury led to the issuance of antidumping and countervailing duty orders by Commerce. *See* n.3, *supra*.

This action followed.

II. *Standard of Review*

In reviewing a challenge to a final determination, the Commission's determination must be upheld unless it is "unsupported by substantial evidence on the record, or otherwise not in accordance with the law." 19 U.S.C. § 1516a(b)(1)(B)(i). "Substantial evidence" is "more than a mere scintilla. It means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 477–78 (1951) (*quoting Consolidated Edison Co. v. NLRB*, 305 U.S. 197, 229 (1938)); *see also Consolo v. Federal Maritime Comm'n*, 383 U.S. 607, 620 (1966) (defining "substantial evidence" as "something less than the weight of the evidence").

"[A] party challenging the Commission's determination under the substantial evidence standard 'has chosen a course with a high barrier to reversal.'" *Nippon Steel Corp. v. United States*, 458 F.3d 1345,1352, 1358 (Fed. Cir. 2006) (*quoting Mitsubishi Heavy Indus., Ltd. v. United States*, 275 F.3d 1056, 1060 (Fed. Cir. 2001)). That party "bears the burden of proving the evidence [is] inadequate." *Micron Tech., Inc. v. United States*, 117 F.3d 1386, 1397 (Fed. Cir. 1997).

[8] One member of the Commission filed separate views, reaching a final affirmative determination as to "material injury." *See* Final Views at 46.

It is, of course, true that any evaluation of the substantiality of evidence "must take into account whatever in the record fairly detracts from its weight," including "contradictory evidence or evidence from which conflicting inferences could be drawn." *Suramerica de Aleaciones Laminadas, C.A. v. United States*, 44 F.3d 978, 985 (Fed. Cir. 1994) (*quoting Universal Camera Corp.*, 340 U.S. at 487–88); *see also Mittal Steel Point Lisas Ltd. v. United States*, 548 F.3d 1375, 1380–81 (Fed. Cir. 2008) (same)). However, the mere fact that it may be possible to draw two inconsistent conclusions from the record does not prevent the agency's determination from being supported by substantial evidence. *Am. Silicon Techs. v. United States*, 261 F.3d 1371, 1376 (Fed. Cir. 2001); *see also Consolo v. Federal Maritime Comm'n*, 383 U.S. at 620.

In short, "[i]t is not the function of a court to decide that, were it the Commission, it would have made the same decision on the basis of the evidence." *Matsushita Elec. Indus. Co. v. United States*, 750 F.2d 927, 936 (Fed. Cir. 1984). The court's role is "limited to deciding whether the Commission's decision is unsupported by substantial evidence on the record, or otherwise not in accordance with law." *Id*. (internal quotations omitted).

And "when the totality of the evidence does not illuminate a black-and-white answer to a disputed issue, it is the role of the expert factfinder – here the majority of the Presidentially-appointed, Senate-approved Commissioners – to decide which side's evidence to believe." *Nippon Steel Corp.*, 458 F.3d at 1359. "So long as there is adequate basis in support of the Commission's choice of evidentiary weight, the Court of International Trade . . . , reviewing under the substantial evidence standard, must defer to the Commission." *Id*.

III. *Analysis*

As discussed above, the Commission's responsibility in antidumping and countervailing duty investigations is to determine whether the domestic industry in question is being "materially injured or is threatened with material injury" by reason of imports. 19 U.S.C. §§ 1671d(b)(1), 1673d(b)(1); *see generally* section I, *supra*.

In determining whether a domestic industry is threatened with material injury by reason of imports of specified merchandise, the Commission is directed to consider, "among other relevant economic factors," nine enumerated statutory threat factors:

> (I) if a countervailable subsidy is involved, such information as may be presented to [the Commission] by [Commerce] as to the nature of the subsidy . . . , and whether imports of the subject merchandise are likely to increase,

> (II) any existing unused production capacity or imminent, substantial increase in production capacity in the exporting country indicating the likelihood of substantially increased imports of the subject merchandise into the United States, taking into account the availability of other export markets to absorb any additional exports,
>
> (III) a significant rate of increase of the volume or market penetration of imports of the subject merchandise indicating the likelihood of substantially increased imports,
>
> (IV) whether imports of the subject merchandise are entering at prices that are likely to have a significant depressing or suppressing effect on domestic prices, and are likely to increase demand for further imports,
>
> (V) inventories of the subject merchandise,
>
> (VI) the potential for product-shifting if production facilities in the foreign country, which can be used to produce the subject merchandise, are currently being used to produce other products,
>
> (VII) in any investigation . . . [involving] imports of both a raw agricultural product . . . and any product processed from such raw agricultural product, the likelihood that there will be increased imports, by reason of product shifting, if there is an affirmative determination by the Commission . . . with respect to either the raw agricultural product or the processed agricultural product (but not both),
>
> (VIII) the actual and potential negative effects on the existing development and production efforts of the domestic industry, including efforts to develop a derivative or more advanced version of the domestic like product, and
>
> (IX) any other demonstrable adverse trends that indicate the probability that there is likely to be material injury by reason of imports (or sale for importation) of the subject merchandise (whether or not it is actually being imported at the time).

19 U.S.C. § 1677(7)(F)(i).

The Foreign Producers' threshold attack on the Commission's threat of injury determination is their claim that the Commission erred in basing its determination principally on a subset of the nine statutory threat factors – specifically, factors (II), (III), (IV), and (IX). Pls.' Brief at 8–9. The Foreign Producers contend that – because the

Commission did not specifically discuss all nine factors – the Commission's determination is "not in accordance with the law." Pls.' Brief at 8–9.

The Foreign Producers misinterpret the requirements of 19 U.S.C. §1677(7)(F)(i). Pls.' Brief at 7–9. In a threat of material injury determination, the Commission is required to consider the nine specifically enumerated factors in assessing the possible threat of imminent injury to the U.S. industry, to the extent that is appropriate. *See* 19 U.S.C. § 1677(7)(F)(i). In its determination here, the Commission focused its analysis principally on four of the nine statutory factors. *See* Final Views at 21–22 n.126, 31 n.201.

As the Commission noted, statutory threat factor (VII) is not applicable, because no imports of agricultural products were involved. Final Views at 21–22 n.126; *see also* 19 U.S.C. § 1677(7)(F)(i)(VII). Surely the Foreign Producers do not contend that the Commission was required to engage in an extended discussion of factor (VII). Statutory threat factor (VIII) also is not applicable. There is no suggestion that the domestic industry is currently engaging in, or will imminently engage in, any efforts to "develop a derivative or more advanced version of the domestic like product." Final Views at 21–22 n.126; *see also* 19 U.S.C. § 1677(7)(F)(i)(VIII).

As for the remaining statutory threat factors, it is true that factors (I), (V), and (VI) were not as thoroughly addressed in the Commission's final views as factors (II), (III), (IV), and (IX). Pls.' Brief at 8–9.[9] However, the extent of the Commission's discussion of any particular factor does not, in itself, render the Commission's determination not lawful.[10] Moreover, the Foreign Producers have not established that the factors that the Commission discussed "only in passing" are so significant to the analysis as to "seriously undermine[] [the Commission's] reasoning and conclusions." *Altx, Inc. v. United States*, 25 CIT 1100, 1117–18, 167 F. Supp. 2d 1353, 1374 (2001).

As the Court of Appeals has underscored, "the Commission need

[9] In its volume analysis, the Commission briefly discussed factor (V) (*i.e.*, inventories of subject merchandise) and factor (VI) (*i.e.*, product-shifting). *See* Final Views at 31 n.201. The Commission explained that these factors did not play a substantial role in the threat of injury determination. *See* Final Views at 31 n.201. The Commission also discussed factor (I), the nature of the import subsidies found by Commerce, in its analysis of likely increase of volume. *See* Final Views at 35 n.229.

[10] Congress has acknowledged the fact-intensive nature of injury investigations, emphasizing that "[t]he significance of the various factors affecting an industry will depend upon the facts of each particular case. Neither the presence nor the absence of any factor listed in the bill can necessarily give decisive guidance with respect to whether an industry is materially injured, and the significance to be assigned to a particular factor is for the ITC to decide." S. Rep. No. 96–249 at 88 (1979), *reprinted in* 1979 U.S.C.C.A.N. 381, 474. Congress has instructed that, in determining threat of material injury, the Commission is to consider "any economic factors it deems relevant." *Id*.

only discuss 'material issues of law or fact.'" *Timken U.S. Corp. v. United States*, 421 F.3d 1350, 1356 (Fed. Cir. 2005) (*citing Nat'l Ass'n of Mirror Mfrs. v. United States*, 12 CIT 771, 780, 696 F. Supp. 642, 649 (1988)); *see also Metallverken Nederland B.V. v. United States*, 13 CIT 1013, 1035, 728 F. Supp. 730, 746 (1989) ("[T]here is no requirement that an affirmative determination be based upon an affirmative finding as to all the factors."). Even more to the point, the Court of Appeals has held that the Commission is entitled to "use its sound discretion in determining the weight to afford these and all other factors." *Suramerica*, 44 F.3d at 984. Nothing cited by the Foreign Producers suggests an abuse of that discretion here. *See Metallverken*, 13 CIT at 1029, 728 F. Supp. at 742 (affirming Commission's threat of material injury determination based on less than nine factors); *see also Goss Graphic Sys., Inc. v. United States*, 216 F.3d 1357, 1363 (Fed. Cir. 2000) (same).

The bulk of the Foreign Producers' arguments target the Commission's findings on statutory threat factors (II), (III), (IV), and (IX) – the factors that the Commission addressed in greater detail. The Foreign Producers claim that the Commission did not properly address these four factors and that, as such, the Commission's affirmative final threat of injury determination improperly rested on "mere speculation and conjecture" and on findings that are otherwise "not supported by substantial evidence on the record." Pls.' Brief at 8.

As discussed in further detail below, the Foreign Producers' arguments are without merit.

A. *The Commission's Analysis of the Volume of Imports Statutory Threat Factors (II) and (III)*

In a threat of material injury analysis, the Commission is required to analyze the significance of likely future increases in the volume or market share of imports in the U.S. market, and whether such increases indicate a likely substantial growth in imports into the United States. *See* 19 U.S.C. § 1677(7)(F)(i)(III). In addition, the Commission must consider any increase in foreign producers' capacity and the likelihood that such an increase would give rise to future substantial growth in the volume of imports into the United States. *See* 19 U.S.C. § 1677(7)(F)(i)(II).

In the instant case, the Commission found the capacity to produce coated paper likely to increase in both Indonesia and the PRC. Final Views at 28. With respect to Chinese capacity, the Commission noted that the parties agreed that capacity would increase between 2010 and 2011, but disagreed as to the extent of the projected increase. Final Views at 28. Further, the Commission found that the subject

producers were likely to utilize the additional capacity to increase shipments to the United States. Final Views at 28. Throughout the investigation period, APP – the predominant exporter of coated paper in both the PRC and Indonesia, and the entity that represented and was affiliated with individual subject producers such as plaintiffs here – aggressively sought to increase exports to the United States. Final Views at 3, 24, 28–29. [11] For example, in 2008, APP lost Unisource (a leading U.S. distributor) as a source for U.S. distribution. Shortly thereafter, APP established its own distributor, Eagle Ridge Paper, to retain and increase its presence in the U.S. market. Final Views at 24, 29.[12] Record evidence also established that exporters could readily increase their U.S. market share due to their familiarity with the distribution network and the prevalence of spot market sales. Final Views at 28–29.

Finally, the Commission considered the historic increase in the volume and market penetration of the subject imports from 2007 to 2009. Final Views at 27. Specifically, the Commission found that, in 2009, APP's loss of its major distributor was offset by increased sales to other accounts. Final Views at 29–30. The Commission similarly found that subject imports generally continued to increase even after APP lost its certification from the Forest Stewardship Council ("FSC") in November 2007. Final Views at 30.[13]

In addition, the Commission found that, due to significant increases in production capacity, Chinese and Indonesian producers of coated paper had both the ability and the incentive to increase exports of subject merchandise to the United States in the imminent future. Final Views at 30. Accordingly, the Commission concluded that, absent the imposition of antidumping and countervailing duty orders, the increases in volume of imports of coated paper from the PRC and Indonesia that occurred during the period of investigation were likely to continue. Final Views at 27.

The Foreign Producers challenge the Commission's finding on Chinese production capacity, claiming that the finding is based on speculation and fails to meet the substantial evidence standard. *See* Pls.' Brief at 10–17. The Foreign Producers also dispute the factual basis for the Commission's conclusion that increases in the volume and

[11] According to the Commission, APP's affiliated companies accounted for "[[ ]] of reported subject imports in 2009." Conf. Final Views at 40.

[12] [[

]] Conf. Final Views at 39–40.

[13] Certification by the Forest Stewardship Council indicates to customers that a paper product satisfies "general sustainability criteria." APP Pre-Hearing Brief, C.R. Doc. 296 at Exh. 33 ¶ 2.

market penetration of subject imports in the United States were significant and would likely lead to substantial growth in imports into the United States. *See* Pls.' Brief at 18–26.

1. *Production Capacity*

Under the statute, the Commission was required to assess any latent capacity to produce coated paper in the PRC, the possibility of substantially increased imports to the United States, and the availability of other export markets to absorb any additional exports. *See* 19 U.S.C. § 1677(7)(F)(i)(II). The Commission found that the evidence of production capacity in the PRC during the period of investigation and projections as to future capacity indicated a threat to the U.S. domestic industry. *See* Final Views at 28–30.[14]

The Foreign Producers do not dispute that Chinese production capacity will increase within the imminent future. *See* Pls.' Brief at 10–11. Rather, the Foreign Producers take issue with the projected additional capacity and the Commission's determination that such additional capacity was substantial and likely to increase imports into the United States. Pls.' Brief at 11.

a. *Chinese Production Capacity*

The Commission found a significant imminent increase in the Chinese manufacturers' production capacity that would likely lead to a substantial increase in actual production. Final Views at 28 n.181. In its analysis, the Commission relied on Resource Information Systems Inc. ("RISI") projections of future Chinese consumption of coated paper and capacity to produce coated paper. Final Views at 28 n.181.[15]

In its analysis, however, the Commission did not use RISI's projected capacity utilization rate of approximately 93%. *See* Staff Report at II-8. Instead, the Commission used a projected capacity utilization rate derived from the Chinese producers' questionnaire responses. *See* Staff Report at II-8, VII-7 (Table VII-2). Responding Chinese producers projected a capacity utilization rate of 99.2% of total production capacity in 2010 and 99.3% in 2011. Staff Report at II-8. Because 99.2% and 99.3% roughly equal 100%, the Commission concluded that Chinese manufacturers' future actual production of coated paper would roughly equal the manufacturers' future produc-

[14] The Commission was also required to assess any latent production capacity in Indonesia, and it did so. *See* Final Views at 28. The Foreign Producers have challenged the Commission's findings only as to the PRC.

[15] RISI is an information provider for the global forest products industry. Final Views at 28. In the underlying investigation, both petitioners and respondents relied upon data published by RISI. *See* Final Views at 28.

tion capacity. Based on the RISI projections for consumption and production capacity, as well as a projected capacity utilization rate of essentially 100%, the Commission concluded that there would be approximately 900,000 metric tons of additional Chinese coated paper that would not be absorbed by the Chinese domestic market. Final Views at 28 n.181.

The Foreign Producers contend that the Commission should have used RISI's lower projected capacity utilization rate, rather than the rate derived from the Chinese producers' questionnaire responses. Pls.' Brief at 12. The Foreign Producers emphasize that the Commission relied on RISI data to support most of its analysis, and charge that the Commission selectively "cherry picked" the questionnaire data here to support its production capacity determination. Pls.' Brief at 12; Pls.' Reply Brief at 5.[16]

As a general principle, however, the Commission has the discretion to rely on questionnaire data in circumstances such as these, so long as the Commission does not act arbitrarily. *Int'l Imaging Materials, Inc. v. U.S. Int'l Trade Comm'n*, 30 CIT 1181, 1187 (2006) (*citing Bando Chem. Indus., Ltd. v. United States*, 17 CIT 798, 799 (1993), *aff'd*, 26 F.3d 139 (Fed. Cir. 1994)) ("Although the ITC is permitted to make varying determinations based on the facts of each case, it may not act arbitrarily. . . . [T]he ITC must present a 'reviewable, reasoned basis' for its determinations.").[17]

Here, according to the Commission, RISI's data were based on a category of paper products "somewhat broader than the paper defined by Commerce's scope." Final Views at 28 n.181. In contrast, the scope

[16] The Foreign Producers dispute the reasonableness of the Commission's assumption that – as the Foreign Producers put it – "every ton of capacity will equal to a ton of production." Pls.' Brief at 12. The Foreign Producers argue that no "factory can operate perfectly and production rarely equals capacity." Pls.' Brief at 12. It is no doubt true that no factory can operate perfectly all the time. However, the ability of factories to operate at or near full capacity is not clear on the record. The Foreign Producers have provided no evidence on point. In contrast, the Domestic Producers point to record evidence indicating that "actual production can exceed rated name plate capacity." Def.-Ints.' Brief at 23 n.12. As the Domestic Producers noted, APP started a new paper mill in April 2010 with a rate of capacity of 900,000 metric tons per year; yet the paper mill "churn[ed] out up to 1.45 million metric tons per year." Def.-Ints.' Brief at 23 n.12 (*citing* Petitioners' Pre-hearing Brief, P.R. Doc. 164 at 56). Here, the questionnaire data collected from the Chinese producers themselves projected a capacity utilization rate of slightly more than 99%. Def.-Ints.' Brief at 23 (*citing* Staff Report at VII-7 (Table VII-2)).

[17] In their reply brief, the Foreign Producers argue that the Government cannot rely on the questionnaire data to support the Commission's determination in this forum, because – according to the Foreign Producers – the Commission did not rely on the questionnaire data in reaching its final determination. Pls.' Reply Brief at 5. But the Foreign Producers are simply wrong on the facts. The Commission's staff report, part of the Commission's final views, in fact did rely on capacity utilization data from Chinese producers' questionnaire responses. *See* Staff Report at II-8, VII-7 (Table VII-2). The Government is thus free to make its case based on those data.

of the data collected by the questionnaire responses was within the parameters of the industry as defined by Commerce for this investigation.[18] The Commission thus provided adequate support for the "choices made among various potentially acceptable alternatives" in its decision to rely on questionnaire data. *Int'l Imaging Materials, Inc.*, 30 CIT at 1187 (citation omitted); *see also Nippon Steel Corp.*, 458 F.3d at 1351 (*quoting Universal Camera Corp.*, 340 U.S. at 477–78 (explaining that a reviewing court must determine whether there exists "such relevant evidence as a reasonable mind might accept as adequate to support [the] conclusion")).

The Foreign Producers claim that historical production capacity utilization rates provide "contrary evidence" establishing the Chinese producers' capacity utilization rate to have been about 93%. *See* Pls.' Brief at 12. It is true that the evidence prior to the first half of ("interim") 2010 shows a lower capacity utilization rate than that used by the Commission. *See* Staff Report at VII-7. However, data reported from the first half of 2010 (the most recent period for which historical data was reported) show the *same* capacity utilization rate used by the Commission – 99%. Def.'s Brief at 21–22; *see also* Staff Report at VII-7 (Table VII-2). The most recent historical data thus support the Commission's use of a 99% capacity utilization rate. *See* Staff Report at VII-7 (Table VII-2). The Foreign Producers' challenges cannot carry the day.

b. & c. *Other Export Markets*

After determining the likely increase in Chinese production capacity and the additional production volume that would result therefrom, the Commission analyzed whether additional production was likely to substantially increase imports into the United States. *See* 19 U.S.C. § 1677(7)(F)(i)(II). In so doing, the Commission is directed to consider export markets other than the United States and the ability of those markets to absorb any additional exports from the foreign producers' increased production capacity. *See* 19 U.S.C. § 1677(7)(F)(i)(II).

Here, the Foreign Producers challenge the Commission's analysis as based on an assumption that a substantial proportion of the additional capacity projected in the PRC would be directed to the United

[18] The Government takes issue with the Foreign Producers' representations concerning the extent of the Commission's reliance on RISI data. The Government explains that the Commission has a general preference for questionnaire data in its investigations, but used RISI data here as a "proxy" for missing questionnaire data. Def.'s Brief at 20. Thus, for example, the Commission used RISI data where questionnaire responses did not provide projections for consumption of coated paper in China and Asia. Def.'s Brief at 20. However, the Commission did not rely on RISI data for projected capacity utilization rates, because questionnaire data was available. *See* Staff Report at II-8, VII-7 (Table VII-2).

States. Pls.' Brief at 14. According to the Foreign Producers, the Commission's determination failed to consider the possibility that the increase in Chinese-made subject merchandise would displace imports into the PRC and the Chinese manufacturers' potential to increase sales in the Asian market. *See* Pls.' Brief at 13–17.

i. *Chinese Market*

The Foreign Producers claim that the Commission's production capacity analysis did not address "substantial record evidence that Chinese producers were capturing a larger and larger share of the Chinese market in excess of consumption growth." Pls.' Brief at 14.[19] The Foreign Producers cite evidence of Chinese producers allegedly increasing their share of the Chinese market. Pls.' Brief at 14. The Foreign Producers also refer to Chinese customs data which, according to the Foreign Producers, show a "steady rate of decline" in imports of coated paper into the PRC "since at least 2005." Pls.' Brief at 14. The Foreign Producers point to these facts as proof that Chinese producers are not concerned about increasing their presence in the U.S. market. Pls.' Brief at 14.

But the Foreign Producers' arguments are not borne out by the Chinese customs data. Those data merely depict decreasing imports of coated paper into the PRC. *See* Pls.' Brief at 14 (explaining Chinese customs data). The data do not constitute substantial evidence that Chinese producers of coated paper were capturing a larger share of the Chinese market. This is especially true in light of the Commission's staff report, which shows the Chinese producers' share of the Chinese market as constant. *See* Conf. Staff Report at VII-10 (Table VII-2). In addition, the record documents the percentage of shipments that Chinese producers directed to the home market as decreasing during the period of investigation.[20] The Foreign Producers' argument thus consists of little more than speculation based on decreased imports into the PRC. Absent concrete, direct evidence that the Chi-

[19] The Foreign Producers cite the views of one RISI graphic paper economist as evidence that "Chinese producers would focus efforts on the domestic and regional markets" rather than the United States. Pls.' Brief at 14; *see* APP Pre-Hearing Brief, C.R. Doc. 296 at Exh. 36 (RISI article). In an article, the economist expresses his own personal opinions concerning the markets that he expects Chinese producers to target. *See* APP Pre-Hearing Brief, C.R. Doc. 296 at Exh. 36 (RISI article). Contrary to the Foreign Producers' assertions, the economist's article was not "conveniently ignored" by the Commission. Pls.' Brief at 14. As the Domestic Producers observe, however, a single article – without more – does not invalidate the Commission's findings. *See* Def.-Ints.' Brief at 24 n.13.

[20] As documented in the Commission's staff report, the percentage of total quantity of shipments to the Chinese home market was 65.5% in 2007, 62.7% in 2008, and 61.5% in 2009. Staff Report at VII-7 (Table VII-2).

nese producers were increasing their share of the Chinese market, the Foreign Producers gain no traction against the Commission's findings and determination.

ii. *Asian Markets*

The Foreign Producers further contend that the Commission's determination that increased Chinese production would be directed to the United States did not adequately address opportunities for Chinese producers in the Asian regional market. *See* Pls.' Brief at 15. Specifically, the Foreign Producers argue that the Commission erred in not accounting for the potential for Chinese exports to displace third-country imports into the Asian region. Pls.' Brief at 16.

According to the Foreign Producers, data from 2007 to 2009 indicate that 95% of Chinese exports of subject merchandise went to countries other than the United States. *See* Pls.' Brief at 16. The Foreign Producers also cite to data showing that Chinese exports to the United States increased at a slower pace than exports to other markets during the same period of time. *See* Pls.' Brief at 16. The Foreign Producers claim that this evidence casts into doubt the Commission's conclusion that Chinese exports would target the U.S. market. Pls.' Brief at 16. The Foreign Producers conclude that the Commission's determination was unlawful, because – according to the Foreign Producers – the Commission failed to properly analyze "other export markets." Pls.' Brief at 15 (*citing* 19 U.S.C. § 1677(7)(F)(i)(II)).

The data cited by the Foreign Producers do not, *per se*, undermine the Commission's conclusion that Chinese producers would target the U.S. market. In its analysis, the Commission gave great weight to Chinese producers' concerted efforts to target the U.S. market. *See* Final Views at 29–30. As discussed elsewhere herein, the evidence of those efforts included APP's own efforts to establish a distribution network in the United States. *See* section III.A.2.b.ii, *infra*; n.12, *supra*. Moreover, the Commission's analysis of "other export markets" found no evidence that the growth in consumption in the rest of Asia would be able to absorb the excess Chinese production. Final Views at 28 n.181.[21]

Similarly unavailing is the Foreign Producers' claim that the Commission ignored the potential for Chinese exports to displace third-

[21] Based on RISI data, the Commission projected that – between 2009 and 2011 – demand in the rest of Asia would exceed growth in production by 160,000 tons. Final Views at 28 n.181.

country imports into Asia. *See* Pls.' Brief at 16–17.[22] The Foreign Producers highlight an article by a RISI economist, opining on the vulnerability of non-Asian imports to displacement by Chinese imports. *See* Pls.' Brief at 17. As previously discussed (*see* n.19, *supra*), however, a single article such as this is entitled to limited weight, particularly given the contrary record evidence and the very substantial discretion that is afforded the Commission. Moreover, record data squarely contradict the Foreign Producers' assertions that Chinese producers were increasing their focus on Asian markets. Def.'s Brief at 22. The questionnaire data, for example, indicate that the percentage of the Chinese producers' shipments to Asian markets was constant, and showed no increase from 2007 to 2009. Def.'s Brief at 22 (*citing* Conf. Staff Report at VII-10).

Aside from one article by a RISI economist, the Foreign Producers proffered no affirmative evidence to establish that Chinese producers have taken any significant steps to increase their presence in the Asian market. The Foreign Producers' arguments must therefore be rejected.

2. *Volume and Market Penetration*

As part of its threat of material injury analysis, the Commission is required to consider the effect of any significant rate of increase in import volume or market penetration of subject imports in the U.S. market. *See* 19 U.S.C. § 1677(7)(F)(i)(III). In its affirmative final determination in this case, the Commission found the increase in imports of coated paper from the PRC and Indonesia during the period of investigation to be significant, both on an absolute basis and relative to apparent U.S. production and consumption. Final Views at 27. The quantity of imports increased by more than 15,000 short tons from 2008 to 2009, despite a 21.3% decline in U.S. consumption over the same period. Final Views at 27 n.172. The Commission relied on these trends, together with evidence of the Chinese producers' interest in the U.S. market, in reaching its affirmative determination. *See* Final Views at 30–31.

The Foreign Producers claim that the Commission failed to explain why it concluded that the increases in import volume and market share were significant. Pls.' Brief at 18; *see* section III.A.2.a, *infra*. Further, the Foreign Producers argue that the Commission ignored affirmative evidence refuting its predictions that the rates of increase gave rise to a "likelihood of substantially increased imports" into the

[22] The Foreign Producers cite RISI data, suggesting that as much as 228,000 metric tons of non-Asian imports into Asian markets were vulnerable to displacement by Chinese exports. Pls.' Brief at 17.

United States. Pls.' Brief at 18–26; *see* section III.A.2.b, *infra*.

a. *Significant Rate of Increase of Future Volume or Market Penetration of Imports*

The Foreign Producers protest the Commission's conclusion that the increased rates of import volume and market penetration found were significant. Final Views at 26–27; Pls.' Brief at 19. The Foreign Producers dispute the Commission's methodology, and, in addition, assert that the Commission's ultimate finding of a "significant" rate of increase was not supported by substantial evidence. Pls.' Brief at 19–21.

i. *Commission Methodology*

In its determination of the "significance" of the rates of increase, the Commission acknowledged that imports from the PRC and Indonesia declined during the first half of 2010. Final Views at 27. The Commission found that the sharp decline in subject import volume began in March 2010 – the month in which Commerce issued its preliminary countervailing duty determination, and thus imposed provisional duties on subject imports. Final Views at 27, 29 n.191. The Foreign Producers themselves acknowledge that the interim 2010 declines in the volume of subject imports were due to the pending trade cases. Pls.' Brief at 21; *see also* Final Views at 27.

Under the statutory scheme, the Commission is authorized to accord less weight to data for the period following the commencement of a trade investigation, if the Commission finds that changes in the volume, price effects, and impact of the subject imports are attributable to the pendency of an investigation. *See* 19 U.S.C. § 1677(7)(I).[23] Here, the Commission invoked and applied that provision of the statute to justify discounting the 2010 data in the underlying investigation. *See* Final Views at 27 n.174.

The Foreign Producers claim that – instead of merely reducing the weight accorded it – the Commission effectively ignored the 2010 data, in disregard of 19 U.S.C. § 1677(7)(I). Pls.' Brief at 21–22. Specifically, the Foreign Producers allege that the Commission failed to compare data from the second half of 2010 to the first half of 2009,

[23] 19 U.S.C. § 1677(7)(I) provides, in relevant part:

> The Commission shall consider whether any change in the volume, price effects, or impact of imports of the subject merchandise since the filing of the petition in an investigation under part I or II of this subtitle is related to the pendency of the investigation and, if so, the Commission may reduce the weight accorded to the data for the period after the filing of the petition in making its determination of material injury, threat of material injury, or material retardation of the establishment of an industry in the United States.

19 U.S.C. § 1677(7)(I).

and did not account for the drop in volume of subject imports in the first half of 2010 as compared to the second half of 2009. Pls.' Brief at 21–22.

The Foreign Producers' claim is unfounded. The Commission collected and compiled data for 2010, included the data in the staff report and its tables, and discussed the data in the Commission's final views. *See*, *e.g.*, Final Views at 27, 29–30; *see generally* Staff Report. In its determination, the Commission took note of the steep decline in import volume after March 2010, and concluded that the decline (and other such developments) were attributable to the pending trade cases. Final Views at 30. Accordingly, the Commission did not ignore 2010 data. Rather, the Commission considered the data, but then discounted its value due to the pending trade investigations, in accordance with the applicable statute. "Courts have repeatedly recognized that the initiation of antidumping and countervailing duty proceedings can create an artificially low demand for subject imports, thereby distorting post-petition data compiled by the Commission." Statement of Administrative Action, Uruguay Round Agreements Act ("SAA"), H.R. Doc. No. 103316, Vol. 1, *reprinted in* 1994 U.S.C.C.A.N. 4040, 4186 (1994) [24]; *see*, *e.g.*, *USX Corp. v. United States*, 11 CIT 82, 88, 655 F. Supp. 487, 492 (1987) (same); *Rhone-Poulenc, S.A. v. United States*, 8 CIT 47, 53, 592 F. Supp. 1318, 1324 (1984) ("[T]he antidumping order, operating as a strong corrective or deterrent can be presumed to distort the meaningfulness of observable data regarding present conduct in the United States market.") (citations omitted).

As a result of the pending investigations, the Commission made a reasonable decision – well within its discretion, and, indeed, expressly contemplated by statute – to accord less weight to data for 2010. *See Wieland Werke, AG v. United States*, 13 CIT 561, 576, 718 F. Supp. 50, 61 (1989) ("[T]he Commission acted reasonably in gathering the data, identifying its inherent weaknesses, and tempering its reliance on the data"); *see also Corus Staal BV v. U.S. Int'l Trade Comm'n*, 27 CIT 459, 470 (2003), *aff'd*, 85 F. App'x 772 (Fed. Cir. 2004) ("The Commission, having found that changes in subject import volume, price effects, and impact were related to the pendency of the investigation, acted within its discretion in discounting post-petition

[24] The SAA "represents an authoritative expression by the Administration concerning its views regarding the interpretation and application of the Uruguay Round agreements." Statement of Administrative Action, Uruguay Round Agreements Act ("SAA"), H.R. Doc. No. 103–316, *reprinted in* 1994 U.S.C.C.A.N. 4040, 4140 (1994). "[I]t is the expectation of the Congress that future Administrations will observe and apply the interpretations and commitments set out in this Statement." SAA at 4186.

data.") (*citing* 19 U.S.C. § 1677(7)(I)). The Foreign Producers' claims that the Commission simply ignored the 2010 data have no foundation in fact.

The Foreign Producers' argument that the Commission should have used semi-annual trends in its investigation is similarly without merit. Pls.' Brief at 21. There is no requirement that the Commission base its findings on semi-annual data. *See Altx, Inc. v. United States,* 26 CIT 1425, 1437 (2002), *aff'd*, 370 F.3d 1108 (Fed. Cir. 2004) (*citing Copperweld Corp. v. United States*, 12 CIT 148, 161, 682 F. Supp. 552, 565 (1988)). Indeed, the Commission "typically" uses year-over-year data in its injury analysis. Def.'s Brief at 15; *see also Nitrogen Solutions Fair Trade Comm. v. United States*, 29 CIT 86, 97, 358 F. Supp. 2d 1314, 1325 (2005); *Steel Auth. of India v. United States*, 25 CIT 472, 477, 146 F. Supp. 2d 900, 907 (2001) (Commission's general practice is "to conduct an annual analysis of the volume and effects of imports over the period of investigation"); *Asociacion de Produtores de Salmon y Trucha de Chile AG v. U.S. Int'l Trade Comm'n*, 26 CIT 29, 37–38, 180 F. Supp. 2d 1360, 1370 (2002) ("[T]he yearly trend analysis is a permissible method."). The Commission's choice to use year-over-year trends thus was also reasonable, and well within its considerable discretion; and the Foreign Producers' argument to the contrary must fail.

ii. *Significance of Rate of Increase Found by the Commission*

The Commission determined that the 3.8% increase in volume of subject imports and the 4.4% increase in subject import market share during the period of investigation were significant. Final Views at 27.[25] The Foreign Producers dispute the Commission's finding as to the "significance" of the increases found. Pls.' Brief at 20. In particular, the Foreign Producers claim that the Commission ignored the relevance of the 4.8% increase in market share that the domestic industry experienced during the period of investigation. Pls.' Brief at

[25] Specifically, the Commission explained that,

> [d]espite the overall declines in production and shipments from 2007 to 2009, the domestic industry increased its market share during this period by 4.8 percentage points and the market share of subject imports increased by 4.4 percentage points. The increases in market share by the domestic industry and subject imports from 2007 to 2009 came at the expense of the non-subject imports whose market share fell by 9.3 percentage points from 2007 to 2009.

Final Views at 36.

20. According to the Foreign Producers, the Commission thus lacks substantial evidence to support its conclusion. Pls.' Brief at 20.[26]

The Commission's analysis expressly acknowledged the increase in the domestic industry's share of the U.S. market. But the Commission nevertheless found the increase in volume of subject imports and the increase in subject import market share to be significant. In reaching that conclusion, the Commission analyzed both the volume of subject imports and market share, in light of industry trends.

The Commission found, for example, that substantial imports were already present in the U.S. market at the beginning of the period of investigation, and had continued to increase. Final Views at 27.[27] Moreover, U.S. consumption of coated paper was substantially declining during the period of investigation, yet the subject imports still were able to increase their share of the U.S. market. Final Views at 26, 30. In fact, from 2007 to 2009, subject imports were "the only source of increased volume into the U.S. market . . . as both the volumes of the domestic industry's U.S. shipments and that of non-subject imports declined." Final Views at 26–27. Specifically, towards the end of the period of investigation, subject import volume increased each month from late 2008 through January 2009. Final Views at 27 n.172.[28] In comparing the increase in subject imports to domestic production, the Commission found that the ratio of subject imports to U.S. production had steadily increased from 20.5% in 2007 to 24.8% in 2009. Final Views at 26.

In short, although the domestic industry was able to increase its market share during the period of investigation, the Commission acknowledged the increase and explained – by reference to numerous trends and indicators in the U.S. industry – why the increases in

[26] The Foreign Producers criticize the Commission for using the term "significant" instead of "substantial" in its finding of a likelihood of an increase in future volume of imports into the United States. Pls.' Brief at 19–20. However, the Foreign Producers do not claim any attendant harm. In any event, as the Government points out, the legislative history of the statute makes clear that the two terms were not intended to express different legal standards. *See* Def.'s Brief at 27–28 (*citing* Uruguay Round Agreements Act (URAA), Pub. L. No. 103–465 (1994)); *see also Metallverken*, 13 CIT at 1036, 728 F. Supp. at 747 (explaining that the Commission "need not use the precise statutory language in findings as long as the basis for determination is reasonably discernable").

[27] As reported by the Commission, from 2007 to 2009, U.S. consumption declined by 21.3%, while the volume of subject imports in the U.S. market increased by 3.8%. Final Views at 26–27. The Commission also found 2008 to 2009 U.S. consumption to have declined by 14.7%, while subject import volume increased by 8.2%, and subject import market share increased by 3.9%. Final Views at 27–28.

[28] Notably, in September 2008, subject import volume was 30,883 short tons. It continued to increase every month thereafter, until January 2009. In October 2008, subject import volume increased to 37,935 short tons, in November to 44,680 short tons, in December to 39,974 short tons, and, in January 2009, it increased to 46,964 short tons. Final Views at 27 n.172.

subject import volume and market share were significant. Final Views at 26–27. The Foreign Producers' challenge to the sufficiency of the Commission's explanation therefore must be rejected.

b. *Likelihood of Substantially Increased Imports*

In addition to determining the significance of the rate of increase, the Commission also must determine whether a rate of increase in imports or market share that has been found to be significant "indicat[es] [a] likelihood of substantially increased imports" into the United States. 19 U.S.C. § 1677(7)(F)(i)(III). In its determination in this case, the Commission relied on evidence demonstrating the attractiveness of the U.S. market to foreign producers and on evidence of APP's intention to increase its presence in the U.S. market. Final Views at 28–30. The Commission also took into account APP's loss of certification by the Forest Stewardship Council ("FSC"), and concluded that it would not be an impediment to APP's ability to increase imports into the United States in the imminent future. Final Views at 30–31.

The Foreign Producers raise three major challenges to the Commission's determination. Each is addressed below.

i. *The Attractiveness of the U.S. Market*

The Foreign Producers argue that the Commission's price effects determination incorrectly inferred that higher U.S. prices would "pull more subject imports" into the United States. Pls.' Brief at 22–23.[29] The Foreign Producers claim that such an inference is illogical in light of the higher average unit value in the U.S. from 2007 to 2009, which, according to the Foreign Producers, did not pull more subject imports into the United States. Pls.' Brief at 22.[30] The Foreign Producers assert that it is therefore "pure speculation" to conclude that higher prices would pull additional imports into the United States in the imminent future. Pls.' Brief at 22.

But the Foreign Producers' argument is premised on a misunderstanding of the Commission's position. The Commission relied on the U.S. market's relatively high prices to establish the attractiveness of the U.S. market to Chinese producers. Final Views at 30. The Commission explained that the United States is a highly attractive mar-

[29] It is undisputed that prices of subject merchandise are generally higher in the United States than in the PRC or other markets in Asia. *See* Final Views at 29; Pls.' Brief at 22.

[30] According to the Foreign Producers, exports to the United States increased by only 12,192 tons during the period of investigation. Pls.' Brief at 22–23. In contrast, the Foreign Producers note that exports to other "lower priced" markets increased by 46,913 tons (Europe), 49,442 (Asia), and 126,206 (other). Pls.' Brief at 22–23 (*citing* Staff Report at VII-7 (Table VII-2)).

ket for coated paper producers from the PRC and Indonesia not only because of its higher prices, but also because of its large size and its relative openness, as well as Chinese producers' familiarity with the U.S. market. Final Views at 30. The Commission considered the attractiveness of the U.S. market when it concluded that subject producers "have both the ability and the incentive to increase exports of subject merchandise." Final Views at 30.

Contrary to the Foreign Producers' assertions, the Commission never drew the inference that the Foreign Producers contend would have been erroneous. The Foreign Producers' claim therefore has no basis in fact.

ii. *Foreign Producer's Behavior*

The Foreign Producers also contest the Commission's assessment of APP's failed relationship with Unisource. Pls.' Brief at 23–24. In finding a likelihood of substantially increased imports into the United States, the Commission cited evidence of APP's "continuing pattern of behavior" reflecting an interest in increasing its presence in the U.S. market. Final Views at 28–29. This evidence included an affidavit attesting that – after APP lost its account with a major U.S. distributor (*i.e.*, Unisource) – APP made a significant investment to establish its own U.S. distribution network, Eagle Ridge Paper ("Eagle Ridge"), in order to maintain and enhance its profile in the U.S. market. *See* Final Views at 28–29.

The Foreign Producers contend that the Commission's analysis lacks "a solid foundation based on 'currently available evidence,'" and they argue that the analysis fails to draw "logical assumptions and extrapolations flowing from that evidence." Pls.' Brief at 23 (*citing Matsushita Elec. Indus. Co.*, 750 F.2d at 933–34). The Foreign Producers assert that APP's failed contract with Unisource undermines the Commission's findings, because – according to the Foreign Producers – the turn of events reflects a "failed effort," rather than a likelihood of substantially increased imports. Pls.' Brief at 23–24.

Anticipating the Foreign Producers' argument, the Commission acknowledged that, taken in isolation, APP's loss of its account with Unisource and other developments "may tend to weigh against a finding of imminent increased import volumes." Final Views at 29–30. However, as the Commission further explained, the evidence indicates that APP's loss of business "did not result in a substantial reduction in the volume of overall subject imports." Final Views at 29–30. Moreover, the loss of business eventually led to APP's successful establishment of a new channel of distribution in the U.S. *See* Final Views at 29.

Given that the Foreign Producers provided no direct evidence of APP's intent, the Commission had little choice but "to rely on circumstantial evidence from which to infer likely intent." *Matsushita Elec. Indus. Co.*, 750 F.2d at 933–34. The Commission's conclusion, based on an affidavit describing APP's actions, was rational and supported by substantial record evidence.

iii. *FSC Certification*

Finally, the Foreign Producers challenge the Commission's conclusion that APP's ability to import into the United States would not be hindered by its lack of certification by the Forest Stewardship Council ("FSC"). Pls.' Brief at 24. In its final determination, the Commission concluded that APP's 2007 loss of FSC certification would not adversely affect its capacity to increase future imports into the United States. Final Views at 30. The Commission based that conclusion principally on the increasing levels of subject imports into the United States from the PRC even after APP lost its FSC certification. *See* Final Views at 30.

The Foreign Producers argue that APP's past ability to import into the United States notwithstanding its loss of FSC certification does not necessarily mean that the loss will not affect its prospects in the future. Pls.' Brief at 25. The Foreign Producers proffered evidence in an attempt to show that FSC certification may become an important factor for purchasers in the future. Pls.' Brief at 24–25.[31]

It is black letter law, however, that Commission findings "will not be overturned merely because the plaintiff 'is able to produce evidence . . . in support of its own contentions and in opposition to the evidence supporting the agency's determination.'" *Torrington Co. v. United States,* 14 CIT 507, 514, 745 F. Supp. 718, 723 (1990), *aff'd*, 938 F.2d 1276 (Fed. Cir. 1991) (*quoting Hercules, Inc. v. United States*, 11 CIT 710, 755, 673 F. Supp. 454, 490 (1987)). To be sure, the Foreign Producers proffered evidence that contradicts evidence relied upon by the Commission. However, the production of contrary evidence alone cannot upset a Commission determination. Moreover, levels of subject imports were not the sole evidence that the Commission cited to support its conclusion. Questionnaire data cited in the Commission's

[31] The Foreign Producers cite to a questionnaire response by Global Paper Solutions noting the growing importance of FSC certification, marketing materials of three petitioners noting the growing demand for FSC-certified products, a list of specific customers that refused to purchase from APP because it was not able to offer FSC-certified coated paper, and a sworn declaration as well as sworn testimony from an APP manager, both to the effect that the combination of the lack of FSC certification and "aggressive attack campaigns by environmental NGO's [*sic*] hinder[] APP's ability to substantially increase shipments to the United States in the future." Pls.' Brief at 24–25.

staff report reference only a single response in which "environmental attributes" were listed as a factor in purchasing decisions. Conf. Staff Report at II-23.

As discussed above, it is improper for a court to substitute its judgment for that of the Commission. *See*, *e.g.*, *Torrington Co. v. United States*, 16 CIT 220, 226, 790 F. Supp. 1161, 1167 (1992), *aff'd*, 991 F.2d 809 (Fed. Cir. 1993) ("[I]t is not the Court's function to decide that it would have made another decision on the basis of the evidence.") (*citing Matsushita Elec. Indus. Co.*, 750 F.2d at 936). Here, the Commission's assessment of the impact of FSC certification on imports is adequately supported by the record, and any necessary weighing of the evidence falls within the Commission's domain.

The Foreign Producers' challenges to the Commission's findings as to statutory factors (II) and (III) therefore cannot be sustained.

B. *The Commission's Analysis of Effects on Prices Statutory Threat Factor (IV)*

With respect to the price effects[32] of future imports, Congress has instructed the Commission to consider whether "imports of the subject merchandise are entering [the United States] at prices that are likely to have a significant depressing or suppressing effect on domestic prices, and are likely to increase demand for other imports." 19 U.S.C. § 1677(7)(F)(i)(IV).

Here, the Commission concluded that imports from the PRC and Indonesia would likely have "significant adverse effects on [U.S.] prices in the imminent future." Final Views at 34–35. In reaching its conclusion, the Commission noted an apparent relationship between declining prices for imports from the PRC and Indonesia beginning in the fourth quarter of 2008 and declining prices for the domestic like product in early 2009. Final Views at 32. The Commission concluded that these relationships, together with significant underselling by importers of coated paper from the PRC and Indonesia, demonstrated that "subject imports depressed domestic prices at least to some extent for part of the period under examination." Final Views at 33.

Nevertheless, the Commission did not find *significant* present price depression or suppression of domestic prices, because it could not ascertain whether the imports at issue contributed significantly to the adverse price effects that occurred throughout the remainder of the period of investigation. Final Views at 33.[33] The Commission's inability to determine whether the effect of imports on domestic

[32] "Price effects" are the degree to which subject imports *depress* prices (*i.e.*, force prices down) or *suppress* prices (*i.e.*, prevent prices from rising) in the domestic market.

[33] The Foreign Producers argue that – in light of the Commission's findings in its negative

prices was significant was in light of two other market factors that contributed to the adverse effects on domestic prices, particularly in later 2009 – specifically, the significant declines in consumption in the U.S. market and the "black liquor tax credit," which effectively lowered domestic producers' input costs. Final Views at 33.[34]

In contrast, the Commission's threat of material injury analysis found that market factors other than the subject imports would not have the same price suppressing or depressing effects in the imminent future that they had during the period of investigation. Final Views at 34. [[ ]] in domestic U.S. consumption in [[ ]] were projected to be modest compared to the 14.7% drop in U.S. consumption between 2008 and 2009. *See* Final Views at 27; *see also* Conf. Final Views at 48, 44.[35] In addition, the black liquor tax expired in 2009 and was unlikely to be renewed in the imminent future. *See* Final Views at 34–35. The Commission evaluated these likely changes in conditions of competition while taking into account the likely continued increases in subject import volume and the predominant underselling by imports from the PRC and Indonesia. Final Views at 35. In light of these evaluations, the Commission found that the causal relationship between falling domestic prices and increased volumes of subject imports sold at lower prices, observed during late 2008 and early 2009, would likely be reestablished. Final Views at 34. The Commission therefore concluded that the subject imports would likely have significant adverse price effects in the imminent future. Final Views at 35.

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present material injury determination (*i.e.*, the findings that imports had not *significantly* suppressed or depressed domestic prices during the period of investigation) – the Commission's affirmative *threat* of material injury finding (*i.e.*, the finding that a significant effect on domestic prices is likely in the imminent future) cannot be sustained. Final Views at 37–39. Specifically, the Foreign Producers assert that the Commission found that there was "insufficient evidence to find that subject imports had any current adverse price effects." Pls.' Brief at 26–27. To the contrary, what the Commission actually said was that subject imports "depressed domestic prices at least to some extent for part of the period under examination." Final Views at 33, 37. The Commission further explained that it was unable to find *significant* present price effects that were attributable to coated paper imports from the PRC and Indonesia because "other factors that were occurring in the U.S. market likely also contributed importantly to lower prices." Final Views at 33. There is thus no truth to the Foreign Producers' assertion that the Commission found that subject imports had *no* current adverse price effects.

[34] In 2009, certain U.S. paper mills applied for and received an alternative fuel tax credit, known as the "black liquor tax credit," which allowed producers to receive a tax credit of $.50 per gallon of kraft pulp by-product (or "black liquor") that they produced. The tax credit, which went into effect in late 2007, expired at the end of 2009. *See* Final Views at 25; *see also* Staff Report at V-2.

[35] Domestic consumption was projected to decline by [[ ]]% from 2010 to 2011, and by [[ ]] in 2012. Conf. Final Views at 55.

The Foreign Producers raise three challenges to the Commission's finding as to the subject imports' adverse effects on domestic pricing. *See* Pls.' Brief at 26–36. First, the Foreign Producers claim that the Commission's finding is not supported by substantial evidence. *See* Pls.' Brief at 2732; section III.B.1, *infra*. Second, the Foreign Producers argue that the Commission failed to address two of their arguments from the underlying investigation, which the Foreign Producers claim undercut the Commission's finding. *See* Pls.' Brief at 32–33; section III.B.2, *infra*. Finally, the Foreign Producers dispute the Commission's price effects findings as contrary to law, asserting that the Commission failed to take into account "other relevant economic factors." *See* Pls.' Brief at 33–36; section III.B.3, *infra*. Each of these challenges is addressed, in turn, below.

1. *Substantial Evidence Determination*

To determine the likely future effects of import prices on the U.S. market, the Commission analyzed, among other factors, the level of underselling by importers in the United States. *See* Final Views at 31, 34. In its analysis, the Commission found predominant underselling by importers of coated paper from the PRC and Indonesia during the period of investigation, when the imports at issue undersold the domestic like product in 48 out of 58 comparisons. Final Views at 31.

The Foreign Producers do not dispute the fact that subject imports undersold domestic like products during the period of investigation. Pls.' Brief at 28. Instead, the Foreign Producers claim that the Commission's findings on underselling failed to explain the Commission's greater reliance on 2009 data, relative to data for 2010. According to the Foreign Producers, 2009 data was inappropriate due to the effects of recession. Pls.' Brief at 28–29. The Foreign Producers also argue that the Commission did not adequately explain how the absence of market factors – which depressed prices in 2009 – will affect future domestic prices. Pls.' Brief at 28–29. Absent such explanation and justification, the Foreign Producers contend that the Commission's affirmative threat of injury determination is not supported by substantial evidence.

The Foreign Producers' challenge to the Commission's reliance on 2009 data is unfounded. Contrary to the Foreign Producers' assertions, the Commission explained its decision to give greater weight to data from 2009 (as compared to data for 2010). The Commission noted that the 2010 pricing data demonstrated uncharacteristic changes after provisional duties were imposed on subject imports as a result of Commerce's affirmative preliminary determinations. Final Views

at 27, 37. Those uncharacteristic changes are documented in the Commission's staff report, which presented data for 2009 and 2010 collected from questionnaire responses. *See* Conf. Staff Report at V-9, V-12, V-20 (Tables V-1, V-4, V-7). The 2009 data – unlike the 2010 data – reflected trends comparable to data from 2007 and 2008.

For example, the data documented the quantity of imports sharply dropping and prices [[ ]] in 2010. *See* Conf. Staff Report at V-9, V-12, V-20 (Tables V-1, V-4, V-7).[36] In addition, the staff report reflected [[ ]] underselling by Chinese imports in the United States through 2009, followed by a [[ ]] in underselling in 2010. *See* Staff Report at V-10 (Table V-7); *see also* Final Views at 27 n.174 (noting that Commerce's preliminary determination issued on March 9, 2010).[37] Even though 2009 was marked by a recession, the Commission's explanation – supported by the record – refutes any suggestion that it was error for the Commission to rely on data from 2009. As indicated in the Commission's final views, the trends from 2009 corresponded more closely to past trends than those from 2010. The Foreign Producers' assertion that the Commission failed to explain why 2009 data is more relevant than 2010 data is therefore without merit. Pls.' Brief at 28–29.[38]

Moreover, as discussed above, 19 U.S.C. § 1677(7)(I) supports the Commission's decision to give reduced weight to data collected after the commencement of the trade investigations. *See* section III.A.2.a.i, *supra*; *Corus Staal BV v. U.S. Int'l Trade Comm'n*, 27 CIT 459, 470 (2003), *aff'd*, 85 F. App'x 772 (Fed. Cir. 2004) ("The Commission, having found that changes in subject import volume, price effects, and impact were related to the pendency of the investigations, acted within its discretion in discounting post-petition data.") (*citing* 19 U.S.C. § 1677(7)(I)); *see also Nucor Corp. v. United States*, 414 F.3d 1331, 1336 (Fed. Cir. 2005) ("[I]t was reasonable for the Commission

[36] For example, the number of instances of underselling for products 1 to 5 from 2007 to 2009 ranged between 14 and 15, while there were only four instances in 2010. Staff Report at V-10 (Table V-7). The quantity of imports in 2010 was also dramatically lower than any previous year. Staff Report at V-10 (Table V-7).

[37] As reported, the underselling margin for January to March of 2010 for [[ ]] products was at least [[ ]]%. *See* Conf. Staff Report at V-9 (Table V-1), V-11 (Table V-3), V-12 (Table V-4); *see also* Conf. Def.'s Brief at 31 n.8. In comparison, the underselling margin for March to June 2010, after the institution of the trade cases, was [[ ]]. *See* Conf. Staff Report at V-9 (Table V-1), V-11 (Table V-3), V-12 (Table V-4).

[38] The Foreign Producers claim that the "natural premium" afforded to domestic producers in 2010 limited the underselling margin for that period. Pls.' Brief at 29. The Foreign Producers further contend that the Commission failed to consider that limited underselling in its determination. Pls.' Brief at 29. However, as discussed above, the Commission was under no obligation to base its findings on data for 2010. *See* section III.B.1, *supra*. The fact that the Commission did not discuss 2010 underselling was inconsequential to the Commission's ultimate conclusion.

to interpret the statutory language to permit it to accord different weight to imports during different portions of the period of investigation depending on the facts of each."). The Commission's reliance on 2009 data thus does not render its determination unsupported by substantial evidence. The Commission not only provided a reasonable explanation for its decision, but also acted within its statutory authority in according less weight to the data from 2010. *See American Lamb Co. v. United States*, 785 F.2d 994, 1004 (Fed. Cir. 1986) (explaining that court's role is to ascertain whether there was a "sufficiently reasonable" basis for determination).

Similarly unavailing is the Foreign Producers' challenge to the Commission's conclusion as to the future impact of certain market factors on domestic prices. In its determination, the Commission found that import volume would become a "key factor" in domestic prices in the absence of market factors that depressed prices in 2009. Final Views at 34. The Foreign Producers counter that "simple logic" suggests that, with the disappearance of the market factors that depressed domestic prices during the period of investigation (*i.e.*, decreasing consumption and increasing pulp production due to the black liquor tax credit), domestic prices will increase. Pls.' Brief at 29–30. The Foreign Producers further assert that this "simple logic" refutes the Commission's conclusion that future imports will have a negative effect on domestic prices. Pls.' Brief at 29–30. According to the Foreign Producers, the Commission failed to set forth a "reasoned explanation" for its conclusion, rendering its determination unsupported by substantial evidence. Pls.' Brief at 31 (*citing U.S. Steel Group v. United States*, 25 CIT 1046, 1047, 162 F. Supp. 2d 676, 678 (2001)).

In its determination, the Commission explained that domestic prices are not expected to increase notwithstanding the absence of the 2009 market factors. Final Views at 34–35. The Commission reasoned that the projected U.S. demand for coated paper will be insufficient to absorb the likely increased imports of coated paper from the PRC and Indonesia at less than fair market value. Final Views at 34–35.[39] Accordingly, domestic competition would be likely to increase. Final Views at 34. The Commission concluded that, in such a climate, subject imports would continue to undersell domestic like products through aggressive pricing to gain market share in the United States

[39] For a discussion of the Commission's determination concerning the likelihood of increased future imports, *see* section III.A.2.b, *supra*.

and, in doing so, would significantly affect domestic prices. *See* Final Views at 33–34 (establishing that underselling by subject imports will "likely increase the attractiveness of those imports to domestic purchasers").[40]

The Commission also noted that unfairly priced subject imports led domestic prices downward in late 2008 and 2009. Final Views at 34. The questionnaire responses received by the Commission support the Commission's conclusion, reporting price as "an important consideration in purchasing decisions." Final Views at 31. Under these circumstances, the Commission reasonably determined that, absent negative market factors, an increase in subject import volume would likely lead to significant underselling and price suppression within the foreseeable future. Final Views at 34–35.

The Foreign Producers further claim that the Commission erred by relying on evidence of increased volume of subject imports in its analysis of price effects. Pls.' Brief at 30–31. The Foreign Producers assert that the statute requires a price effects determination to be based on actual current pricing data, rather than increased volumes of imports. Pls.' Brief at 30–31; *see* 19 U.S.C. § 1677(7)(F)(i)(IV). In support of their argument, the Foreign Producers point to the statutory language, which directs the Commission to consider whether "imports of the subject merchandise are entering at prices that are likely to have a significant" adverse effect on domestic prices. Pls.' Brief at 27 (*quoting* 19 U.S.C. § 1677(7)(F)(i)(IV)). However, the language of the statute does not preclude the Commission from examining prices of merchandise entering the United States in the context of the industry's vulnerability to imports. *See* 19 U.S.C. § 1677(7)(F)(i)(IV). In fact, the statute directs the Commission to consider the factors "as a whole" in making a determination. *See* 19 U.S.C. § 1677(7)(F)(ii). There is nothing to indicate that the Commission's consideration of increased volume in its price effects analysis was not in accordance with the statutory scheme. The Foreign Producers' challenges to the substantiality of the evidence supporting the Commission's finding are without merit.

2. *The Foreign Producers' Other Arguments*

The Foreign Producers contend that, once the Commission determined that the market factors that were present in 2009 were going to be absent in 2010 and 2011, the Commission had an obligation to recognize the Foreign Producers' arguments in relation to 2007 and

[40] The Commission cited statements made by domestic producers indicating that they were "forced to lower prices . . . to compete with the bulk of the imports and the resulting depressed pricing structure." Final Views at 32 n.213.

2008 – a period which did not experience the 2009 market factors. Pls.' Brief at 32–33. The Foreign Producers claim that the Commission failed to do so, and that the Commission's determination is therefore not in accordance with law, because the Commission "did not satisfy the statutory requirement to include 'an explanation of the basis for its determination that addresses relevant arguments' by the parties." Pls.' Brief at 32 (*quoting* 19 U.S.C. § 1677 f(i)(3)(B)).[41]

Notably, "[t]here is no statutory requirement that the Commission respond to each piece of evidence presented by the parties." *Garanges Metallverken, AB v. United States*, 13 CIT 471, 477, 478–79, 716 F. Supp. 17, 24 (1989) (citations omitted).[42] "[T]he fact that certain information is not discussed in a Commission determination does not establish that the Commission failed to consider that information." *Timken U.S. Corp.*, 421 F.3d at 1355–56 (*citing Nat'l Ass'n of Mirror Mfrs.*, 12 CIT at 779–80, 696 F. Supp. at 648–49). Rather, "the Commission need only discuss 'material issues of law or fact.'" *Timken U.S. Corp.*, 421 F.3d at 1355–56 (*citing Nat'l Ass'n of Mirror Mfrs.*, 12 CIT at 779–80, 696 F. Supp. at 648–49). Here, the Foreign Producers have failed to show how their two arguments in relation to data from 2007 and 2008, made in the underlying investigation and not discussed by the Commission in its final views, are so "material" that it was error for the Commission not to specifically address them.

The Foreign Producers' first argument from the underlying investigation was that domestic prices increased during 2007 and 2008 despite the underselling by subject imports. According to the Foreign Producers, that fact constitutes evidence that domestic prices would not be adversely impacted by subject imports in the imminent future. Pls.' Brief at 32. The Foreign Producers' second argument asserted that the margins of underselling in 2007 and 2008 were largely consistent with the natural premium afforded to domestic products.

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[41] 19 U.S.C § 1677f(i)(3)(B) provides, in relevant part, that:

> . . . the Commission shall include in a final determination of injury an explanation of the basis for its determination that addresses relevant arguments that are made by interested parties who are parties to the investigation or review (as the case may be) concerning volume, price effects, and impact on the industry of imports of the subject merchandise.

19 U.S.C § 1677f(i)(3)(B).

[42] The Statement of Administrative Action ("SAA") acknowledges that "existing law does not require that an agency make an explicit response to every argument made by a party, but instead requires that issues material to the agency's determination be discussed, so that the 'path of the agency may reasonably be discerned' by a reviewing court." SAA at 4215; *see*, *e.g.*, *Ceramica Regiomontana, S.A. v. United States*, 810 F.2d 1137, 1139 (Fed. Cir. 1987) ("A court may 'uphold [an agency's] decision of less than ideal clarity if the agency's path may reasonably be discerned.'") (citations omitted).

According to the Foreign Producers, this demonstrates the absence of adverse price effects in the imminent future by reason of subject imports. Pls.' Brief at 32.[43]

In arguing that both of these issues should have been addressed in the Commission's final views, the Foreign Producers emphasize that – much like the period of time for which the Commission is projecting a threat of injury – during 2007 and 2008, U.S. consumption did not decrease and the black liquor tax credit was not a factor (because, in 2007 and 2008, domestic producers generally were not yet taking advantage of the tax credit). Pls.' Brief at 32–33. The Foreign Producers reason that, because subject imports did not adversely affect domestic prices between 2007 and 2008, it follows that they will likely not affect domestic prices in the imminent future. Pls.' Brief at 32.

However, the Foreign Producers' argument fails to recognize significant differences between the two periods. First, the Foreign Producers assume that import volume during 2007 and 2008 was similar to the projected volume in the imminent future. Pls.' Brief at 32. But, as the Government counters, the Foreign Producers' focus on the increase in domestic prices during 2007 and 2008 "disregards that subject import volume was lower, and increasing less rapidly, during 2007 and much of 2008 than in 2009." Def.'s Brief at 35. In addition, as the Domestic Producers note, the domestic industry was not able to increase prices in 2007 and 2008 sufficiently to cover rising production costs, because the industry experienced a "cost-price squeeze." Def.-Ints.' Brief at 35 n.18.[44] The price increase during 2007 and 2008 thus does not undermine the Commission's conclusion that underselling would likely impact domestic prices.

Further, the Foreign Producers' second argument, which deals with underselling margins in 2007 and 2008, does not comport with the evidence. Specifically, the record reflects an underselling margin for 2007 that exceeded the highest natural premium reported. *See* Staff Report at V-10 (Table V-7).[45] As for 2008, although the underselling margin was smaller than that of 2007, it still exceeded the natural

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[43] As the Commission's staff report explained, "U.S. producer New Page reported that historically it was able to receive a premium of $40 to $60 per ton." Final Views at 31. "A premium of $40-$60 per ton is approximately equivalent to a premium of 4 to 6 percent of pricing product 1 and 4 and approximately equivalent to a premium of 3 to 5 for pricing product 3." Final Views at 31; *see also* Staff Report at V-10.

[44] A cost-price squeeze occurs when the cost of goods sold ("COGS") exceeds price and the producer is unable to raise the price – that is, when the producer is unable to sell the good for more than it costs to produce it. *See Nippon Steel Corp.*, 458 F.3d at 1354 n.4. *But see* n.43, *supra* (discussing historical natural premiums reported).

[45] According to data submitted in response to Commission questionnaires, the 2007 average margin of underselling for products 1 to 5 was 11.0%. Staff Report at V-10 (Table V-7).

premium afforded to domestic products. *See* Staff Report at V-10 (Table V-7).[46]

Although there are some similarities between 2007/2008 and the relevant period for which the Commission is projecting a threat of injury, the differing industry conditions preclude the Foreign Producers' attempts to directly correlate the two. The Foreign Producers have pointed to no concrete evidence to discredit the Commission's determination as to the impact of imports on future U.S. prices. Particularly in light of these circumstances, the Commission was under no obligation to specifically discuss the Foreign Producers' arguments from the underlying investigation.

3. *Other Relevant Economic Factors*

The Foreign Producers further contend that the Commission ignored "other relevant economic factors" that it was obligated to consider under 19 U.S.C. § 1677(7)(F)(i).[47] In particular, the Foreign Producers argue that the Commission ignored the role of prices for pulp (the key component in the production of paper) in the Commission's explanation of price trends, and that the Commission failed to explain why pricing data for the paperboard segment of the industry was not included in its underselling findings. Pls.' Brief at 33–34.

In its determination of a threat of material injury, the Commission did not explicitly consider the impact of pulp prices on the domestic industry's prices – in part because the data collected during the period of investigation reflected the black liquor tax credit and other market factors that, according to the Commission, made it impossible to gauge the effects of pulp prices alone on domestic prices. Final Views at 33. The Foreign Producers argue that, in the absence of other evidence illuminating the effect of pulp prices on the domestic industry, the Commission should have considered the econometric model submitted by the Foreign Producers during the underlying investigation, as a measure of the effect of pulp prices on the domestic

[46] Data submitted in response to Commission questionnaires indicate that the 2008 average margin of underselling for products 1 to 5 was 9.2%. Staff Report at V-10 (Table V-7). Even examining in isolation products 1 and 4 [[ ]], the underselling margins still exceeded the average natural premiums afforded to domestic products in most quarters analyzed by the Commission. *See* Conf. Staff Report at V-9 (Table V-1), V-12 (Table V-4); *see also* Final Views at 32. Further, record evidence shows that 2009 and the first quarter of 2010 (the most recent period for which data were collected) [[ ]]. *See* Conf. Staff Report at V-9 (Table V-1), V-11 (Table V-3), V-12 (Table V-4).

[47] 19 U.S.C. § 1677(7)(F)(i) provides, in relevant part:

> In determining whether an industry in the United States is threatened with material injury by reason of imports (or sales for importation) of the subject merchandise, the Commission shall consider, *among other relevant economic factors* . . .

19 U.S.C. § 1677(7)(F)(i) (emphasis added).

industry. Pls.' Brief at 33–34.[48] The Foreign Producers maintain that the econometric model "documented the relative contribution of changing pulp prices and demand, compared to subject imports." Pls.' Brief at 33–34.

The Commission determined that the Foreign Producers' econometric model was inadequate for use in determining the impact of pulp prices on domestic prices of coated paper, because the model provided limited data. The model failed to account for the relationship between pulp prices and domestic coated paper prices in the imminent future. Def.'s Brief at 35.

The Foreign Producers originally proffered their econometric model to rebut a model that the Domestic Producers had introduced for purposes of the analysis of *present* material injury. *See* Staff Report at V-12; *see also* Def.'s Brief at 35. The Foreign Producers' model was therefore designed to attempt to explain the historical impact of the price of pulp on U.S. profit margins during the period of investigation, for purposes of the Commission's *present* material injury analysis. *See* Def.'s Brief at 35 (*citing* Conf. Respondent Post-Hearing Brief, C.R. Doc. 320 at 1). The Foreign Producers' model was not designed to do projections concerning the price of pulp and other factors *in the future*. *See* Def.'s Brief at 35; *see also* Staff Report at V-11 – V-12. Among other things, the model did not take into account the manner in which certain market factors would affect domestic prices in the imminent future. Def.'s Brief at 35–36. As such, the Foreign Producers' econometric model was of little value to the Commission in its analysis of a future threat of material injury.

In addition, the Foreign Producers' model was based on pricing data from a particular firm, not the entire industry. Def.'s Brief at 36 n.10. This is particularly important because, as the Government notes, domestic producers did not face uniform cost trends with respect to pulp. Def.'s Brief at 36; *see also* Final Views at 25 n.162. A model based on one firm's pulp costs would not be representative of all producers in the industry. Given these limitations, the Commission's decision to disregard the Foreign Producers' model in the Commission's threat of material injury analysis was not unreasonable. *See U.S. Steel Group v. United States*, 18 CIT 1190, 1224, 873 F. Supp. 673, 703 (1994), *aff'd*, 96 F.3d 1352 (Fed. Cir. 1996) (noting Commission's discretion in interpreting data).

The Foreign Producers also claim that the Commission ignored

[48] The econometric model was submitted by the respondents in the underlying investigation. Only three of the five respondents are plaintiffs in this litigation. Moreover, two of the plaintiffs in this litigation were not respondents in the underlying investigation. Nevertheless, for ease of reference, the econometric model is referred to herein as the Foreign Producers' model.

"pricing data trends for the *paperboard segment* of the total industry, and how that data affected conclusions about the overall industry." Pls.' Brief at 34.[49] The Foreign Producers contend that the Commission's underselling analysis failed to take into account paperboard companies that were included in the scope of the "domestic industry" after the Commission had collected pricing data from a sample of domestic producers. Pls.' Brief at 34–35. The Foreign Producers maintain that the Commission's underselling finding therefore is not representative of the industry as a whole. Pls.' Brief at 34–35.

In particular, the Foreign Producers argue that the Commission's addition of the paperboard companies into the "domestic industry" nearly doubled the size of the industry and, as such, that the Commission's findings had no relevance for almost half of the domestic industry. Pls.' Brief at 34–35.[50] The Foreign Producers submit that, because none of the domestic paperboard producers sold the types of coated paper products for which product-specific data had been obtained by the Commission, the underselling findings based on such data were irrelevant for the paperboard section of the industry. Pls.' Brief at 35. In addition, the Foreign Producers highlight the fact that the paperboard segment of the industry enjoyed a stronger profitability margin than the rest of the industry over the period of investigation. Pls.' Brief at 35–36.

The Foreign Producers, however, make it clear that they are not contesting the Commission's definition of the domestic industry or the lack of usable pricing data for paperboard companies. Pls.' Brief at 35. Instead, the Foreign Producers contend that the Commission failed to explain how underselling findings from an earlier time period that apply to a subset of U.S. production "constitute 'substantial evidence' of 'imminent' and 'significant' price effects from future subject imports." Pls.' Brief at 35.

Essentially, the Foreign Producers seek to discredit the sample that the Commission relied on in its finding of underselling by imports from the PRC and Indonesia. As the Domestic Producers note, how-

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[49] In the Commission's final determination, paperboard products were included in the scope of the Commission's investigation. Final Views at 4–5.

[50] The Foreign Producers' assertion that the inclusion of the paperboard companies nearly doubled the size of the domestic industry is not an accurate characterization of the facts. Pls.' Brief at 35. As the staff report shows, domestic coated paper production before the inclusion of the paperboard companies was calculated to be 999,459 tons in 2009. Staff Report at C-4 (Table C-1). After the paperboard companies were included, the total production of domestic coated paper was calculated to be 1,477,233 tons. *See* Staff Report at IV-11 (Table IV-6). Including companies that produced paperboard in the scope of the domestic industry thus did not result in a doubling of the size of the domestic industry; it resulted in an increase of less than 50%.

ever, the Foreign Producers failed to properly raise this issue before the Commission in the course of the underlying investigation. Def.-Ints.' Brief at 37–38 (*citing Diamond Sawblades Manuf. Coal. v. United States*, 612 F.3d 1348, 1362 (Fed. Cir. 2010) (concluding that "isolated statements" made in a party's pre- and post-hearing briefs to the Commission during an investigation concerning an issue "are simply not enough to indicate that [a party] effectively presented [the] issue to the Commission")).

The Foreign Producers had ample opportunity in the course of the investigation to raise any concerns they may have had about the adequacy of sampling and the data sought by the Commission. For example, the Commission circulated drafts of questionnaires to all parties, and invited all to comment. Def.-Ints.' Brief at 38 (*citing* Commission's Notice: Scheduling of Final Phase of Investigations, P.R. Doc. 106). The Foreign Producers submitted extensive comments to the Commission, totaling 278 pages. Def.-Ints.' Brief at 38 (*citing* Respondents' Comments on Draft Questionnaires, P.R. Doc. 110). In those very detailed comments, the Foreign Producers asked the Commission to send producer questionnaires to eight additional paperboard companies. Def.-Ints.' Brief at 38. However, the Foreign Producers' comments failed to request pricing data for paperboard products. Def.-Ints.' Brief at 38. Even after the pre-hearing staff report issued (which contained the same pricing data as the final report), the Foreign Producers failed to raise any concerns about the sufficiency of the pricing data. Def.-Ints.' Brief at 38–39. The Foreign Producers thus failed to exhaust their administrative remedies. They cannot now be heard to complain that the Commission did not address issues that the Foreign Producers themselves failed to raise before the Commission in a timely fashion.

Moreover, the fact that the Commission did not provide an explanation for its pricing data sample does not, in itself, render the Commission's underselling finding not supported by substantial evidence. Pls.' Brief at 35. During the Commission's investigation, the parties agreed that the Commission should not divide the domestically-produced merchandise into multiple domestic like products. Final Views at 6. In fact, the Commission concluded that paperboard products and coated paper products are "broadly interchangeable in the marketplace." Final Views at 6–7. Since the Commission determined that there were no "bright lines" between coated paper and paperboard, the Commission had no reason to believe that the data collected before the paperboard companies were added to the domestic industry were not usable data. Further, after the paper-

board producers were identified and made part of the domestic industry, the pricing data collected by the Commission still covered more than half of the identified domestic producers. *See* Staff Report at I-3 – I-4.

Given the agreement that paperboard products are interchangeable with coated paper products, it was incumbent on the Foreign Producers to raise the issue of sampling with the Commission if they were dissatisfied. Under the circumstances, the Commission had no affirmative obligation to explain its choice of pricing data in the sample. "The burden of 'show[ing] that the sample relied on by the Commission was not representative' falls on the party challenging that sample, and '[g]eneral allegations that the [market at issue] is not homogenous and that small samples consequently yield skewed results are insufficient to meet this burden.'" *Nucor Fastener Div. v. United States*, 35 CIT ____, ____, 791 F. Supp. 2d 1269, 1288 (2011) (*quoting U.S. Steel Group v. United States*, 96 F.3d 1352, 1366 (Fed. Cir. 1996)).

As discussed above, the Foreign Producers never challenged the Commission's sampling during the course of the administrative proceedings. The Commission therefore was not required to explain why the sample that it relied on for its underselling finding did not include paperboard companies – a product within the scope of the domestic industry. The burden to raise such a challenge lies with the party challenging the sample; and the issue must be first raised with the Commission, before it can be raised in this forum.

In sum, none of the Foreign Producers' arguments discussed above seriously calls into question any aspect of the Commission's determination as to statutory factor (IV).

C. *The Commission's Analysis of Causation Statutory Threat Factor (IX)*

In its threat of material injury determination, the Commission is required to ensure that the threat of material injury found in its analysis is attributable to the subject imports rather than other sources of injury. Statutory threat factor (IX) requires that any "adverse trends" for the domestic industry be "by reason of subject imports." 19 U.S.C.§ 1677(7)(F)(i)(IX).[51]

In analyzing the threat of material injury here, the Commission found that – due to the projected declines in U.S. consumption of

[51] 19 U.S.C.§ 1677(7)(F)(i) provides, in relevant part, that "the Commission shall consider, among other relevant economic factors . . . (IX) any other demonstrable adverse trends that indicate the probability that there is likely to be material injury by reason of imports (or sale for importation) of the subject merchandise (whether or not it is actually being imported at the time)."

coated paper – the U.S. market could not accommodate the likely future growth in imports from the PRC and Indonesia without material injury to the domestic industry. Final Views at 38. The Commission's ultimate injury determination relied, in part, on the vulnerable condition of the domestic industry found by the Commission. Final Views at 38.

In determining that the U.S. industry was in a vulnerable condition, the Commission specifically cited double-digit percentage declines from 2007 to 2009 in production, capacity utilization, U.S. shipments, employment, and capital expenditures. Final Views at 38. The domestic industry's operating income decreased during each of the full years investigated, and its operating income as a ratio of net sales fell from 7.4% in 2007 to 4.9% in 2008, and then to 3.8% in 2009. Final Views at 37. The Commission noted that, in the first half of 2010, when subject imports had largely exited the U.S. market, the domestic industry increased production, shipments, and capacity utilization, but its operating ratio was slightly lower than in interim 2009 and its ratio of cost of goods sold ("COGS") to net sales was higher. Final Views at 37. In light of its vulnerable condition and the Commission's other findings in relation to price and volume, the Commission determined that the domestic industry would likely experience future declines in employment, sales, and profitability. Final Views at 38–39.

In determining whether the threat of future material injury was significantly attributable to coated paper imports from the PRC and Indonesia, the Commission considered whether there were other factors that would likely have an imminent impact on the domestic industry. Final Views at 38–39. In its causation analysis, the Commission noted the modest projected declines in U.S. consumption of coated paper, but explained that – while demand trends were likely to limit the domestic industry's ability to increase sales and prices – their likely impact on the domestic industry would not be of such magnitude as to render insignificant the likely adverse effects of the imports at issue. Final Views at 38. The Commission also examined imports from sources other than the PRC and Indonesia. Final Views at 39. The Commission observed that such non-subject imports lost market share between 2007 and 2009, and were generally priced higher than the subject imports. Final Views at 39. The Commission concluded that – if the provisional duties that had been imposed on imports from the PRC and Indonesia were lifted – imports from the PRC and Indonesia would compete on price to regain the market share that they lost to both the domestic industry and non-subject imports in interim 2010. Final Views at 39.

The Foreign Producers attack the Commission's causation analysis on two fronts. The Foreign Producers first claim that the Commission lacked substantial evidence to support its conclusion that the domestic industry is vulnerable to injury from Chinese and Indonesian coated paper imports. Pls.' Brief at 36–38; *see* section III.C.1, *infra*. In addition, the Foreign Producers contend that the Commission failed to ensure that its finding of a threat of material injury did not attribute injury from other market sources to imports of coated paper from the PRC and Indonesia. Pls.' Brief at 38–42; *see* sections III.C.2 & III.C.3, *infra*. Each of the Foreign Producers' main arguments is addressed below.

1. *The U.S. Industry's Vulnerability*

The Commission's threat of material injury determination rests on its conclusion that future material injury would be significantly attributable to coated paper imports from the PRC and Indonesia. Here, the Commission's attribution of injury determination was based in part on the Commission's conclusion that the U.S. industry was vulnerable to material injury. Final Views at 38. The Foreign Producers claim that the Commission's vulnerability conclusion is not supported by substantial evidence on the record. Pls.' Brief at 36–38. In seeking to make their case, the Foreign Producers emphasize the fact, found by the Commission, that the "domestic industry remained profitable and steadily increased its market share" during the period of investigation. Pls.' Brief at 36–37 (*quoting* Final Views at 37–38). With respect to the domestic industry's market share growth, the Foreign Producers assert that the Commission failed to explain why an industry that has increased its share of the market every year constitutes an industry in a "weakened state." Pls.' Brief at 37 (*citing* Final Views at 38). The Foreign Producers point to an alleged increase in the U.S. industry's operating profits in 2009. Pls.' Brief at 37. They claim that, because of the black liquor tax credit that U.S. producers received in 2009, the U.S. industry experienced an increase in operating profits. Pls.' Brief at 37. In light of such findings, the Foreign Producers argue that the U.S. industry could not reasonably be considered to be in a vulnerable condition in the first half of 2010. Pls.' Brief at 37. According to the Foreign Producers, "[n]o longer having the ability to enjoy surplus profits . . . is not the same as being in a 'weakened state.'" Pls.' Brief at 37. The Foreign Producers maintain that the domestic industry's allegedly higher operating profit in 2009 is evidence that the domestic industry was not in a weakened or vulnerable state. Pls.' Brief at 37–38.

It is true that, in its vulnerability analysis, the Commission acknowledged the domestic industry's increase in market share during the period of investigation. *See* Final Views at 36. But that fact alone does not suffice to undercut the Commission's vulnerability finding. *See* Final Views at 36. In an analysis of a threat of material injury, the Commission is instructed to analyze the relevant economic factors "as a whole." *See* 19 U.S.C. § 1677(7)(F)(ii) (providing that "[t]he presence or absence of any factor which the Commission is required to consider . . . shall not necessarily give decisive guidance with respect to the determination"). In its review of the U.S. industry, the Commission found a downward trend in virtually all of the industry's performance indicators.[52] According to the Commission, "the domestic industry suffered double-digit percentage declines in production, shipments, capacity utilization, net sales, production workers, operating income and capital expenditures." Final Views at 38. Further, the Commission highlighted evidence indicating that, even in interim 2010, after a majority of subject imports left the U.S. market due to the institution of the trade cases, some of the domestic industry's performance indicators continued to decline. *See* Final Views at 38.[53] In light of the multiple market indicators cited by the Commission, the fact that the domestic producers' share of the U.S. market increased is, in and of itself, not enough to render the Commission's determination unsupported by substantial evidence.

The Foreign Producers also claim that operating income for the U.S. industry had increased in 2009, which – according to the Foreign Producers – casts doubt on the Commission's conclusion that the U.S. market was in a vulnerable state. Pls.' Brief at 37. However, the Foreign Producers' claim that operating income had increased is inconsistent with the Commission's finding. *See* Pls.' Brief at 37; Final Views at 37. According to the Commission, "the domestic industry experienced positive, but declining operating income in each year of the period examined, falling from $144.0 million in 2007 to $95.1 million in 2008 and $61.8 million in 2009." Final Views at 37; *see* Staff Report at C-7 (Table C-3) (reporting a decline in operating income by

[52] According to the Commission's staff report, U.S. consumption of coated paper fell by 21.3% during the period of investigation, domestic industry production declined by 14.4%, capacity utilization decreased by 11.7%, and shipment quantity shrank by 15.0%. Final Views at 35–36. Labor metrics also decreased; employed production-related workers decreased by [[ ]]%, hours worked decreased by [[ ]]%, and wages paid decreased by [[ ]]%. Conf. Final Views at 52. Finally, the domestic industry's profitability margins narrowed; operating income dropped by 57% from 2007 to 2009 and operating income as a ratio of net sales decreased while the COGS to net sales ratio increased. *See* Conf. Final Views at 52–53; *see also* Staff Report at C-7 (Table C-3); Def.-Ints.' Brief at 40.

[53] For example, the domestic industry's COGS to net sales ratio continued to increase as the number of production workers and operating margins continued to decline. Final Views at 38.

57.1% from 2007 to 2009). In their principal brief, the Foreign Producers provide a table that appears to show that the domestic industry had increased operating income in 2009. Pls.' Brief at 37. But the Foreign Producers' table depicts a 2009 trend in operating income for the domestic industry that is at odds with the trend discerned by the Commission, because the Foreign Producers used a different method of calculating operating income. Pls.' Brief at 37.

In calculating the domestic industry's operating income for 2009, the Foreign Producers included the black liquor tax credit that the U.S. industry received that year. *See* Pls.' Brief at 37. In contrast, the Commission's calculation did not include the black liquor tax credit as part of the domestic industry's operating income. Instead, the Commission classified the tax credit as a separate "other" (non-operating) income item. *See* Staff Report at VI-4 (Table VI-I n.1). As a result of this methodological difference, the Commission's calculation reported lower operating income for the domestic industry than the calculation conducted by the Foreign Producers.

Distilled to its essence, the fundamental issue raised by the Foreign Producers is not whether the Commission failed to account for the domestic industry's surplus profit in the Commission's vulnerability determination, but, rather, whether the Commission had the discretion to exclude the tax credit from its calculation of the domestic producers' operating income. The Commission has discretion to "perform its duties in the way it believes most suitable." *U.S. Steel Group*, 96 F.3d at 1362. However, in doing so, the Commission may not act arbitrarily. *U.S. Steel Group*, 96 F.3d at 1362. Here, the Commission's choice of methodology was not arbitrary.

The Commission's decision to exclude the black liquor tax credit from its calculation of the 2009 domestic industry's operating income was both practical and consistent with practice in the industry. Specifically, as the record indicates, domestic producers that received the tax credit did not report it in a uniform manner in their public financial statements; and most did not report it as part of operating income. *See* Conf. Staff Report at VI-39.[54] The Commission's staff report confirms that the black liquor tax credit was not included in the Commission's calculation of the domestic industry's operating income because most of the producers reported that they did not treat

[54] The staff report detailed how each of the questionnaire respondents classified the tax credit. *See* Conf. Staff Report at VI-39. According to the staff report, with respect to the U.S. producers responding to the Commission's questionnaire and whose public income statement classification has been determined, the tax credit was classified by two of the companies as "other" income and by two others as a direct offset to COGS. *See* Conf. Staff Report at VI-39. One classified the tax credit as part of operating income and another classified it as a component of its Pulp and Paperboard segment of operating income. *See id*.

it as such. Conf. Staff Report at VI-39 – V-41; Def.'s Brief at 38. Further, because some domestic producers were not eligible to receive it, the tax credit was not reported in their financial statements at all. Def.'s Brief at 38 (*citing* Conf. Staff Report at VI-39). In light of the fact that it appears to be industry practice to exclude the tax credit from operating income, the Commission's determination to do the same was reasonable. The Foreign Producers' claims to the contrary miss their mark.

The Foreign Producers' challenges to the Commission's vulnerability analysis therefore must be rejected.

2. *U.S. Consumption*

The Foreign Producers also seek to discredit the Commission's threat of material injury determination by faulting the Commission's causation analysis. Pls.' Brief at 38. According to the Foreign Producers, the Commission's analysis failed to adequately address the impact on the U.S. industry of the projected decline in U.S. consumption. Pls.' Brief at 39. The Foreign Producers challenge the Commission's finding, asserting that it does not reflect the adverse price effects attributable to future decreases in U.S. consumption and does not distinguish such effects from those attributable to subject imports. Pls.' Brief at 39.

The Foreign Producers' challenges are baseless. The Commission examined the projected decrease in U.S. consumption, considered it as an alternative source of injury, and concluded that the projected declines in U.S. consumption would not be of a "magnitude that would render insignificant the likely effects of subject imports." Final Views at 39. [55] In light of the [[ ]] in U.S. consumption reported for every year since 2007, the Commission reasonably determined that the declines projected for 2010 to 2011 and 2011 to 2012 were [[ ]]. *See* Conf. Staff Report at II-19 – II-20. Because the Commission found that the projected decline in U.S. consumption would have little adverse effect on the U.S. industry, the Commission logically had no obligation to explain how it ensured that those (insignificant) effects were not attributed to subject imports. The Foreign Producers fail to provide any reason as to why the projected decline in U.S. consumption, which is smaller relative to the declines in previous years of the investigation, was significant. The Commission's conclusion that future declines in U.S. consumption would not attribute injury to subject imports is therefore reasonable and supported by the record.

[55] RISI projects "a decline of [[ ]] percent in apparent U.S. consumption from 2010 to 2011 and a further reduction of [[ ]] percent in 2012." Conf. Final Views at 55.

3. *Non-Subject Imports*

The Foreign Producers' final challenge to the Commission's causation findings focuses on the Commission's analysis of the likely future role of coated paper imports from countries other than the PRC and Indonesia. Pls.' Brief at 39–40. The Foreign Producers claim that imports from the PRC and Indonesia, on the one hand, and imports from other countries, on the other hand, have alternated in taking market share from one another. Pls.' Brief at 40. In essence, the Foreign Producers argue that the two types of imports – "subject" imports and "non-subject" imports – compete with one another, instead of competing with domestic coated paper products.

The Foreign Producers point to evidence from the interim of 2009 and interim of 2010 that shows the market share of third-country imports as well as imports from the PRC and Indonesia after the institution of the trade cases. Pls.' Brief at 40. That evidence reflects imports from the PRC and Indonesia losing a large portion of their share of the U.S. market in response to the institution of the trade cases. Pls.' Brief at 40. The Foreign Producers claim that the market share lost by imports from the PRC and Indonesia was absorbed by third-country imports on a "one-to-one" basis. Pls.' Brief at 41; Pls.' Reply Brief at 13. The Foreign Producers contend that the Commission failed to explain why imports from the PRC and Indonesia are projected to increase to such an extent that they would capture more of the U.S. market than the market share lost by third-country imports. Pls.' Brief at 41. The Foreign Producers maintain that any potential future increase in imports from the PRC and Indonesia will "disproportionately affect non-subject imports," and will have "only negligible effects" on the domestic industry. Pls.' Brief at 40.

The data cited by the Foreign Producers indicate that, from the interim of 2009 to the interim of 2010, coated paper imports from the PRC and Indonesia lost 12.9% of their U.S. market share, while coated paper imports from other countries – *i.e.*, countries not subject to the trade cases – gained 6.1% of the U.S. market share. Pls.' Brief at 40. Beyond that, the data also show that, during the same period of time, the domestic industry's share of the U.S. market increased by 6.8%. Pls.' Brief at 40. It is therefore unclear how the Foreign Producers reached the conclusion that the market share lost by coated paper imports from the PRC and Indonesia was absorbed by third-country imports on a one-to-one basis. The evidence shows that the domestic market also absorbed some of the market share lost by subject imports. *See* Pls.' Brief at 40–41. The record similarly shows that, from 2007 to 2009, the volume of coated paper imports from the PRC and Indonesia into the United States increased, while that of the

domestic producers and third-country importers declined, further demonstrating that subject imports can adversely affect the domestic industry. Pls.' Brief at 39; Def.'s Brief at 41 (*citing* Conf. Staff Report at C-6–7).

The Foreign Producers also assert that the Commission failed to explain how the increased presence of coated paper imports from the PRC and Indonesia renders the U.S. market more price-competitive. Pls.' Brief at 41. The Foreign Producers claim that evidence from 2010 shows that higher priced imports from other countries that are not subject to the trade investigations replaced low-priced imports from the PRC and Indonesia. Pls.' Brief at 41. According to the Foreign Producers, the increase in imports of high-priced merchandise into the U.S. market had no effect on domestic prices. Pls.' Brief at 41. The Foreign Producers maintain that there is thus "no reason to conclude that reversing the situation will suddenly drive [domestic] prices down." Pls.' Brief at 41–42. As such, the Foreign Producers apparently maintain that an influx into the U.S. market of low-priced imports from the PRC and Indonesia would replace higher-priced imports from other countries, but would have no impact on prices for domestic products.

The Foreign Producers' argument fails to take into account the fact that, in 2010, non-subject imports were priced within APP's natural premium and were fairly competing with domestic products. *See* Staff Report at C-6 (Table C-3) (comparing subject import pricing with that of non-subject imports); *see also* Def.-Ints.' Brief at 42–43. Imports from the PRC and Indonesia, on the other hand, undersold domestic producers and, as documented by Commerce, were being sold at less than fair market value throughout the period of investigation. Final Views at 1. This difference in competition, coupled with data from the questionnaire responses that report pricing as an important determinant for domestic purchasers, reveals the flaw in the Foreign Producers' argument. Final Views at 31. In short, if the situation were "reversed" (as the Foreign Producers put it), there is good reason – based on record evidence – to expect that lower-priced imports from the PRC and Indonesia would affect the domestic industry. Given the importance of price in the coated paper industry, the domestic industry would not be able to compete with imports from the PRC and Indonesia unless domestic producers slashed their prices. Final Views at 31.

The Commission cited ample evidence to explain the causal link between the increased presence of subject imports in the U.S. market and increased price competition. None of the Foreign Producers' arguments seriously calls into question the Commission's conclusion

that an influx of undervalued subject imports into the U.S. market would create price competition. The Foreign Producers' challenges to the Commission's determination based on statutory factor (IX) must therefore be rejected.

IV. *Conclusion*

For the reasons set forth above, Plaintiffs' Motion for Judgment on the Agency Record must be denied, and the Commission's affirmative final threat of material injury determination in Certain Coated Paper Suitable for High-Quality Print Graphics Using Sheet-Fed Presses from China and Indonesia, Inv. Nos. 701-TA-470–471 and 731-TA-1169–1170 (Final), USITC Pub. 4192 (Nov. 2010) – as memorialized in Certain Coated Paper Suitable For High-Quality Print Graphics Using Sheet-Fed Presses From China and Indonesia, 75 Fed. Reg. 70,289 (Nov. 17, 2010) – must be sustained.

Judgment will enter accordingly.

Dated: December 21, 2012
New York, New York

/s/ Delissa A. Ridgway
DELISSA A. RIDGWAY JUDGE

Slip Op. 13–24

FOSHAN SHUNDE YONGJIAN HOUSEWARES & HARDWARES CO., LTD., Plaintiff v. UNITED STATES, Defendant.

Before: Leo M. Gordon, Judge
Plaintiff, Court No. 12–00069

[Final results of administrative review sustained in part; remanded in part; and stayed in part.]

Dated: February 22, 2013

Gregory S. Menegaz, *J. Kevin Horgan*, and *John J. Kenkel*, DeKieffer & Horgan of Washington, DC for Plaintiff Foshan Shunde Yongjian Housewares & Hardwares Co., Ltd.

Carrie A. Dunsmore, Trial Attorney, Commercial Litigation Branch, Civil Division, U.S. Department of Justice, of Washington, DC, for Defendant United States. With her on the brief were *Stuart F. Delery*, Principal Deputy Assistant Attorney General, *Jeanne E. Davidson*, Director, *Patricia M. McCarthy*, Assistant Director. Of counsel on the brief was *Nathaniel J. Halvorson*, Office of the Chief Counsel for Import Administration, U.S. Department of Commerce of Washington, DC.

Frederick L. Ikenson, Blank Rome LLP of Washington, DC for Defendant-Intervenor Home Products International, Inc.

OPINION AND ORDER

Gordon, Judge:

This action involves an administrative review conducted by the U.S. Department of Commerce ("Commerce") of the antidumping duty order covering Floor-Standing, Metal-Top Ironing Tables from China. *See Floor-Standing, Metal-Top Ironing Tables and Certain Parts Thereof from the People's Republic of China*, 77 Fed. Reg. 14,499 (Dep't of Commerce Mar. 12, 2012) (final results admin. review) ("*Final Results*"); *see also* Issues and Decision Memorandum for Final Results of Antidumping Duty Administrative Review of Floor-Standing, Metal-Top Ironing Tables and Certain Parts Thereof from the People's Republic of China, A-570–888 (Mar. 5, 2012), available at http://ia.ita.doc.gov/frn/summary/PRC/2012–5915–1.pdf (last visited this date) ("*Decision Memorandum*"). The court has jurisdiction pursuant to Section 516A(a)(2)(B)(iii) of the Tariff Act of 1930, as amended, 19 U.S.C. § 1516a(a)(2)(B)(iii) (2006),[1] and 28 U.S.C. § 1581(c) (2006).

Before the court is the motion for judgment on the agency record of Plaintiff Foshan Shunde Yongjian Housewares and Hardwares Co. ("Foshan Shunde") challenging Commerce's (1) surrogate country selection, (2) steel wire input surrogate valuation, (3) financial statement selection for calculating surrogate financial ratios, (4) brokerage and handling surrogate value calculation, and (5) zeroing methodology. Because Commerce's financial statement selection and brokerage and handling issues are similar to issues being addressed in litigation involving a prior administrative review, the court is staying the disposition of those issues pending a final decision in that litigation. Likewise, the zeroing issue is presently before the U.S. Court of Appeals for the Federal Circuit, and the court is staying disposition of the zeroing issue pending guidance from the Court of Appeals. As for the remaining issues, the court sustains Commerce's surrogate country selection, but remands the issue of the steel wire input surrogate valuation to Commerce for further consideration.

I. Standard of Review

For administrative reviews of antidumping duty orders, the U.S. Court of International Trade sustains Commerce's "determinations, findings, or conclusions" unless they are "unsupported by substantial evidence on the record, or otherwise not in accordance with law." 19 U.S.C. § 1516a(b)(1)(B)(i). More specifically, when reviewing agency

[1] Further citations to the Tariff Act of 1930, as amended, are to the relevant provisions of Title 19 of the U.S. Code, 2006 edition.

determinations, findings, or conclusions for substantial evidence, the court assesses whether the agency action is reasonable given the record as a whole. *Nippon Steel Corp. v. United States*, 458 F.3d 1345, 1350–51 (Fed. Cir. 2006). Substantial evidence has been described as "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *DuPont Teijin Films USA v. United States*, 407 F.3d 1211, 1215 (Fed. Cir. 2005) (quoting *Consol. Edison Co. v. NLRB*, 305 U.S. 197, 229 (1938)). Substantial evidence has also been described as "something less than the weight of the evidence, and the possibility of drawing two inconsistent conclusions from the evidence does not prevent an administrative agency's finding from being supported by substantial evidence." *Consolo v. Fed. Mar. Comm'n*, 383 U.S. 607, 620 (1966). Fundamentally, though, "substantial evidence" is best understood as a word formula connoting reasonableness review. 3 Charles H. Koch, Jr., *Administrative Law and Practice* § 9.24[1] (3d. ed. 2012). Therefore, when addressing a substantial evidence issue raised by a party, the court analyzes whether the challenged agency action "was reasonable given the circumstances presented by the whole record." Edward D. Re, Bernard J. Babb, and Susan M. Koplin, 8 *West's Fed. Forms, National Courts* § 13342 (2d ed. 2012).

Separately, the two-step framework provided in *Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 842–45 (1984), governs judicial review of Commerce's interpretation of the antidumping statute. *See United States v. Eurodif S.A.*, 555 U.S. 305, 316 (2009) (Commerce's "interpretation governs in the absence of unambiguous statutory language to the contrary or unreasonable resolution of language that is ambiguous.").

II. Discussion

A. Surrogate Country Selection

On September 29, 2010, Commerce initiated an administrative review covering Foshan Shunde for the August 1, 2009 through July 30, 2010 period of review ("POR"). *See Initiation of Antidumping and Countervailing Duty Administrative Reviews and Requests for Revocation in Part*, 75 Fed. Reg. 60,076 (Dep't of Commerce Sept. 29, 2010). On May 4, 2011, Commerce extended the deadline for the preliminary results of review until August 31, 2011. *See Floor-Standing, Metal-Top Ironing Tables and Certain Parts Thereof from the People's Republic of China*, 76 Fed. Reg. 25,301 (Dep't of Commerce May 4, 2011) (extension for prelim. results). Commerce issued its original antidumping questionnaire to Foshan Shunde on October 4, 2010, to which Foshan Shunde responded to sections A, C, and D on

November 12, 2010, November 19, 2010, and November 30, 2010, respectively. Petitioner, Home Products International, Inc. ("HPI"), filed comments on Foshan Shunde's sections A, C, and D responses on January 12, 2011, May 17, 2011, July 8, 2011, and July 28, 2011. Commerce then issued supplementary questionnaires to Foshan Shunde on March 30, 2011, June 2, 2011, and July 13, 2011. Foshan Shunde responded to each of these supplemental requests on May 2, 2011, June 23, 2011, and July 29, 2011.

On June 8, 2011, Commerce issued its Surrogate Country List containing six countries that Commerce determined to be economically comparable to China based on their Gross National Income (GNI) as published in the World Bank's 2011 *World Development Report*. The six countries listed were the Philippines, Indonesia, Ukraine, Thailand, Columbia, and South Africa—but not India. *See* Memorandum from Carole Showers to Richard Weible, Request for a List of Surrogate Countries for an Administrative Review of the Antidumping Duty Order on Floor-Standing, Metal-Top, Ironing Tables and Parts Thereof from the People's Republic of China ("PRC"): Surrogate Country List (June 8, 2011) ("Surrogate Country List"). On June 10, 2011, Commerce emailed its Surrogate Country List to the interested parties. *See Floor Standing, Metal-Top Ironing Tables and Certain Parts Thereof from the People's Republic of China*, 76 Fed. Reg. 55,357 (Dep't of Commerce Sept. 7, 2011) (prelim. results) ("*Preliminary Results*"). Subsequently, on July 8, 2011, HPI submitted Indonesian financial statements for suggested valuation of factors of production ("FOP"), while on July 22, 2011, Foshan Shunde submitted Indian financial statements for FOP valuation. *See Preliminary Results*.

On September 7, 2011, Commerce published its preliminary results where it selected Indonesia as the surrogate country for valuing the factors of production. *See Preliminary Results*. In the *Final Results*, published on March 12, 2012, Commerce affirmed its decision to use Indonesia as the surrogate country and assigned Foshan Shunde an antidumping duty margin of 43.47 percent. *See Final Results*. Foshan Shunde then commenced this action.

1. Reasonableness of Commerce's Surrogate Country Selection

a. Parties' Contentions

Foshan Shunde argues that Commerce's selection of Indonesia as the surrogate country for FOP valuation is unreasonable (unsupported by substantial evidence) and that Commerce should have instead selected India. Plaintiff claims that Commerce "violated its

Policy Bulletin 04.1 by waiting 252 days [after the start of the administrative review] to determine the list of countries it deemed economically comparable to China" and that this "tardy release of potential surrogate countries . . . has severely prejudiced Foshan Shunde . . . because the list did not include India by reason of [Commerce's] tardiness." Pl.'s R. 56.2 Mot. for J. upon the Agency R. at 8, ECF No. 27 ("Pl.'s Br."). Foshan Shunde further contends that "principles of fairness prevent [Commerce] from changing its approach at such a late stage when a respondent reasonably relied on [Commerce's] approach in every other 2009–2010 review." *Id.* (citing *Shikoku Chems. Corp. v. United States*, 16 CIT 382, 388, 795 F. Supp. 417, 422 (1992). Plaintiff argues that it had no notice that India would not be on the Surrogate Country List, and that it has been:

> unreasonably disadvantaged . . . because all of its U.S. pricing for the POR had been predicated on [Commerce's] 25 years of past practice and [Commerce's] practice in the prior six segments (investigation plus five reviews) in which India was selected not only for a place on the list of economically comparable countries but . . . as the surrogate country.

Pl.'s Br. at 9. Foshan Shunde maintains that "[b]y removing India from consideration after the pricing period for the POR, [Commerce] unlawfully and unreasonably denied Foshan Shunde the ability to reasonably appreciate its costs, and, in turn, its ability to set prices to avoid dumping . . . ." *Id.* at 10.

Next, Foshan Shunde argues that "even if India properly was not listed within the . . . band of most economically comparable countries . . ., [Commerce] was obligated to consider whether India was nonetheless a more appropriate source than the listed countries." *Id.* at 5. Plaintiff explains that Commerce placed too much emphasis on GNI, and that it should have focused more on which country was a significant producer. In contrast to Indonesia, Foshan Shunde contends that India is both a major steel producer and a significant producer of the subject merchandise. *Id.* at 17–18 ("India is home to several substantial public producers of ironing tables. . . . The record reflects that there is no ironing board producer in Indonesia."). It adds that Commerce's practice has been to use multiple countries in calculating the factors of production ("FOP"). *Id.* at 20 (citing *Chlorinated Isocyanurates from the People's Republic of China*, 77 Fed. Reg. 41,746, 41,748–49 (Dep't of Commerce July 16, 2012) (prelim. results admin. rev.); *High Pressure Steel Cylinders from the People's Republic of China*, 77 Fed. Reg. 26,739 (Dep't of Commerce May 7, 2012) (final determ. of sales at LTFV).

Defendant responds arguing that Commerce followed its established practice of choosing a country based on (1) GNI relative to China, (2) whether the country was a significant producer of comparable merchandise, and (3) the availability of surrogate values within the selected country. Def.'s Resp. to Pl.'s Mot. for J. on the Agency R. at 4, ECF No. 32 ("Def.'s Br.") (citing *Decision Memorandum* at 10). Defendant further contends that Commerce's "approach is consistent with [Commerce's] regulations (19 C.F.R. § 351.408(b)), with Policy Bulletin No. 04.1, and with the approach employed by [Commerce] in all proceedings that involve NMEs, including past reviews of this case." *Decision Memorandum* at 10 (citation omitted). Defendant argues that, in following this approach, Commerce's selection of Indonesia as the surrogate country was reasonable.

As to Foshan Shunde's claim that Commerce should have relied on other countries, Defendant counters that the facts did not warrant seeking data from other countries because Commerce found Indonesia to be a significant producer of comparable merchandise and to possess reliable sources of publicly available surrogate value data. Def.'s Br. at 7 (citing *Decision Memorandum* at 6).

Defendant also maintains that Commerce's determination regarding "what constitutes the best available information is largely within the agency's discretion," and the court's role is "not to evaluate whether the information Commerce used was the best available, but rather whether Commerce's choice of information is reasonable." Def.'s Br. at 5–6 (citing *Nation Ford Chem. Co. v. United States*, 166 F.3d 1373, 1377 (Fed. Cir. 1999); *Peer Bearing Co.-Changshan v. United States*, 27 CIT 1763, 1770, 298 F. Supp. 2d 1328, 1336 (2003)).

As to the timing of the surrogate country decision, Defendant argues that Foshan Shunde was not prejudiced and that Plaintiff mischaracterizes the selection of Indonesia as a "late change" and "unfair surprise." Def.'s Br. at 9 (citing Pl.'s Br. at 8–9). Defendant also disputes Foshan Shunde's claim of insufficient notice and stresses that the same administrative review cited by Foshan Shunde in support of its arbitrary and capricious argument, *Certain Steel Nails from the People's Republic of China*, provides such notice. Def.'s Br. at 10 (citing *Decision Memorandum* at 12 (citing Petitioner's rebuttal brief and the Surrogate Country List)); *see also Certain Steel Nails from the People's Republic of China*, 76 Fed. Reg. 56,147 (Dep't of Commerce Sept. 12, 2011) (prelim. rescission and partial revocation of new shipper review) ("*Steel Nails*"). In *Steel Nails*, Commerce stated "the disparity in per capita GNI between India and China has consistently grown in recent years, and should this trend continue, [Commerce] may determine in the future that the two countries are

no longer 'at a comparable level of economic development.'" *Id.* Defendant denies any patent unfairness in Commerce's scheduling of the proceedings because as Commerce stated "Foshan Shunde was . . . afforded several months to comment on the methodology used . . . to identify the primary surrogate country, and to submit value information." *Decision Memorandum* at 11. Finally, Defendant states that Foshan Shunde "oddly suggest[s]" that it would have reported FOPs differently had it known which surrogate country would be selected because it was required to report accurate FOPs—irrespective of the surrogate country. Def.'s Br. at 9.

Defendant-Intervenor supports Defendant's arguments. Additionally, Defendant-Intervenor disagrees with Foshan Shunde's claim that Commerce should have selected India because it is a producer of identical merchandise whereas Indonesia is a producer of comparable merchandise. Defendant-Intervenor argues that the statute, 19 U.S.C. § 1677b(c)(4) imposes no hierarchy between producers of identical versus comparable merchandise. Def.-Intv.'s Resp. to Pl.'s Mot. for J. on the Agency R. at 5, ECF No. 32 ("Def.-Intv.'s Br.") (citing *Jiaxing Brother Fastener Co. v. United States*, 34 CIT ___, ___, 751 F. Supp. 2d 1345, 1352–53 (2010)).

b. Analysis

In determining whether merchandise is being sold at less than fair value, Commerce compares the export price or constructed export price and normal value ("NV"). 19 U.S.C. § 1677b(a). Generally, Commerce calculates a non-market economy's NV using data from surrogate countries to value the factors of production. *See Shakeproof Assembly Components, Div. of Ill. Tool Works, Inc. v. United States*, 268 F.3d 1376, 1381 (Fed. Cir. 2001). When valuing these factors of production, Commerce must use the "best available information" in selecting surrogate data from "one or more" surrogate market economy countries. 19 U.S.C. § 1677b(c)(1), (4). The statute provides that Commerce must base its surrogate country selection on, to the extent possible, whether that country is economically comparable to the non-market economy, and whether it is a significant producer of comparable merchandise. 19 U.S.C. § 1677b(c)(4). Under its regulations, Commerce will normally, "use publicly available information" and "value all factors in a single surrogate country." 19 C.F.R. § 351.408(c)(1), (2).

Commerce employs a four-step process to select the surrogate country. First, Commerce compiles a list of countries that are at a level of economic development comparable to the country being investigated.

U.S. Department of Commerce, Import Administration Policy Bulletin 04.1: Non-Market Economy Surrogate Country Selection Process at 2 (Mar. 1, 2004), *available at* http://ia.ita.doc.gov/policy/qjbull04–1.html (last visited this date) ("Policy Bulletin"). Commerce then ascertains which, if any, of those countries produce comparable merchandise. *Id.* Next, from the resulting list of countries, Commerce determines, which, if any, of the countries are significant producers of comparable merchandise. Finally, Commerce evaluates the quality, *i.e.*, the reliability and availability, of the data from those countries. *Id.* at 3. "Upon review of these criteria, Commerce chooses the country most appropriate for use as a surrogate for the [review]." *Dorbest Ltd. v. United States*, 30 CIT 1671, 1679, 462 F. Supp. 2d 1262, 1271 (2006).

Commerce followed this approach in finding that Indonesia was the most appropriate surrogate country and explained:

> In selecting Indonesia, we adhered to our established practice which is to base the surrogate country on (1) GNI, relative to that of [China]; (2) whether that country is a significant producer of comparable merchandise; and (3) the availability of surrogate values within the selected country.
>
> The Department determines economic comparability on the basis of per capita gross national income (GNI). *See* 19 CFR 351.408(b), and Policy Bulletin No., 04.1. Based on the most current data available from the World Bank (*World Development Report 2011*), the Department, determines that Indonesia, with a GNI of 2,230 USD has a GNI that is proximate to that of [China] . . ., which has a GNI of 3,590 USD. Moreover, we continue to find that Indonesia is a significant producer of comparable merchandise. Ironing tables are currently classifiable under U.S. Harmonized Tariff Schedule item 9403.20.0011 which is classified as a specific type of "household metal furniture" and falls within the international subheading 9403.20 ("Other metal furniture"). During the [PO]R Indonesia exported merchandise within the category 9403.20 which we view as a "comparable product" within the meaning of Policy Bulletin No., 04.1. *See*, *e.g.*, *Amended Final Results of Antidumping Duty Administrative Review and New Shipper Reviews: Wooden Bedroom Furniture From the People's Republic of China*, 72 FR 46957 (August 22, 2007), and accompanying Issues and Decision Memorandum, at Cmt. 1, 5 Petitioner July 8, 2011 submission at Exhibit 1. Finally, we found Indonesia had sufficient available data from which to value the factors of production for these final

results, as the Department was able to obtain surrogate values for all the factors of production from Indonesia.

Decision Memorandum at 5–6.

First, Commerce examined the GNIs, relative to that of China, by relying on the following 2011 World Bank data:

Country	**GNI (USD)**	**Relative to China (%)**
China	$3,590	100.0%
South Africa	$5,770	160.7%
Columbia	$4,930	137.3%
Thailand	$3,760	104.7%
Ukraine	$2,800	78.0%
Indonesia	**$2,230**	**62.1%**
Philippines	$1,790	49.9%
India	**$1,180**	**32.9%**

Def.-Intv.'s Br. at 3 (citing *Decision Memorandum,* cmt. 1 at 4). Because of a two year lag, the World Bank's 2011 publication represents data from 2009, which is more contemporaneous with the POR than the 2010 report. *Decision Memorandum* at 6. The record demonstrates that Indonesia was economically comparable to China—and that India was not. The data reveals that China had a GNI of $3,590, Indonesia had a GNI of $2,230 (62.1% of China's GNI), and India had a GNI of $1,180 (32.9% of China's GNI). It also shows that Indonesia's GNI is almost twice India's, rendering it reasonable for Commerce to have selected Indonesia, and not India, as the surrogate country. Similarly, since India had the lowest GNI of the above listed countries and was therefore the least economically comparable to China, it was reasonable for Commerce not to have included India in the Surrogate Country List.

Second, Commerce found Indonesia to be a significant producer of comparable merchandise. Although Foshan Shunde argues that Commerce should have selected India because it is a producer of identical merchandise while Indonesia only produces comparable merchandise, the court agrees with Defendant-Intervenor that the statute, 19 U.S.C. § 1677b(c), does not distinguish between identical and comparable merchandise. *Jiaxing Brother Fastener Co. v. United States*, 34 CIT ___, ___, 751 F. Supp. 2d 1345, 1353 (2010) (There is "no support for any preference between identical versus comparable merchandise."). Accordingly, it was reasonable for Commerce to determine that Indonesia satisfied the second requirement of being a significant producer of comparable merchandise. Last, there is no dispute that Indonesia fulfilled the third requirement of availability of surrogate

values within the selected country. Since all the requirements for surrogate country selection were met, it was reasonable for Commerce to select Indonesia as the most appropriate surrogate country for this review.

Foshan Shunde next claims detrimental reliance from Commerce's "late change" and "unfair surprise" in the procedural timing of the surrogate country selection. Pl.'s Br. at 8–9. The court agrees with Defendant in finding this claim meritless. Foshan Shunde relies on *Shikoku Chems. Corp. v. United States*, 16 CIT 382, 388, 795 F. Supp. 417, 421 (1992) that states "[p]rinciples of fairness prevent Commerce from changing its methodology at this late stage." However, there was no change in methodology in determining the surrogate country here. In contrast, *Shikoku* involved a change to the method of calculating the repacking expenses—and *not* a change in outcome based on the *same* calculations methodology. *Id.* What has changed here are the underlying facts, not the method. As Defendant correctly explained:

> for 25 years, Commerce selected a surrogate country according to the same methodology it used in this case, that is, selecting a primary surrogate country based on economic comparability. That the economies of India and China are no longer comparable is a factual, evidentiary matter, supported by substantial record evidence. Foshan Shunde was unreasonable to assume that economies remain static over a 25 year period of time.

Def.'s Br. at 9. Commerce foreshadowed the shift from India to Indonesia in *Steel Nails*. The court therefore is not persuaded that Foshan Shunde was "unfairly" surprised.

The court also disagrees that Commerce violated Policy Bulletin 04.1 by not requesting the creation of the surrogate country list "early in a proceeding" and that this "tardiness" prejudiced Foshan Shunde. Pl.'s Br. at 5 (citing Policy Bulletin 4.1), 8. The Surrogate Country List was issued on June 8, 2011, almost three months before the September 7, 2011 *Preliminary Results*, and prior to Foshan Shunde's June 23, 2011 and July 29, 2011 responses to the supplemental questionnaires. Under these circumstances, Foshan Shunde had ample opportunity to challenge Commerce's selection of Indonesia as the surrogate country. Accordingly, Commerce's timing in issuing the Surrogate Country List was reasonable.

For the foregoing reasons, Commerce's surrogate country selection is reasonable and is therefore sustained.

2. APA Claim of Notice and Comment

a. Parties' Contentions

Foshan Shunde contends that Commerce's surrogate country selection is unlawful because it did not provide an opportunity for notice and comment pursuant to Section 553(c) of the Administrative Procedure Act ("APA"), 5 U.S.C. § 553 (2006). Plaintiff argues that "[r]emoving India from the list was in fact per se one of the most significant acts of rulemaking by the Department in 25 years, requiring notice and comment." Pl.'s Br. at 10 (citing 5 U.S.C. § 553(c)).

Defendant responds that surrogate country selection is a factual determination, not a policy or practice, and therefore not within the gamut of rule making to which notice and comment attaches pursuant to Section 553. Def.'s Br. at 10 (citing *GSA, S.R.L., v. United States*, 23 CIT 920, 931, 77 F. Supp. 2d 1349, 1359 (1999) (stating that "the APA does not apply to antidumping administrative proceedings."). Defendant argues that the "decision not to include India on the list of potential surrogate countries in these final results does not represent a change in methodology, but rather a change in result based on the record evidence present in this administrative review." Def.'s Br. at 10 (citing *Decision Memorandum* at 12). Defendant maintains that the APA's notice and comment requirement are not applicable as "this determination fits squarely within the province of the agency's discretion to weigh the evidence and make factual findings." *Id.* at 10. Defendant-Intervenor echoes Defendant's arguments by stating, "there was no change in rule; no change in policy; not even a change in methodology. There was only a change in result, as a consequence of a change in facts (GNI)." Def.Intv.'s Br. at 6.

b. Analysis

The court agrees with Defendant and Defendant-Intervenor that Foshan Shunde was not unlawfully denied an opportunity for notice and comment pursuant to 5 U.S.C. § 553. Foshan Shunde claims that the Indonesian selection as the surrogate country was "per se one of the most significant acts of rulemaking by the Department in 25 years, requiring notice and comment . . . ." Pl.'s Br. at 10. The court disagrees. Section 553 of the APA requires agencies to give interested parties notice and an opportunity to comment on proposed rule making. Rule making is defined as the "agency process for formulating, amending, or repealing a rule," and a rule is further defined as "an agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy . . . ." 5 U.S.C. § 551(4), (5). The surrogate country determination made

during the administrative proceeding was an investigative, factual determination based on existing policies and regulations—not an implementation of a new policy or practice. Because the surrogate country selection does not constitute "rule making," Section 553 and its notice and comment requirements are inapplicable. *See JTEKT Corp. v. United States*, 35 CIT ___, ___, 768 F. Supp. 2d 1333, 1347 (2011) (rejecting Plaintiff's argument that Commerce's change in methodology for identifying similar merchandise in an antidumping proceeding is a rule to which Section 553 of the APA applies).

3. Whether Commerce's Surrogate Country Selection was Arbitrary and Capricious

a. Parties' Contentions

Finally, Foshan Shunde argues that Commerce acted arbitrarily and capriciously by finding India economically comparable to China in other administrative reviews with the same POR, yet chose Indonesia in this review. It relies on *JTEKT Corp. v. United States* ("*JTEKT I* ") in which the court held Commerce's decision to postpone implementing its new position on freight allocations impermissibly arbitrary because Commerce applied the decision to all respondents except one. 33 CIT ___, ___, 675 F. Supp. 2d 1206, 1239–1240 (2009). In support, Foshan Shunde provides the following list of annual reviews for the 2009–2010 POR where Commerce included India on the surrogate country list: *Folding Metal tables and Chairs from the People's Republic of China*, 76 Fed. Reg. 66,036 (Dep't of Commerce Oct. 25, 2011) (final results); *Tapered Roller Bearings and Parts Thereof, Finished and Unfinished, from the People's Republic of China*, 77 Fed. Reg. 2271 (Dep't of Commerce Jan. 17, 2012) (final results); *Steel Nails*; and *Fresh Garlic from the People's Republic of China*, 77 Fed. Reg. 34,346 (Dep't of Commerce June 11, 2012) (final results). Pl.'s Br. at 12.

Foshan Shunde places particular emphasis on *Steel Nails* because that review shared the same initiation notice with *Ironing Tables*." *Id.*. at 12–13 (citing *Notice of Initiation of Antidumping and Countervailing Duty Administrative Reviews*, 75 Fed. Reg. 60,076 (Dep't of Commerce Sept. 29, 2010). In *Steel Nails*, Commerce requested the surrogate country list from its Office of Policy on January 31, 2011. In contrast, Foshan Shunde argues that because Commerce, in this proceeding, requested the list on June 8, 2011, it was untimely. [2] Pl.'s Br. at 13.

[2] The court notes that the record reflects that, June 8, 2011, is the date of the Surrogate Country List and not when Commerce requested the Office of Policy to create that list. *See Preliminary Results.*

Defendant responds that Plaintiff's claim of disparate treatment "disregards the evidence on the record of this proceeding in wholesale fashion." Def.'s Br. at 7. Defendant maintains that when the Surrogate Country List was issued, India was no longer economically comparable to China. "Rather than dispute this crucial fact, Foshan Shunde merely points to other antidumping cases in which World Bank data available at that time demonstrated that India was economically comparable to China." *Id.* at 8 (citing Pl.'s Br. at 12). Defendant argues that all the administrative reviews cited by Foshan Shunde used the 2010 World Bank data—the then most contemporaneous report; however, this review used the 2011 data—the then most contemporaneous report. *Id.* at 8. As noted above, Defendant again argues that the surrogate selection was a fact-based determination, not a policy choice. Therefore, according to Defendant, Commerce's surrogate country selection was in accordance with law.

b. Analysis

Commerce's surrogate country determination is not arbitrary or capricious. An "agency action is arbitrary when the agency offers[s] insufficient reasons for treating similar situations differently." *Transactive Corp. v. United States*, 91 F.3d 232, 237 (D.C. Cir. 1996) (citing *Motor Vehicle Mfrs. Ass'n, Inc. v. State Farm Mutual Auto. Ins. Co.*, 463 U.S. 29, 57 (1983)). For example, in *JTEKT I* the court faulted Commerce for treating one respondent differently than the others without providing sufficient explanation for the disparate treatment. 33 CIT ___, 675 F. Supp. 2d. 1206. Here, however, Commerce has provided an explanation for selecting Indonesia in this review, but not in the other contemporaneous reviews. As explained below, the factual information of the other administrative reviews (the available GNI data) varied from the instant administrative review.

The timing of the other reviews were such that the most contemporaneous *World Development Report* was the 2010 report, whereas when Commerce analyzed the different GNIs in this review, the more recent 2011 report had become available. *See Decision Memorandum* at 6. In essence, Foshan Shunde argues that it was unreasonable for Commerce to use the information that is the most recent and contemporaneous to the POR because it contained a lower Indian GNI than the 2010 report. Commerce has an established practice of relying on the most current annual issue of the *World Development Report*, and this review did not deviate from that practice. *Id.* Commerce is statutorily tasked with using the "best available" information and is given broad discretion to determine what constitutes the

best available information. 19 U.S.C. § 1677b(c)(1); *Peer Bearing Co.-Changshan v. United States*, 27 CIT ___, ___, 298 F. Supp. 2d 1328, 1336 (2003). Its reliance on the more recent 2011 *World Development Report,* whose data is more contemporaneous to the POR, is well within that mandate. As Defendant correctly states, Foshan Shunde "is not entitled to have the Court remand the case to Commerce with instructions to disregard evidence that India and China are no longer economically comparable and instead base its decision on an obsolete "practice" of finding India comparable." Def.'s Br. at 9 (citing Pl.'s Br. at 9–11). Accordingly, the court sustains Commerce's surrogate country selection.[3]

B. Surrogate Valuation for Steel Wire Input

Foshan Shunde proposed subheading 7217.10.1000 of the Indian Harmonized Tariff Schedule ("HTS") for Commerce's valuation of its steel wire input. Foshan Shunde SV (Surrogate Value) Submission for Prelim., PD 41.[4] However, after the *Preliminary Results* in which Commerce selected Indonesia as the surrogate country, Foshan Shunde submitted Indonesian HTS 7217.10.1000 for its steel wire valuation. Indonesian HTS 7217.10.1000 has a carbon content threshold of less than 0.25 percent. Foshan Shunde SV Submission for Final, PD 10–13. HPI proposed Indonesian HTS 7217.10.3900 as the proper surrogate value for the steel wire input. Indonesian HTS 7217.10.3900 has a carbon content threshold of less than 0.6 percent. HPI SV Submission, PD 9 (Sept. 27, 2011). In the *Final Results*, Commerce valued Foshan Shunde's steel wire under Indonesian HTS 7217.10.3900:

> We continue to find that HTS classification 7217.10.3900, which covers "steel wire not coated or plated, containing 0.6% or more carbon" constitutes the best available information for valuing steel wire in these Final Results. *Foshan Shunde's production records do not distinguish the carbon content of its steel wire inputs or record the carbon content contained in its steel wire*. Therefore, we disagree with Foshan Shunde that HTS classification 7217.10.3900 is an inappropriate value because it covers

[3] In its reply brief Foshan Shunde raises a new argument that Commerce's use of GNI to determine economic comparability constitutes an unreasonable interpretation of the antidumping statute under *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984). This new legal argument is not appropriate for a reply brief and should have been raised in Plaintiff's opening brief. The court therefore deems the issue waived. *See* Scheduling Order at 6, May 18, 2012, ECF No. 22 ("The reply brief must be confined to rebutting arguments contained in the response brief. The reply brief may not introduce new arguments.").

[4] "PD" refers to a document in the public administrative record.

> a higher carbon content than Foshan Shunde's proffered HTS value from India. Accordingly, in these final results, we have continued to use HTS classification 7217.10.3900 to value carbon steel wire.

Decision Memorandum at 13 (emphasis added).

1. Parties Contentions

Foshan Shunde argues that Commerce's valuation of its steel wire input under Indonesian HTS 7217.10.3900 is unreasonable (unsupported by substantial evidence), and that "this Court [should] remand this issue with instructions to [Commerce] to recalculate [its] steel wire input applying the Indonesian import values for HTS 7217.10.1000." Pl.'s Br. at 25. Foshan Shunde contends that its steel wire is composed of low carbon steel and should have been valued under Indonesian HTS 7217.10.1000, containing 0.25 percent carbon, as opposed to Commerce's valuation under Indonesian HTS 7217.10.3900, which contains the higher 0.6 percent carbon content.

Defendant responds that Foshan Shunde did not exhaust its administrative remedies and is presenting new arguments not made before the agency. Accordingly, Defendant asks the court to sustain Commerce's determination. Defendant claims that Foshan Shunde is now arguing that Commerce should have used low rather than high carbon steel data, but failed to present this argument at the administrative level. Defendant explains that "in the proceeding below Foshan Shunde failed to meaningfully advance such an argument; rather it addressed steel wire in one paragraph, noting that no party had rebutted its proffered low carbon steel surrogate values from India and that common sense supported its argument." Def.'s Br. at 12–13 (citing Foshan Shunde's Admin. Case Br. at 51, PD 22). Defendant further contends that Foshan Shunde did not provide any evidence at the administrative level that would support its new argument. *Id.* at 13. Defendant-Intervenor supports Defendant's exhaustion argument and argues that Commerce's surrogate value selection is reasonable.

2. Analysis

The court does not believe that Defendant and Defendant-Intervenor's exhaustion arguments have any merit. Foshan Shunde articulated in its administrative case brief why it believed Indonesian HTS 7217.10.1000 was the only reasonable surrogate value choice on the administrative record. *See* Foshan Shunde Admin. Case Br. at 51 ("As a matter of common sense, this common household product has no special requirement for high tensile strength high carbon steel

wire, and petitioner has offered not a shred of documentary evidence that it does."). It therefore properly exhausted its administrative remedies.

Turning to the merits, as noted above, when valuing factors of production in a non-market economy proceeding, Commerce must use the "best available information" when selecting surrogate data. 19 U.S.C. § 1677b(c)(1), (4). Here, Commerce chose Indonesian HTS 7217.10.3900 as the "best available information" to value Foshan Shunde's steel wire inputs. The court agrees with Foshan Shunde that this selection is potentially unreasonable. Foshan Shunde challenges Commerce's valuation "because [Commerce] failed to consider all of the pertinent record evidence with regard to Foshan Shunde's surrogate value for steel wire." Pl.'s Br. at 21. Specifically, Foshan Shunde claims that Commerce "failed to consider the surrogate value for low-carbon steel wire based on *Indonesian* import data that Foshan Shunde placed on the record of this case in its surrogate value submission for the final results." *Id.* Foshan Shunde adds that it "has stated positively on the record of this case that the steel wire that it consumes is appropriately classified under Indonesian HTS No. 7217.10.1000, which corresponds to low carbon wire." *Id.* at 25; *see also* Pl.'s Reply Br. at 8, ECF No. 36 ("Foshan Shunde fact certified, under potential criminal penalties, that it consumed low carbon wire.").

In the *Decision Memorandum* Commerce failed to review, compare, and explain the two proffered Indonesian data sources, focusing instead on a meaningless comparison between HPI's proffered Indonesian data source and a moot Indian data source: "we disagree with Foshan Shunde that HTS classification 7217.10.3900 is an inappropriate value because it covers a higher carbon content than Foshan Shunde's proffered HTS value from *India*." *Decision Memorandum* at 13 (emphasis added). Commerce needs to review, compare, and explain why HPI's proffered Indonesian surrogate data is preferable to Foshan Shunde's submitted Indonesian surrogate value as the best available information. To provide additional guidance and context, the court is struggling to understand why it is reasonable on this administrative record to assume that Foshan Shunde's steel wire inputs actually have higher carbon content than Foshan Shunde's proffered Indonesian HTS category, especially when read against Foshan Shunde's disputation of HPI's higher carbon content category: "[a]s a matter of common sense, this common household product has no special requirement for high tensile strength high carbon steel wire, and petitioner has offered not a shred of documentary evidence that it does." Foshan Shunde Admin. Case Br. at 51. Absent verifica-

tion of the carbon content of Foshan Shunde's inputs, the court cannot understand the reasonableness of assuming a higher carbon content on this administrative record. This is especially difficult to comprehend given Commerce's prior choices for steel valuation when India was the surrogate country. Likewise, the court searched HPI's submissions for some explanation that ironing board manufacturers typically use higher content carbon steel, but could not find an explanation. Commerce's inference about the appropriate Indonesian HTS data source does not appear reasonable on this administrative record. Perhaps there is some reasonable explanation justifying Commerce's surrogate value choice for steel wire inputs. In any event, Commerce needs to explain why HPI's proffered Indonesian HTS category is preferable to Foshan Shunde's, and to also explain why it is reasonable to infer/assume from the administrative record that a household item like an ironing board requires higher carbon content. The court therefore will remand this issue to Commerce for further consideration.

III. Conclusion

Accordingly, it is hereby

ORDERED that Foshan Shunde's challenge to Commerce's practice of zeroing is stayed pending a decision on the issue from the U.S. Court of Appeal for the Federal Circuit; it is further

ORDERED that Foshan Shunde's challenges to Commerce's financial statement selection and surrogate valuation of brokerage and handling are stayed pending a final disposition of those issues in *Since Hardware (Guangzhou) Co. v. United States*, Consol. Court No. 11–00106; it is further

ORDERED that Commerce's surrogate country selection is sustained; it is further

ORDERED that Commerce's steel wire valuation is remanded to Commerce to reconsider its selection of a surrogate value for Foshan Shunde's steel wire input; it is further

ORDERED that Commerce shall file its remand results on or before April 9, 2013; and it is further

ORDERED that, if applicable, the parties shall file a proposed scheduling order with page limits for comments on the remand results no later than seven days after Commerce files its remand results with the court.

Dated: February 22, 2013
New York, New York

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

Slip Op. 13–25

SUNSHINE INTERNATIONAL TRADING, INC., Plaintiff, v. UNITED STATES, Defendant.

Before: Judith M. Barzilay, Senior Judge
Court No. 12–00190

[Defendant's Motion to Dismiss is granted.]

Dated: February 26, 2013

Stein Shostak Shostak Pollack & O'Hara, LLP (*Elon A. Pollack, Joseph P. Cox, and Juli C . Schwartz*) for Plaintiff, Sunshine International Trading, Inc.

Stuart F. Delery, Acting Assistant Attorney General; *Barbara S. Williams*, Attorney in Charge, International Trade Field Office, Commercial Litigation Branch, Civil Division, United States Department of Justice (*Beverly A. Farrell*); Office of the Assistant Chief Counsel, International Trade Litigation, United States Customs and Border Protection (*Paula S. Smith*, Of Counsel) for Defendant, United States.

OPINION

BARZILAY, Senior Judge:

Before the court is Defendant United States' motion to dismiss for lack of subject matter jurisdiction or, alternatively, for failure to state a claim under USCIT Rule 12(b). Plaintiff Sunshine International Trading, Inc. ("Sunshine") initiated this action to challenge the U.S. Customs and Border Protection's ("Customs") rejection of its attempted entry of women's jeans. While Sunshine alleges that Customs' rejection amounted to a protestable exclusion under 19 U.S.C. § 1514(a)(4), the Government asserts that no protestable event occurred and that the court is without jurisdiction under 28 U.S.C. § 1581(a). For the reasons set forth below, the court grants the Government's motion.

I. BACKGROUND

Sunshine is a California company that imports women's apparel. On May 17, 2012, Sunshine attempted to enter a shipment of jeans at the Port of Los Angeles, and filed an "Entry/Immediate Delivery" form, No. ANR-3013258–2, accompanied by an ocean bill of lading, a commercial invoice, and a packing list. The latter two documents identified the exporter of the goods as Guangzhou Jointsum Trading Co., Ltd. ("Jointsum"). The commercial invoice stated that Jointsum sold 1,690 dozen pairs of jeans to Sunshine at a per unit price of $2.70. In a column on the invoice titled "Mark" the jeans were identified as "Shylo Made in China" and "Masoi Made in China." A column titled "Description of Goods" described two different types of jeans in the shipment: (1) ladies 98% cotton, 2% polyester jeans, and (2) ladies

55% cotton, 40% fieer, 5% spandex jeans. The invoice also contained the handwritten notation "6204.62.4011/16.6%."

Customs subsequently issued an "Entry/Summary Rejection Sheet" dated May 1, 2012, rejecting entry ANR-3013258–2.[1] In issuing the rejection, Customs made the following remarks:

> Merchandise has been reappraised at $6.14/pc net; packed (ladies 55% cotton 40% fieer 5 spandex jeans)
> Merchandise has been reappraised at $6.33/pc net; packed (ladies 98% coton 2% polyester jeans)
> Reference 19 CFR 141.86[2] and 19 CFR 141.90[3] for contents of invoices and general requirements, to include style numbers and the manufacture [sic] name and address, HTS number and rate of duty.
> Reference 113.13(d)
> Live entry required with a single transaction bond for the duty, taxes and fees.
> Please resubmit a live entry, STB and a corrected invoice and a check.

Customs' reappraisal of the jeans is consistent with an April 2012 entry made by Sunshine when it entered jeans similar to those at issue here. The earlier entry involved two types of jeans with entry documents setting forth per unit prices of $2.70 and $2.90. As it did in this case, Customs issued an "Entry/Summary Rejection Sheet" reappraising the jeans at $6.14 and $6.13, and directing Sunshine to resubmit "a live entry, STB and a corrected invoice and a check." In that instance, Sunshine complied by filing corrected entry paperwork and depositing duties reflecting the higher appraised value.

In this case, rather than complying, Sunshine filed a protest challenging Customs' rejection. In its protest, Sunshine claimed that that the rejection was invalid as a matter of law because it was dated May 1, 2012, more than two weeks before its entry papers were filed. Sunshine also argued that Customs had no basis for rejecting its merchandise under 19 C.F.R. § 141.86 because the commercial invoices submitted upon entry provided the identity of the seller and

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[1] The fact that the rejection was dated more than two weeks before the attempted entry forms the basis of Count 4 in Sunshine's complaint and is addressed by the court below.

[2] 19 C.F.R. § 141.86 provides that entry documents must set forth the identity of the seller and "[a] detailed description of the merchandise, including . . . the marks, numbers, and symbols" under which it is sold. 19 C.F.R. § 141.86(a)(2) and (3) (2010).

[3] 19 C.F.R. § 141.90 requires that an importer include "the appropriate subheading under the provisions of the Harmonized Tariff Schedule of the United States ["HTSUS"] . . . and the rate of duty for the merchandise being entered." 19 C.F.R. § 141.90(b) (2010). The Government now admits that the handwritten notation "6204.62.4011/16.6%" on the commercial invoice was a reference to the relevant HTSUS provision and duty rate.

the identifying marks of the goods. Finally, Sunshine argued that, contrary to Customs' reappraisal, the value of the merchandise set forth in its entry documents was correct because it was based on the jeans' transaction value. To support this last argument, Sunshine submitted purchase orders containing a per unit price of $2.70, the same price set forth in its entry documentation. Sunshine also filed an HSBC bank wire transfer acknowledgement purporting to show a payment from Sunshine to Jointsum in the amount of $54,756.00, the total amount that would be paid for 1,690 pairs of jeans at a per unit price of $2.70.

Some of the documents filed with the protest, however, confused the facts surrounding the attempted entry. Unlike the commercial invoice filed with Sunshine's entry paperwork, which indicated that Sunshine purchased 1,690 pairs of jeans from Jointsum, the purchase orders attached to the protest showed an order size of 1,710 pairs of jeans, and identified the seller of those jeans as a company called Gunanzhou Long Jun Trade Development, Co., Ltd. Additionally, Sunshine's protest was accompanied by an entry summary indicating that the May 2012 entry of jeans consisted 1,690 pairs of jeans at a total entered value of $126,250.00. This entered value equates to a per unit price of $6.23 – a value much closer to the reappraisal values contained in Customs' rejection.

On June 27, 2012, Customs issued its ruling on Sunshine's protest denying it in full while also stating that it had been erroneously filed. In doing so, a Customs import specialist checked a box on the protest stating that it was "Denied in full for the reason checked" which was followed by a checked box stating "Other, namely" and finally an explanation that read, in full: "Reference 19 CFR 141.11 Entry was rejected on May 25th 2012. Protest filed in error."[4]

Sunshine subsequently initiated this action alleging four counts in its complaint: (1) unlawful decision to refuse admission from entry; (2) illegal or prohibited valuation; (3) evidence to demonstrate transaction value and right to make entry provided to customs; and (4) notice of rejection null and void on its face. Compl. ¶¶ 17–32. Sunshine asserts that Customs denied its protest under 19 U.S.C. § 1514(a)(4) and claims the court has jurisdiction under 28 U.S.C. § 1581(a).

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[4] 19 C.F.R. § 141.11 sets forth the documentation necessary to establish a common carrier's right to make entry. It appears to have no relation to Sunshine's attempted entry, and the Government states that this citation is "a *non sequitur* since the [rejection] contained no reference to a rejection based on this regulation." Defendant's Reply, p. 9, n. 9.

II. DISCUSSION

A. Motion to Dismiss Standard

"The CIT is a court of limited jurisdiction, possessing 'only that power authorized by the Constitution and federal statutes, which is not to be expanded by judicial decree.'" *Almond Bros. Lumber Co. v. United States*, 651 F.3d 1343, 1350 (Fed. Cir. 2011) (*quoting Sakar Int'l Inc. v. United States*, 516 F.3d 1340, 1349 (Fed. Cir. 2008)). Sunshine invokes the court's jurisdiction under 28 U.S.C. § 1581(a), which gives this court exclusive jurisdiction over cases commenced to contest the denial of a protest under section 515 of the Tariff Act of 1930, as amended 19 U.S.C. § 1515.[5] Section 1515(a), in turn, refers to protests filed to contest one of the seven categories set forth in 19 U.S.C. § 1514(a). Section 1514(a)(4), the provision relied on by Sunshine, allows for the filing of protests to challenge the wrongful "exclusion of merchandise from entry or delivery." For jurisdictional purpurses, it is essential to determine whether Customs' rejection was an exclusion under § 1514(a)(4) because a plaintiff's protest needs to have involved a "'decision' made by Customs under 19 U.S.C. § 1514. . . . [I]f 'Customs' underlying decision does not relate to any of these seven categories, the court may not exercise § 1581(a) jurisdiction . . . ." *Am. Nat. Fire Ins. Co. v. United States*, 30 CIT 931, 939–40, 441 F. Supp. 2d 1275, 1285 (2006) (*quoting Playhouse Imp. & Exp., Inc. v. United States*, 18 CIT 41, 44, 843 F. Supp. 716, 719 (1994)).

Additionally, "'the party asserting federal jurisdiction when it is challenged has the burden of establishing it.'" *Canadian Lumber Trade Alliance v. United States*, 517 F.3d 1319, 1331 (Fed. Cir. 2008) (*quoting DaimlerChrysler Corp. v. Cuno*, 547 U.S. 332 (2006)). When considering whether a party has met that burden, the court is "obligated to assume all factual allegations to be true and to draw all reasonable inferences in plaintiff's favor." *Henke v. United States*, 60 F.3d 795, 797 (Fed. Cir. 1995).

B. Analysis

Although Sunshine's complaint sets forth four counts, it essentially has three claims: (1) that Customs erred in finding Sunshine's entry documents insufficient under 19 C.F.R. § 141.86 because those documents in fact identified the seller and commercial markings of Sunshine's jeans; (2) that Customs erred in rejecting the $2.70 per unit value provided by Sunshine and substituting a value of over $6.00; and (3) that the rejection is a nullity because of when it was dated.

[5] Citations in this opinion to the Tariff Act of 1930 are to the relevant provisions of Title 19 of the United States Code, 2006 edition.

The Government argues that the court lacks jurisdiction to hear this case under § 1581(a) because the rejection does not amount to an exclusion under 19 U.S.C. § 1514(a)(4). Customs invited Sunshine to resubmit its entry paperwork with corrections, and Sunshine filed a protest instead. The Government maintains that Sunshine's decision not to resubmit does not create a protestable exclusion under § 1514(a)(4). The Government also argues that its reappraisal of Sunshine's jeans was an appropriate exercise of its appraisal authority. Finally, the Government asserts that the incorrect date on its rejection was a mere clerical error that was not protestable under § 1514(a).

Sunshine, in turn, argues that the opportunity it had to re-file its entry papers was illusory. More specifically, Sunshine argues that it could not file corrected entry papers because it had already filed, with its entry and protest, all the documentation in its possession concerning the jeans' seller, identifying marks, and value. Sunshine also argues that Customs should have accepted its proposed value of $2.70 per unit because its documentation established that number as the transaction value for the jeans. Next, Sunshine argues that even if the court determines that its merchandise was not excluded from entry, it was excluded from delivery, which is also a protestable decision under 19 U.S.C. § 1514(a)(4). Finally, Sunshine continues to argue that the date on the rejection rendered it too confusing to be effective.

Ruling on the instant motion with respect to counts one through three of Sunshine's complaint requires a determination of whether Customs' rejection was an exclusion within the meaning of § 1514(a)(4). "Exclusion" is not defined in the statutes or regulations. However, in cases where this court has exercised jurisdiction over a protest filed pursuant to § 1514(a)(4), the exclusion has typically been a final determination by Customs that merchandise may not be entered for some serious, usually codified, policy reason. For example, in *China Diesel Imports, Inc. v. United States*, 18 CIT 515, 855 F. Supp. 380 (1994), the court reviewed Customs' exclusion of goods determined to be manufactured by forced labor in violation of 19 U.S.C. § 1307. In *R.J.F. Fabrics, Inc. v. United States*, 10 CIT 735, 651 F. Supp. 1431 (1986), the court determined that it had jurisdiction to review the exclusion of goods suspected of transshipment. In *M.W. Kasch Co. v. United States*, 10 CIT 460, 640 F. Supp. 1335 (1986) the court exercised jurisdiction to review Customs' exclusion of goods thought to violate copyright laws. In each of these cases, the court exercised jurisdiction under 28 U.S.C. § 1581(a) because a protestable exclusion

under § 1514(a)(4) occurred below. *See also Sanho Collections, Ltd. v. Chasen*, 1 CIT 6, 505 F. Supp. 204 (1980) (finding that judicial review would have been available under 28 U.S.C § 1581(a) if a § 1514(a)(4) protest had been filed to contest the denial of an entry due to a quota reduction provision).

Here, Customs rejected Sunshine's entry, in part, because it concluded that the documentation failed to comply with 19 C.F.R. § 141.86. Specifically, Customs concluded that Sunshine did not provide the identity of the seller and the marks under which the jeans were sold. The court finds that on the record before it, it is unclear whether Customs was being overzealous in rejecting conflicting, yet compliant, documents as Sunshine contends, or whether Sunshine's documents in fact fell short of the regulatory requirements as determined by Customs. At this stage of jurisdictional inquiry, however, the court need not decide this issue. What it must decide is whether this exchange amounted to a protestable exclusion under 19 U.S.C. § 1514(a)(4). On that point, the court concludes that to the extent Customs' rejection was based on its determination that Sunshine's papers fell short of the regulatory requirements, it was not a protestable exclusion. The rejection, issued as it was with a colorable basis, and accompanied by an invitation to resubmit simply does not rise to the level of the decisive action taken by Customs in cases like *China Diesel Imports*, *R.J.F. Fabrics*, *M.W. Kasch*, or *Sanho Collections* and cannot be given the same jurisdictional treatment.

On this point, this case is similar to *Tak Yuen Corp. v. United States*, 29 CIT 543 (2005). In *Tak Yuen*, Customs rejected an entry of mushrooms from the People's Republic of China when the importer failed to tender a deposit of applicable antidumping duties. The importer filed a protest contesting exclusion of its goods under §1514(a)(4). After the protest was denied and review was sought in this court, the court declined to exercise jurisdiction. In addition to noting that the protest was immature because liquidation had not occurred, the court stated that it could not "equate the return of entry papers to the plaintiff with an actionable exclusion, in particular because [plaintiff] was invited by Customs to resubmit." *Tak Yuen*, 29 CIT at 550.

If anything, Customs' rejection in *Tak Yuen* was more decisive than the rejection here because its role in assessing antidumping duties is merely ministerial, meaning that Customs must liquidate merchandise so as to collect any antidumping duties imposed by the Department of Commerce. *See Koyo Corp. of U.S.A. v. United States*, 497 F.3d 1231, 1242 (Fed. Cir. 2007). Despite Customs' lack of discretion,

the court in *Tak Yuen* concluded, at least in part due to the invitation to resubmit, that the rejection did not rise to the level of an actionable exclusion. Here, Customs itself made the determination that Sunshine failed to comply with 19 C.F.R. § 141.86, and requested that Sunshine resubmit corrected entry paperwork. Sunshine declined to do so. Like the court in *Tak Tuen*, the court will not equate this with a protestable exclusion.

The court is also not persuaded by Sunshine's argument that even if its jeans were not excluded from entry, they were excluded from delivery. It is true that § 1514(a)(4) allows for protests contesting exclusions from both entry and delivery, and that these two concepts are distinct. *See Lowa, Ltd. v. United States*, 5 CIT 81, 561 F. Supp. 441 (1983). However, to be excluded from delivery, a party must have the right to make delivery, either because its goods were already entered, *see* 19 U.S.C. § 1448, or because of an immediate delivery privilege. *See Lowa*, 5 CIT at 86, 561 F. Supp. at 445; *see also* 19 C.F.R. § 142.21. Sunshine's jeans were not entered, and Sunshine did not enjoy an immediate delivery privilege. It, therefore, did not have the right to make delivery, and may not assert this incapacity as an exclusion from delivery under § 1514(a)(4).

On the issue of valuation, the record contains conflicting information as to whether Sunshine's jeans should be valued at $2.70 per unit, or at $6.14 and $6.33 as determined by Customs. The problem for Sunshine, however, is that disputed appraisals are not protested under 19 U.S.C. § 1514(a)(4), but under 19 U.S.C. § 1514(a)(1), which provides for protests contesting "the appraised value of the merchandise." Additionally, protests contesting an appraisal by Customs may only be filed after the merchandise in question is liquidated. *See Volkswagen of Am., Inc. v. United States*, 532 F.3d 1365, 1370 (Fed. Cir. 2008) ("If an importer wishes to challenge the appraised value of merchandise, the importer must protest the liquidation."); *United States v. Utex Int'l, Inc.*, 857 F.2d 1408, 1410 (Fed. Cir. 1988) ("It is the liquidation which is final and subject to protest, not the preliminary findings or decisions of customs officers.").

Sunshine's entry of jeans was not liquidated, and so Customs' reappraisal was not yet a protestable decision under § 1514(a)(1). Although Sunshine relies on § 1514(a)(4), that provision does not apply to the valuation question here because the court cannot review appraisal disputes without the final determination of admissibility and assessment of duties that liquidation provides. *See Tak Yuen*, 29 CIT at 549 ("The legality of that contemplated assessment cannot be determined in this proceeding because the rate or amount of duty has

not yet been definitely determined. The plaintiff must wait until after liquidation before he can litigate the issue.").

It is worth noting that Customs' actions below confused this entire proceeding and made abiding by this framework more difficult. When Sunshine filed its protest, Customs did note that it had been "filed in error." However, Customs also denied the protest, and cited a regulation unrelated to these proceedings. This course of action clearly conflicts with the direction of this court as set forth in *Padilla v. United States*, 33 CIT __, 659 F. Supp. 2d 1290 (2009):

> When Customs receives a protest that does not raise a protestable issue within the meaning of 19 U.S.C. § 1514, the agency should mark the protest "[r]ejected as non-protestable." Marking the protest "rejected" sends a clear signal to all involved that there has been no denial of the protest within the meaning of 19 U.S.C. § 1515, and the protest cannot subsequently be contested in this court under 28 U.S.C. § 1581(a). Marking rejected protests as denied only fosters confusion among the parties bringing or challenging such protests, government attorneys defending against such litigation, and the courts.

Padilla, 33 CIT at __, 659 F. Supp. 2d at 1294 (record citation omitted). When Sunshine filed the protest at issue here, it filed a protest that did "not raise a protestable issue within the meaning of 19 U.S.C. § 1514." Not only is this the Government's position here, it appears to have been Customs' position below. In accord with *Padilla*, Customs should then have rejected the protest as non-protestable. This would have clarified Customs' position that the rejection was not a protestable event, and perhaps led to the resolution, or at least proper preservation below, of the issues in dispute presented in this case.

Turning to the final count of Sunshine's complaint, the court concludes that there is no jurisdiction under 28 U.S.C. § 1581(a) to consider Sunshine's claim regarding the date of the rejection. First, and most importantly, Customs issuing an incorrectly dated form is not one of the protestable events listed in 19 U.S.C. § 1514(a). Furthermore, Sunshine does not claim that the rejection was *actually* issued before it attempted to enter its jeans, or that it relied on the May 1, 2012 date on the rejection to its detriment. Moreover, the rejection contained the same entry number that was listed on Sunshine's May 17, 2012 entry form. There is no legitimate way to extend the reach of § 1581(a) to this claim, and the court will not exercise jurisdiction over it.

III. CONCLUSION

For these reasons, the Government's motion to dismiss for lack of jurisdiction is granted. Judgment will be entered accordingly.

Dated: February 26, 2013
New York, NY

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

Slip Op. 13–26

ALUMINUM EXTRUSIONS FAIR TRADE COMMITTEE Plaintiff, v. UNITED STATES Defendant, and AAVID THERMALLOY, LLC, EVERGREEN SOLAR, INC., ZHONGYA SHAPED ALUMINUM (HK) HOLDING LTD., and ZHAOQING NEW ZHONGYA ALUMINUM CO., LTD., Defendant-Intervenors.

Before: Donald C. Pogue, Chief Judge
Consol.[1] Court No. 11–00216

MEMORANDUM AND ORDER

Upon consideration of Defendant-Intervenor's, Aavid Thermalloy, LLC ("Aavid"), and Defendant's motions to dismiss, any responses thereto, and the record as a whole, it is hereby **ORDERED** that the Defendant's motion is **GRANTED** and the Defendant-Intervenor's motion is **GRANTED** in part and **DENIED** in part.

Defendant properly contends that the court lacks subject matter jurisdiction over Plaintiff's claims under 28 U.S.C. § 1581(i) because jurisdiction is currently available under § 1581(c). Therefore, Defendant concludes, the portions of Plaintiff's Complaint which assert jurisdiction under 1581(i) should be dismissed. The court agrees.

It is settled that this court may take jurisdiction under 1581(i) only when jurisdiction is unavailable under other subsections of 28 U.S.C. § 1581. *See Hartford Fire Ins. Co. v. United States*, 544 F.3d 1289, 1292 (Fed. Cir. 2008) (citing *Int'l Custom Prods. v. United States*, 467 F.3d 1324, 1327 (Fed. Cir. 2006)). Here, jurisdiction is available under 1581(c) because Commerce's exclusionary language in the Antidumping Duty and Countervailing Duty Orders (collectively "the Orders") explicitly stated that it was revising the scope of the Orders and therefore the exclusion of all finished heat sinks may be challenged under 1581(c) as a negative part of Commerce's final determination. *E.g., Aluminum Extrusions from the People's Republic of China*, 76 Fed. Reg. 30,650 (Dep't Commerce May 26, 2011) (antidumping duty order) (" . . . the Department is revising the scope of the subject

[1] This action is consolidated with Court No. 11–00218.

merchandise stated in the *Final Determination* to exclude finished heat sinks from the scope of the order."); 19 U.S.C. § 1516a(a)(2)(B)(i) (granting jurisdiction over "final affirmative determinations . . . including any negative part of such a determination").

Defendant-Intervenors assert that this case is not ripe for judicial review under 1581(c) because Plaintiffs failed to exhaust their administrative remedies and must first file a request for a scope determination pursuant to 19 C.F.R. § 351.225(c). This argument misses the point. A scope determination would only suffice to address whether specific imports fall under the scope of Commerce's final determinations and their accompanying orders. Plaintiff's complaint is that Commerce's Orders (revising the scope of the Final Determinations) unlawfully and erroneously excluded all finished heat sinks and deprived Plaintiff of relief to which it was otherwise entitled because the International Trade Commission's negative injury determination was limited to the subset of finished heat sinks sold to electronic manufacturers. Pl's Compl., ECF No. 7 at ¶¶ 7, 13, 14, and 23. A scope determination request, therefore, could not address the sufficiency of the Orders as a whole.

Defendant and Defendant-Intervenor's motions to dismiss for lack of subject matter jurisdiction under 28 U.S.C. § 1581(i) are therefore **GRANTED** and Defendant-Intervenor's motion to dismiss for failure to exhaust administrative remedies is **DENIED**.

It is so **ORDERED**.

Dated: February 27, 2013
New York, NY

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

Slip Op. 13–27

WUHU FENGLIAN CO., LTD., and SUZHOU SHANDING HONEY PRODUCT CO., LTD., Plaintiffs, v. UNITED STATES, Defendant, and AMERICAN HONEY PRODUCERS ASSOCIATION, AND SIOUX HONEY ASSOCIATION, Defendant-Intervenors.

Before: Gregory W. Carman, Judge
Court No. 11–00045

[Judgment will be entered sustaining the Department of Commerce's redetermination on remand to rescind Plaintiffs' new shipper reviews.]

Dated: February 27, 2013

Yingchao Xiao, Lee & Xiao, of San Marino, CA for Plaintiffs.

Courtney S. McNamara, Trial Attorney, Commercial Litigation Branch, Civil Division, United States Department of Justice, of Washington, DC, for Defendant. With her on the briefs were *Stuart F. Delery*, Assistant Attorney General, *Jeanne E. Davidson*, Director, *Reginald T. Blades, Jr.*, Assistant Director, and *Sapna Sharma*, Attorney, United States Department of Commerce, of Counsel.

Michael J. Coursey, *R. Alan Luberda*, and *Benjamin Blase Caryl*, Kelley Drye & Warren LLP, of Washington, DC for Defendant-Intervenors.

OPINION & ORDER

Carman, Judge:

Plaintiffs Wuhu Fenglian Co., Ltd. and Suzhou Shanding Honey Product Co., Ltd (collectively "Plaintiffs"), exporters of honey from the People's Republic of China ("PRC"), challenge a redetermination decision by the U.S. Department of Commerce ("Commerce") following a remand from this Court. In the Remand Redetermination, Commerce accepted into the administrative record certain documents that Plaintiffs submitted, as required by the Court. Upon evaluation of the record, including the new documents, Commerce determined to rescind antidumping duty new shipper reviews requested by Plaintiffs. *See* Final Results of Redetermination Pursuant to Court Remand ("Remand Redetermination"), ECF No. 82. The Court sustains Commerce's remand redetermination because it is supported by substantial evidence on the record and is otherwise in accordance with law.

BACKGROUND

Plaintiffs requested new shipper reviews on honey from the People's Republic of China on February 4, 2010. Remand Redetermination at 2. Commerce published a Preliminary Determination on September 10, 2010, rescinding the new shipper reviews on the grounds that the sales made by Plaintiffs did not appear to be bona fide. *Honey From the People's Republic of China: Preliminary Intent to Rescind New Shipper Reviews*, 75 Fed. Reg. 55,307, 55,308 (Sep. 10, 2010) ("Preliminary Determination"). Commerce's Final Determination came to the same conclusion. *Honey From the People's Republic of China: Final Results and Rescission of Antidumping Duty New Shipper Reviews*, 76 Fed. Reg. 4,289, 4,290 (Jan. 25, 2011) ("Final Determination"). Plaintiffs then challenged the Final Determination by this lawsuit.

I. *Remand to Commerce*

On April 25, 2012, the Court issued Slip Op. 12–57, remanding the case to Commerce for redetermination. ECF No. 80. In the remand opinion, the Court required Commerce to accept certain documents from Plaintiffs that Commerce had initially rejected. Plaintiffs had

submitted a number of documents by way of rebutting certain data from U.S. Customs and Border Protection ("CBP") that was placed into the administrative record by Commerce. Commerce rejected the rebuttal as untimely. In the absence of any statutory or regulatory deadline for rebutting a filing by Commerce, the Court held that Commerce had wrongly rejected the rebuttal, which had been submitted only 20 days after Commerce's administrative record filing and almost four months before Commerce issued the final results. *See* Slip Op. 12–57 at 10–14. The Court therefore required Commerce to accept the rebuttal materials and issue a remand redetermination taking account of them. The Court declined, however, to require Commerce to supplement the remand record with certain factual information, consisting of a protest lodged with CBP by an unrelated exporter of honey from the PRC, which Plaintiffs did not submit during the new shipper review. *See id.* at 15–16.

II. *Redetermination on Remand*

On remand, Commerce noted that the rebuttal evidence submitted by Plaintiffs contrasted with CBP data Commerce had placed in the record regarding imports of honey from the PRC during the period of review ("POR"). In resolving the conflict in the data, Commerce determined that Plaintiffs' submission were not as reliable as the CBP data, and therefore reached the same conclusion as in the Final Results: that Plaintiffs' sales were not *bona fide* and that Commerce would thus rescind the new shipper reviews. Remand Redetermination at 2, 4–5.

A. Honey Export Statistics from PRC

Plaintiffs submitted honey export statistics published by the Ministry of Commerce ("MOC") of the PRC for May 2009, indicating that no honey was exported to the United States that month. *Id.* at 5. According to Plaintiffs, this report shows the CBP data to be inaccurate, since the CBP data showed entries of PRC honey into the United States during May 2009. *Id.*

Commerce stated that it has a routine method to resolve situations in which it faces "two conflicting data sources": Commerce gives preferences to "primary data sources, where the Department knows the methodology used to collect the data." *Id.* at 6.

Applying this analysis, Commerce determined that it would not rely on the PRC honey report because the record lacked information as to how the PRC data was collected and collated; by contrast, the CBP data contained "the actual entry documentation for the shipment, including the Customs 7501 form, invoice, and bill of lading."

Id. Commerce specifically noted that the record did not show the definition of "honey" employed by the MOC, "which, alone, could explain why the PRC MOC data indicate no exports." *Id.* Commerce also noted that the record did not reveal whether the PRC honey report was based on primary export documents, secondary trade reports, or some other source or sources. *Id.* Finally, Commerce noted that "shipping lag times" might account for the absence of exports in the honey report at a time when the CBP data showed entries of honey from the PRC. *Id.*

B. Website and Advertising Printouts from PRC Exporter

Second, Plaintiffs submitted printouts from the website and internet advertisements of a certain Chinese honey exporter whose identity is Business Propriety Information and who will therefore be referred to simply as the "Confidential Exporter." *Id.* at 7. Sales into the United States by the Confidential Exporter were reported in the CBP data that Commerce used in its *bona fide* analysis. *Id.* Plaintiffs claim the web printouts and advertisements show that the Confidential Exporter did not export to the United States during the relevant time period, and that as a result the CBP data must be incorrect. *Id.*

Commerce again applied its technique for resolving questions about the relative reliability of conflicting documents. Commerce determined that no evidence showed when the website printouts were created, whether they were ever updated (and, if so, when), and whether the statements in the documents related to the POR for these new shipper reviews. *Id.* As a result, Commerce determined that the website and advertising printouts from the Confidential Exporter did not discredit the CBP data. *Id.*

C. PIERS Data from United States Government

Third, Plaintiffs submitted data from the United States Government Port Import Export Reporting System ("PIERS") which, according to Plaintiffs, show that no honey from the PRC was entered into the United States during May, June, and July 2009. *Id.* Commerce acknowledged that the PIERS data showed "no entries of honey from the PRC to North America during May 2009." *Id.* However, Commerce determined that "without knowing the methodologies used to gather and analyze the PIERS data," it could not be given as much weight as the CBP data. *Id.* at 8. Noting that the CBP data contains entry documentation including the Customs 7501 form, invoice, and bill of lading, Commerce determined that "something as simple as a difference in the collection methodologies between the sources or the different level of specificity of the underlying source of the PIERS data"

could explain the discrepancy between the PIERS and CBP data. *Id.* In this regard, Commerce noted more specifically that PIERS data "are gathered from entries on ships' manifests," while the CBP data incorporated "a variety of actual import documentation," including the Customs entry paperwork that determines the "legal description" of imported goods. *Id.* at 18. Having already addressed the issue of conflicts between PIERS data and CBP data in other cases,[1] and having developed a policy of giving more weight to CBP data in the case of such a conflict, Commerce found that the conflicting PIERS data provided no reason to abandon use of the CBP data in this instance. *Id.* at 8.

D. National Honey Reports from the USDA

Finally, Plaintiffs submitted National Honey Reports from the United States Department of Agriculture ("USDA") for December 2008, June and July 2009, and September through November 2009. *Id.* The USDA National Honey Reports contained information at variance with the CBP data as to the price and quantity of honey entered into the United States from the PRC during the period of review; Plaintiffs sought to undercut Commerce's reliance on the CBP data by introducing the honey reports into the record. *Id.* at 8–9. However, Commerce found the record devoid of evidence as to the methodology by which the honey reports were collected. *Id.* Commerce also noted that it was not even clear whether the data contained in the honey reports was related to the relevant sales within the POR. *Id.* Commerce therefore determined that the USDA honey reports could not be given as much weight as the CBP data, which it decided to continue to rely upon.

In the end, then, Commerce determined that the CBP data was the most reliable of the available data regarding honey imports from the PRC to the United States during the POR, and therefore found no reason in the newly-submitted data to alter its analysis of whether Plaintiffs' sales were *bona fide*. Consequently, Commerce determined

[1] This particular issue was already addressed in the Final Determination of Commerce, issued prior to the Court's remand in this case, and the accompanying Issues and Decisions Memorandum. The Court's remand did not invalidate this analysis. Commerce also addressed the precise question of whether to rely upon PIERS data or CBP data in the case of a conflict between the two in a 2007 determination, *Preliminary Recission of Antidumping Duty Administrative Review: Certain Hot-Rolled Carbon Steel Flat Products from the People's Republic of China*, 72 Fed. Reg. 32,072 (June 11, 2007). In that case, Commerce articulated a policy of weighing CBP data more heavily than conflicting PIERS data since the CBP data is based on primary import documentation, including entry paperwork that provides the appropriate legal classification of the goods contained in the entry, while PIERS data is simply drawn from ship manifests. Remand Redetermination at 18; Defendant's Response to Plaintiff's Comments upon Commerce's Final Remand Redetermination at 17–18, ECF No. 95.

again that Plaintiffs' sales were not *bona fide* and affirmed its recission of the new shipper reviews.

JURISDICTION AND STANDARD OF REVIEW

The Court has jurisdiction over this case pursuant to 28 U.S.C. § 1581(c), and 19 U.S.C. §§ 1516a(a)(1), (a)(2)(B)(iii). In reviewing Commerce's remand redetermination, the Court will "hold unlawful any determination, finding, or conclusion found . . . to be unsupported by substantial evidence on the record, or otherwise not in accordance with law." 19 U.S.C. § 1516a(b)(1)(B)(i).

ANALYSIS

Plaintiffs raise three main critiques of Commerce's Remand Redetermination. First, Plaintiffs attack the procedural propriety of the Remand Redetermination, contending that it is "unacceptably incomplete" owing to Commerce's refusal on remand to accept into the record the CBP Protest filed by an unrelated importer. Comments on the Department of Commerce's Final Results of the Redetermination Pursuant to Court Remand ("Plaintiffs' Comments") at 3, ECF No. 85.

In a similar vein, Plaintiffs contend that the substance of the Remand Redetermination is "unacceptably inaccurate" and therefore must be overturned because Commerce acted unfairly in failing to consider the contents of the rejected CBP Protest. *Id.*

Plaintiffs also assert that, in any case, Commerce acted contrary to the weight of the record evidence in finding that the PRC honey export data, website and advertising printouts from the Confidential Exporter, PIERS data, and USDA honey reports were all less reliable than the CBP data. *Id.* at 26–28.

The Court finds that each of these critiques fails to undermine the Remand Redetermination for the reasons set forth in detail below.

I. *Commerce Properly Refused to Accept the CBP Protest*

Plaintiffs do not argue that they submitted the CBP Protest documents into the record in a timely fashion. Plaintiffs instead offer several reasons why Commerce was wrong to refuse, on remand, to reopen the record and accept the CBP Protest despite its untimely submission.

Plaintiffs assert that Commerce "had a reasonable amount of time in which to consider the information contained in the CBP Protest" because the Court gave Commerce sixty days to submit its Remand Determination. *Id.* at 6. Plaintiffs also insist that Commerce rejected the CBP Protest with no lawful basis, "as doing so unduly hampered Commerce's ability to accurately determine the dumping margins" and improperly substituted finality for accuracy. *See id.* at 7–10.

Plaintiffs also argue that the Court should apply a doctrine that would constructively define the administrative record in this way: the CBP Protest, since it was filed before another federal government agency, was therefore "a matter of federal government record" that was "already in the government's [i.e. Commerce's] possession," putting Commerce "on judicial notice of the content and substance of the CBP Protest." *Id.* at 7. Plaintiffs eventually rise to what may be their most creative expression of this argument, urging the Court that, "because the CBP Protest is a byproduct of and pertains directly to the accuracy of the CBP data used by Commerce, the substance of the CBP Protest is within, or at the very least an essential and inseparable appurtenance of, the original administrative record." *Id.* at 10. (Presumably, the natural consequence of these last two arguments would be to redefine the CBP Protest as being a part of the record *already*, although Plaintiffs leave that deduction for the Court to reach on its own.)

In explaining why these arguments fail, it is appropriate to begin by pointing out two relevant prior decisions in this case. On May 25, 2011, the Court entered an order denying Plaintiffs' First Motion to Stay. *See* ECF No. 10 (motion), ECF No. 28 (order). Plaintiffs' motion sought to delay the case until such time as a final decision was rendered on the CBP Protest. The Court indicated that it was denying the stay in part "[u]pon consideration of . . . the responses in opposition filed by Defendant and Defendant-Intervenor." *See* Order, ECF No. 28. The opposition filings referenced in the order focused almost entirely on the argument that Plaintiffs' motion improperly sought to stall the case until the CBP Protest was decided. *See generally* Defendant's Response in Opposition to Plaintiffs' Motion to Stay, ECF No. 25; Defendant-Intervenors' Response in Opposition to Motion to Stay, ECF No. 26. Both defendant-side parties argued that such a stay would function to surreptitiously introduce the contents of the CBP Protest into the administrative record, which would be improper because the CBP Protest was not filed until *after* Commerce's final determination and therefore was not before the Department when it rescinded Plaintiffs' new shipper reviews.

Second, the Court's order remanding this case to Commerce for redetermination incidentally disposed of a further attempt by Plaintiffs to introduce the CBP Protest into the administrative record. *See* Plaintiffs' Motion to Supplement Administrative Record, ECF No. 73. The Court denied the motion, and also indicated that it would not require Commerce to add the CBP Protest to the administrative

record on remand. (*See* Slip-Op. 12–57 at 15–16 (stating that the Court was "disinclined to obligate Commerce to accept or consider factual information that was not presented during the underlying administrative proceeding").)

For the third (and final) time, the Court now rejects Plaintiffs' attempts to place the CBP Protest at the center of this case. The Court finds that Commerce's decision not to reopen the administrative record on remand was a completely reasonable exercise of its authority. As Commerce explained to Plaintiffs, reopening the record at the time Plaintiffs' request was filed would have hampered Commerce's ability to complete the remand proceeding in the time allotted by the Court, and Defendant-Intervenors would not have had a fair chance to respond to the CBP Protest adequately. Defendant's Response to Plaintiff's Comments upon Commerce's Final Remand Redetermination ("Defendant's Response") at 9, ECF No. 95.

Plaintiffs also urge the Court to misapply the "*NTN / Timken* doctrine," which in certain circumstances requires that the Department accept late factual submissions in order to properly weigh the need for accuracy against the need for finality. *See NTN Bearing Corp. v. United States*, 74 F.3d 1204, 1208 (Fed. Cir. 1995); *see also Timken U.S. Corp. v. United States*, 434 F.3d 1345, 1353–54 (Fed. Cir. 2006). That doctrine is inapplicable here because the CBP Protest is not the kind of untimely factual submission that falls within the *NTN / Timken* doctrine, which "stress[es] that, at the preliminary results stage, Commerce abuses its discretion where it refuses to let a respondent establish an accurate dumping margin by correcting mistakes in its response." *Fischer S.A. Comercio, Industria and Agricultura v. United States*, 34 CIT ___, ___, 700 F. Supp. 2d 1364, 1375 (2010). The doctrine is not as broad as Plaintiffs urge. It is limited to the correction of mistakes in timely factual submissions to ensure an accurate assessment at the final determination stage, which is inapplicable here. And in any case the doctrine has never been extended to require Commerce to reopen the record in a relatively brief remand redetermination in which the Court, rather than the trade laws, provides the deadlines. The Court declines to extend the *NTN / Timken* doctrine in that manner today.

As to Plaintiffs' contentions that the CBP Protest should be considered to be constructively within the administrative record due to the fact that it is tangentially related to documents previously considered in the record before Commerce, Plaintiff cites no authority for this concept, apart from using the legalese "judicial notice." However, the briefest of references to Black's Law Dictionary reveals that judicial notice involves "[a] court's acceptance, for purposes of convenience

and without requiring a party's proof, of a well-known and indisputable fact; the court's power to accept such a fact." Black's Law Dictionary, 9th Ed., at 923. A party may not invoke an inherent power of the Court, especially to assert rights against Commerce, much less to resolve a contested matter such as the classification of entries in a CBP Protest. The Court also rejects Plaintiffs' notion that the Court may, essentially by fiat, interpret the administrative record to include a protest filed after Commerce reached its final determination on that record.

For all of these reasons, the Court concludes that Commerce acted appropriately when it rejected the CBP Protest from the record on remand, and consequently upholds that portion of the Remand Redetermination.

II. *Commerce Correctly Declined to Consider the Contents of the CBP Protest*

The Court also rejects Plaintiffs' argument that Commerce reached an improperly inaccurate result because it refused to examine the contents of the CBP Protest. This point can be seen as moot given the Court's decision that Commerce properly rejected the CBP Protest from the remand record, but the Court believes it is still appropriate to briefly examine this contention in the alternative.

Plaintiffs describe the purported relevance of the CBP Protest this way:

> In a nutshell, an importer unrelated to Plaintiffs made entries of a product it described as non-subject merchandise. CBP reclassified it as honey. Commerce relied on the data from these entries in its unfavorable analyses of the Plaintiffs' U.S. sales. The unrelated importer subsequently filed an official protest, arguing that their [sic] entries were not of honey, and supporting their [sic] argument with laboratory analyses. The results of this protest are pending.

Plaintiffs' Comments at 11–12.

The Court refuses to require that Commerce examine the merits of any CBP Protest related to CBP data it wishes to use before it may rely on such CBP data in determining the final results of a new shipper review. Such a rule would, as Commerce rightly worries, either force Commerce to consider the content of protests and intrude on the statutory authority of Customs, or endlessly delay new shipper reviews while Commerce deferred to CBP and the courts to finalize classification questions. Defendant's Response at 10–11. The statu-

tory presumption of correctness that attaches to Customs' classification decisions would also be weakened and, potentially, rendered a nullity.

The Court immediately sees several significant practical concerns stemming from such a precedent. Commerce would likely be prevented, in practice, from relying on CBP data. Reliance on CBP data would *always* raise the potential that a future protest filed after Commerce's final determination would effectively undo the Commerce proceeding, and require Commerce to reopen its proceeding and record pending (1) the outcome of the protest before Customs, (2) any appeal of a denial by Customs to the Court of International Trade, (3) the conclusion of any appeals of a CIT decision to the Court of Appeals for the Federal Circuit and the Supreme Court, and (4) the eventual final legal settlement of all issues related to proper customs classification of the involved goods. This would be a deeply problematic result.

Not only that, but the Court fears that such a rule could give importers who sought a new shipper review a perverse ability to tamper with Commerce's proceedings. By protesting before Customs the classification of entries that formed the basis of new shipper reviews that they initiated before Commerce, importers could force Commerce into conflict with Customs, potentially obtain contradictory determinations from the two agencies, and render the time limits on new shipper reviews a virtual nullity.

Plaintiffs contend that, "[c]onsidering what the Plaintiffs stand to lose vis-a-vis what can only be a minor and nonrecurring inconvenience to Commerce or CBP of having to wait to wind up their procedures, . . . the minimum of fairness requires that all involved parties at least wait for the results of the CBP Protest." Plaintiffs' Comments at 12. The Court disagrees for the reasons described above, and affirms Commerce's decision to decline to consider the contents of the CBP Protest in its Remand Redetermination.

III. *Commerce's Reliance on the CBP Data Rather Than Plaintiffs' Submissions*

The Court finds that Commerce properly considered the PRC honey export data, website and advertising printouts from the Confidential Exporter, PIERS data, and USDA honey reports that Plaintiffs' submitted. Commerce's decision that these sources of data were all less reliable than the CBP data was supported by the record evidence and otherwise in accordance with law, and is therefore affirmed.

A. Commerce Properly Found the CBP Data More Reliable than the PRC Honey Export Data

Plaintiffs attack on Commerce for weighing the CBP data as more reliable than the PRC honey export data fails because it is (1) based on assumptions that are not part of the record and (2) adopts a backwards approach that Commerce should have the burden of proving *unreliability* of record data, rather than Plaintiffs having a burden to demonstrates the reliability of data they placed in the record. Commerce correctly rejected these contentions, and the Court therefore affirms the agency's decision to rely on the CBP data over the PRC honey export data.

Plaintiffs begin by arguing that "Commerce was fully aware that the MOC is a Chinese Government entity essentially equivalent to Commerce." Plaintiffs' Comments at 15. Plaintiffs rely on "common knowledge" and (again) "judicial notice" to support their assertion that the "MOC obtains its data directly from Chinese customs documentation." *Id.* Plaintiffs do not cite (and the Court has not located) any evidence in the record to establish the truth of these assertions. Plaintiffs also urge that it "was improper for Commerce to treat China's data with any less deference than it would the data of other modern countries." *Id.* "[T]he sensible assumption," Plaintiffs contend, "is that official PRC government data—which the MOC data is—is collected by PRC government officials at the involved ports of export." *Id.* at 17.

The remainder of Plaintiffs arguments on the PRC honey export data are suggestions that Commerce failed in a duty to build an adequate record as to the data's reliability. Plaintiffs suggesting that "a minimal and reasonable inquiry by Commerce would have revealed" the reliability of the data, *id.* at 15; that it was "unreasonable" for Commerce to question whether the MOC data came from primary sources "when there is nothing on the record to suggest as much," *id.* at 17; and that "Commerce had ample time in which to make basic inquiries in order to satisfy its concerns" about the MOC data, *id.*

Plaintiffs miss the point with these arguments. The Court does not review Commerce's decisions to ensure that they are based on sensible assumptions, but rather for evidentiary support in the administrative record and consistency with law. 19 U.S.C. § 1516a(b)(1), (B)(i) (the Court will "hold unlawful any determination, finding, or conclusion found . . . to be unsupported by substantial evidence on the record, or otherwise not in accordance with law"). Indeed, any Commerce decision that was based on assumptions—sensible or otherwise—would be very unlikely to survive a substantial evidence challenge before this Court.

Plaintiffs also mistakenly press for the Court to impose a duty on Commerce to assemble the administrative record of substantial evidence upon which its decisions must be made. However, it is Plaintiffs—*not* Commerce—who bear the burden of creating a record of relevant data in a timely fashion. *Alloy Piping Prods., Inc. v. United States*, 26 CIT 330, 349–50, 201 F. Supp. 2d 1267, 1284 (2002) ("The general rule" is that "the respondent bears the burden and responsibility of creating an accurate record within the statutory timeline"). Plaintiffs cite no authority that would oblige Commerce to gather, on behalf of Plaintiffs, information for the record to ensure that Commerce has a complete understanding of the methodology behind Plaintiffs' submitted data. Nor is the Court aware of any such authority.

The Court therefore finds that Commerce fulfilled its duty in regard to examination of the MOC data: Commerce considered the nature of the data, the available information as to the veracity and weight the data should be accorded, and then made a reasonable, evidence-supported decision to rely instead on the CBP import data that conflicted with the MOC data. Remand Redetermination at 5–6, 10–13; Defendant's Response at 13–14. The Court affirms that determination as supported by substantial evidence and in accordance with law.

B. Commerce Properly Found the CBP Data More Reliable than the Website and Advertising Printouts from the Confidential Exporter

Plaintiffs have similarly thin grounds to attack Commerce's treatment of the printouts from the website of the Confidential Exporter. In the case of these documents, Plaintiffs' arguments are founded on the misapprehension that Commerce did "not give the printouts of the web site of the PRC exporter consideration." Plaintiffs' Comments at 20. Plaintiff cites instances in which Commerce has relied on similar documents and quibbles with Commerce for interpreting ambiguous language in the documents as suggesting that the Confidential Exporter might, in fact, export to the United States. *Id.* at 18–19.

The Remand Redetermination makes it clear that Commerce did, in fact, consider the printouts from the Confidential Exporter. Remand Redetermination at 14–16. Although Plaintiffs wish the Court to substitute Plaintiffs' weighing of those documents for Commerce's weighing, that is not the nature of the Court's inquiry. Instead, the Court finds that Commerce considered the documents and found no evidence in the record from which it could conclude that they were more reliable than the CBP data with which they directly conflicted.

Id. Therefore, the Court affirms Commerce's decision in the Remand Redetermination not to rely on the Confidential Exporter's website printouts over the CBP data.

C. Commerce's Reliance on the CBP Data Instead of the PIERS Data Was Supported by Substantial Evidence

In challenging the Department's decision to accord more weight to the CBP data than to the PIERS data, Plaintiffs assert that, despite a long history of relying on PIERS data, Commerce departed from its practice and did not give Plaintiffs' PIERS submissions full consideration in this case. Plaintiffs' Comments at 22 ("Commerce knows the PIERS data is probative"), 23 (it is unreasonable for "Commerce not to give the PIERS summaries full consideration"). Plaintiffs claim repeatedly that Commerce has a long practice of obtaining and using PIERS data, is intimately familiar with the collection methodologies underlying PIERS data, knows that it is as accurate as CBP data, and accords it the same weight as CBP data. *Id.* at 20–23.

Plaintiffs also argue that, absent specific evidence that the PIERS data were unreliable, Commerce should be forced to either rely on them or obtain the underlying data to resolve any questions about their adequacy. *Id.* at 20 ("there is nothing in the record to indicate that [PIERS data] is any less reliable or accurate than the similarly collected CBP data"), 21 (Commerce, if "sincerely concerned about the corroboration provided by the entry documentation," could have affirmatively obtained it).

Plaintiffs' assertions are unconvincing. Plaintiffs have it backwards when they suggest that Commerce must rely on the PIERS data absent evidence that it is unreliable; in fact, Commerce must find substantial evidence to support any data upon which it rests its decision. The Court therefore rejects this attack by Plaintiffs. The Court also finds that Commerce gave full and careful consideration to the PIERS data. Commerce explained that it found the CBP data more reliable because the CBP data was drawn from a variety of entry documents, including CBP documents that determine the legal description of merchandise contained in entries, while the PIERS data was obtained only from ship manifests and did not have the same legal weight as the CBP data. Remand Redetermination at 18. Commerce therefore reasonably applied its long-standing policy of giving weight to CBP data over PIERS data in situations where the data conflict. *Id.* Commerce explained that its reliance on PIERS data in past proceedings never found it more reliable than conflicting CBP data. *Id.* at 17–18. Far from failing to consider the PIERS data, Commerce fully considered it but came to a conclusion that was not to

Plaintiffs' liking. However, the agency's decision was supported by substantial evidence in the record and is therefore affirmed.

D. Commerce's Reliance on the CBP Data Instead of the USDA Honey Reports Was Also Supported by Substantial Evidence

Plaintiffs claim that the USDA honey reports reveal that the CBP data are flawed as to price and quantity. Plaintiffs' Comments at 24. In attacking Commerce's decision not to rely on the USDA honey reports, Plaintiffs contend that Commerce should be "considered aware of the data collection methodology and content" of the USDA reports since Commerce and the USDA are "each part of the same branch of the federal government" and are therefore "parts of the same entity." *Id.* at 23–24. From this basis, Plaintiffs argue that Commerce refused to give the USDA honey reports "serious consideration," since it did not rely on them despite a lack of evidence in the record to suggest that the USDA reports were flawed.

Again Plaintiffs mischaracterize Commerce's determination. Commerce in fact gave careful consideration to the honey reports. This is demonstrated by Commerce's decision not to rely on the reports because the record lacked evidence about the time span during which the information was collected or the Harmonized Tariff Schedule numbers employed in the reports. Remand Redetermination at 9. As a result, Commerce was unable to tell whether the honey reports even related to the POR as issue. *Id.* Commerce also points out again that it is Plaintiffs that bear the burden of demonstrating the reliability of the USDA reports, not Commerce. *Id.* at 20–21; Defendant's Response at 20. Given that Commerce closely evaluated the substantial evidence in the record when determining that the USDA honey reports were not as reliable as the CBP data, the Court affirms that decision.

E. Commerce's Redetermination Is Supported by Totality of Evidence

Plaintiffs argue that the totality of the evidence overcame any presumption that the CBP data were accurate. Plaintiffs' Comments at 26–28. Since the CBP data Commerce chose to rely upon conflicts with all other information on the record, goes this argument, the agency's "preference for and reliance on CBP data [became] unreasonable." *Id.* at 27. Plaintiffs urge the Court to overturn the redetermination because all of the sources in the record "are consistent in that they all point to the same conclusion, that the CBP data is wildly incorrect." *Id.*

Plaintiffs overstate their argument. While each of the four sources of data submitted by Plaintiffs conflicts with the CBP data in one way

or another, that does not mean that these four data sources agree with each other about the nature of imports of PRC honey into the United States during the POR, or whether Plaintiffs' imports were *bona fide*. Commerce is not required to use perfect data, but to make careful determinations based on the most reliable data in the record. The Court is satisfied that Commerce has done so here. The Court rejects the notion that the mere presence of numerous less reliable data sets in the record can automatically impugn the reliability of the best record evidence.

Plaintiffs' remaining contentions have been examined and found without merit.

CONCLUSION

For the reasons set forth in this opinion, the Court finds that Commerce's Remand Redetermination is based upon substantial evidence in the record and is in accordance with law, and it is therefore

ORDERED that the Remand Redetermination be, and hereby is, SUSTAINED.

Dated: February 27, 2013
New York, New York

/s/ Gregory W. Carman
GREGORY W. CARMAN, JUDGE