U.S. Customs and Border Protection

Slip Op. No. 13–61

ZHENGZHOU HUACHAO INDUSTRIAL CO., LTD. Plaintiff, v. UNITED STATES, Defendant, and FRESH GARLIC PRODUCERS ASSOCIATION, CHRISTOPHER RANCH, L.L.C., THE GARLIC COMPANY, VALLEY GARLIC, and VESSEY AND COMPANY, INC. Defendant-Intervenors.

Before: Richard K. Eaton, Judge
Court No. 11–00139
Public Version

[Plaintiff's motion for judgment on the agency record is denied and the Department of Commerce's final determination rescinding plaintiff's new shipper review is sustained.]

Dated: May 14, 2013

Mark B. Lehnardt, Lehnardt & Lehnardt LLC, of Liberty, MO, argued for plaintiff.

Stephen C. Tosini, Trial Attorney, Commercial Litigation Branch, Civil Division, United States Department of Justice, of Washington, D.C., argued for defendant. With him on the brief were *Stuart F. Delery*, Acting Assistant Attorney General, *Jeanne E. Davidson*, Director, and *Reginald T. Blades, Jr.*, Assistant Director. Of counsel on the brief was *George H. Kivork*, Attorney, Office of the Chief Counsel for Import Administration, United States Department of Commerce, of Washington, D.C.

Michael J. Coursey, Kelley Drye & Warren, LLP, of Washington, D.C., argued for defendant-intervenors. With him on the brief was *John M. Herrmann*.

OPINION

Eaton, Judge:

Before the court is the motion for judgment on the agency record, pursuant to USCIT Rule 56.2, of plaintiff Zhengzhou Huachao Industrial Co., Ltd. ("plaintiff" or "Huachao"), an exporter of fresh, whole garlic from the People's Republic of China ("PRC"). By its motion, Huachao challenges the Department of Commerce's ("Commerce" or the "Department") rescission of its new shipper review under the antidumping duty order on fresh garlic from the PRC following a determination that Huachao's sale into the United States was not bona fide. *See* Garlic From the PRC, 76 Fed. Reg. 19,322 (Dep't of Commerce Apr. 7, 2011) (rescission of antidumping duty new shipper reviews) ("Rescission"), and the accompanying Final Bona Fides Memorandum (Dep't of Commerce Mar. 31, 2011) ("Bona Fides

Mem."); Fresh Garlic From the PRC, 59 Fed. Reg. 59,209 (Dep't of Commerce Nov. 16, 1994) (antidumping duty order) ("Order"). The period of review ("POR") is November 1, 2008 through October 31, 2009.

At center, "Huachao argues that the agency record . . . does not contain substantial evidence to support Commerce's findings that Huachao's sale price, volume, sales transaction, or import information lead to a conclusion that Huachao's sale was not *bona fide*." Pl.'s Br. in Supp. of Mot. for J. on the Agency R. 3 (ECF Dkt. No. 43) ("Pl.'s Br."). Defendant United States ("defendant") fully supports Commerce's determination and insists that it "is supported by substantial evidence and is in accordance with law." Def.'s Mem. in Opp. to Pl.'s Mot. for J. on the Agency R. 1 (ECF Dkt. No. 61) ("Def.'s Mem."). Defendant argues that "Commerce properly considered the quantity, value, business structure, and payment terms of the transaction, and found that the price of Huachao's sale was unusually [[ ]], the quantity was unusually [[ ]], the business decision of Huachao to process *and* sell its garlic was atypical, and the importer's payment records were inconsistent and incomplete." Def.'s Mem. 18.

Defendant-intervenors, the Fresh Garlic Producers Association and its individual members (Christopher Ranch, L.L.C., The Garlic Company, Valley Garlic, and Vessey and Company) ("defendant-intervenors"), maintain that plaintiff's contentions are without merit and the court should sustain the determination in its entirety. Def.-Ints.' Resp. in Opp. to Pl.'s Mot. for J. on the Agency R. 1 (ECF Dkt. No. 56) ("Def.-Ints.' Resp."). The court has jurisdiction pursuant to 28 U.S.C. § 1581(c) (2006) and 19 U.S.C. § 1516a(a)(2)(B)(iii) (2006).

For the reasons set forth below, plaintiff's motion is denied and defendant's Rescission of Huachao's new shipper review is sustained.

BACKGROUND

In 1994, Commerce issued an antidumping duty order on imports of fresh garlic from the PRC. Order, 59 Fed. Reg. at 59,209. Huachao did not participate in the underlying antidumping investigation or in any administrative review and, as a new shipper, is subject to the PRC-wide antidumping rate unless it can secure an individual rate through a new shipper review.

Huachao operates as a domestic garlic trader in the PRC.[1] Def.'s Mem. 3. In the summer of 2009, an acquaintance of Huachao's owner discussed its operations with representatives of an unaffiliated U.S. importer. Pl.'s Br. 3. Huachao and the U.S. importer then negotiated

[1] The record shows that Huachao has [[ ]] shareholders and [[ ]] permanent employees. Def.'s Mem. 3.

a purchase and sale of garlic by telephone and email, eventually leading to an agreement whereby the U.S. importer would import Huachao's garlic into the United States. Pl.'s Br. 3–5. Huachao made a single sale into the United States during the POR, which consisted of [[ ]] kilograms of fresh, whole, unpeeled garlic, with a total value of [[ ]], or an average unit value ("AUV") of [[ ]] per kilogram. Def.'s Mem. 3.

On December 1, 2009, Commerce received Huachao's timely request for a new shipper review. *See* Fresh Garlic from the PRC (Dep't of Commerce Nov. 30, 2009) (request for new shipper review) (P.R. Doc. 3; C.R. Doc. 3). On January 5, 2010, the Department initiated the new shipper reviews for three exporters of fresh garlic from the PRC, including Huachao. Fresh Garlic From the PRC, 75 Fed. Reg. 343 (Dep't of Commerce Jan. 5, 2010) (initiation of new shipper reviews).

On November 12, 2010, Commerce issued its Preliminary Results, finding that Huachao's sale *was* bona fide, and setting its dumping margin at $0.03 per kilogram. *See* Fresh Garlic From the PRC, 75 Fed. Reg. 69,415, 69,417, 69,422 (Dep't of Commerce Nov. 12, 2010) (preliminary results of new shipper reviews and preliminary rescission in part) ("Prelim. Results"), and accompanying Preliminary Bona Fides Analysis Mem. (Dep't of Commerce Nov. 1, 2010) ("Prelim. Bona Fides Mem."). In the Preliminary Results, however, Commerce also stated that "the price and quantity level of [Huachao's] sale causes some concern regarding the *bona fide* nature of the sale." Prelim. Bona Fides Mem. at 4. Furthermore, Commerce found that "given the concerns regarding . . . [Huachao's] reported price and quantity of its garlic sale, as well as the timing of its customer's payment, [Commerce] plan[ned] to continue to examine all factors relating to the *bona fide* nature of [Huachao's] sale throughout the remainder of this [new shipper review]." Prelim. Bona Fides Mem. at 6. Commerce then issued a supplemental questionnaire to Huachao and requested briefing from all parties on the bona fides of the company's sale. In their briefing, the domestic petitioners (defendant-intervenors here) challenged the bona fides of Huachao's sale. Def.-Ints.' Resp. 5–7. Additional evidence was placed on the record by both plaintiff and defendant-intervenors. Rescission, 76 Fed. Reg. at 19,322.

On April 7, 2011, Commerce determined that Huachao's sale was not bona fide, and rescinded the new shipper review. Rescission, 76 Fed. Reg. at 19,324. In the Rescission, Commerce found that

> (1) Huachao's sale price is so high as to be commercially unreasonable and not indicative of the garlic industry, (2) Huachao's sales quantity is not commercially reasonable, (3) Huachao's

function as the processor of its U.S. sale is atypical of its normal business practice, and (4) there are inconsistencies in the information provided by Huachao's customer in the United States, raising doubts about Huachao's description of the sale's structure.

Rescission, 76 Fed. Reg. at 19,324.

STANDARD OF REVIEW

"The court shall hold unlawful any determination, finding, or conclusion found . . . to be unsupported by substantial evidence on the record, or otherwise not in accordance with law." 19 U.S.C. § 1516a(b)(1)(B)(i).

DISCUSSION

I. Legal Framework

Under 19 U.S.C. § 1675(a)(2)(B), Commerce shall, upon request, conduct administrative reviews "for new exporters and producers." 19 U.S.C. § 1675(a)(2)(B). The purpose of these new shipper reviews is to determine whether exporters or producers, whose sales have not previously been examined, are (1) entitled to their own duty rates under an antidumping order, and (2) if so, to calculate those rates. *See Hebei New Donghua Amino Acid Co. v. United States*, 29 CIT 603, 604, 374 F. Supp. 2d 1333, 1335 (2005). When conducting these new shipper reviews, "[i]t is Commerce's practice . . . to determine whether the new exporters and producers have conducted bona fide or commercially reasonable transactions." *Shandong Chenhe Int'l Trading Co. v. United States*, 34 CIT __, __, Slip Op. 10–129, at 5 (Nov. 22, 2010) (citing 19 C.F.R. § 351.214(b)(2) (2009); *Hebei New Donghua*, 29 CIT at 608, 374 F. Supp. 2d at 1338). In doing so, "Commerce normally employs a totality of the circumstances test to determine whether the transaction is 'commercially reasonable' or 'atypical of normal business practices.'" *Shandong Chenhe*, 34 CIT at __, Slip Op. 10–129, at 6 (quoting *Hebei New Donghua*, 29 CIT at 610, 374 F. Supp. 2d at 1339).

Thus, if Commerce determines, after reviewing all of the circumstances surrounding a sale, that the sale was not commercially reasonable, and therefore not bona fide, it may rescind the new shipper review. *See Catfish Farmers of Am. v. United States*, 33 CIT __, __, 641 F. Supp. 2d 1362, 1368 (2009) ("If the weight of the evidence indicates that a sale is not typical of a company's normal business practices, the sale is not consistent with good business practices, or 'the transaction has been so artificially structured as to be commer-

cially unreasonable,' the Department finds that it is not a bona fide commercial transaction and must be excluded from review." (citation omitted)).

"In evaluating whether or not a sale is 'commercially reasonable,' Commerce has considered the following factors, among others: (1) the timing of the sale, (2) the price and quantity[,] (3) the expenses arising from the transaction, (4) whether the goods were resold at a profit, (5) and whether the transaction was at an arm's length basis." *Hebei New Donghua*, 29 CIT at 610, 374 F. Supp. 2d at 1339 (citing *Windmill Int'l Pte., Ltd. v. United States*, 26 CIT 221, 228, 193 F. Supp. 2d 1303, 1310 (2002); *Am. Silicon Techs. v. United States*, 24 CIT 612, 616, 110 F. Supp. 2d 992, 995 (2000)). When weighing these factors, and others, Commerce's overarching goal is to determine "whether the sale(s) under review are indicative of future commercial behavior." *Hebei New Donghua*, 29 CIT at 613, 374 F. Supp. 2d at 1342 (citations omitted); *see also Shandong Chenhe*, 34 CIT at __, Slip Op. 10–129, at 6; *Tianjin Tiancheng Pharm. Co. v. United States*, 29 CIT 256, 258, 366 F. Supp. 2d 1246, 1249 (2005). For Commerce, a primary indication that a sale (or series of sales) is not bona fide is evidence that the sales price is unusually high in comparison to the prices of other sales of subject merchandise during the POR. Underlying this sales price inquiry is the idea that a respondent might arrange for a high sales price in order to avoid the imposition of a significant antidumping duty margin.[2] *Jinxiang Chengda Imp. & Exp. Co. v. United States*, 37 CIT __, __, Slip Op. 13–40, at 4–5 (Mar. 25, 2013).

Commerce's "totality of the circumstances" methodology has been found reasonable by this Court. *See, e.g.*, *Shandong Chenhe*, 34 CIT at __, Slip Op. 10–129, at 6; *Catfish Farmers*, 33 CIT at __, 641 F. Supp. 2d at 1368 ("In determining whether a sale is a bona fide commercial transaction, the Department examines the totality of the circumstances of the sale in question."); *Allied Tube & Conduit Corp. v. United States*, 32 CIT 363, 364 n.1, 556 F. Supp. 2d 1350, 1351 n.1 (2008); *Allied Tube & Conduit Corp. v. United States*, 31 CIT 1090,

[2] An antidumping duty margin is "the amount by which the normal value exceeds the export price or constructed export price of the subject merchandise." 19 U.S.C. § 1677(35)(A). In other words, "[i]f the price of an item in the home market (normal value) is higher than the price for the same item in the United States (export price), the dumping margin comparison produces a positive number, indicating that dumping has occurred." *Qingdao Sea-Line Trading Co., Ltd. v. United States*, 36 CIT __, __, Slip Op. 12–00039, at 5 n.3. (Mar. 21, 2012). Therefore, if a respondent is able to enter its merchandise at a high sales price, the difference between the sales price and the price in the home market will be low, resulting in a low dumping margin.

1092 (2007); *Hebei New Donghua*, 29 CIT at 609, 374 F. Supp. 2d at 1338 ("Commerce's use of a 'totality of the circumstances' bona fide sale test in new shipper reviews constitutes a permissible construction of the statute.").

II. The Department's Determination That Huachao's Sales Price Was Unusually [[ ]] Was Supported by Substantial Evidence

A. Huachao's Sales Price Rank & Deviation from the Average Unit Value

Commerce began its analysis of Huachao's sale by examining the company's sales price to its unaffiliated U.S. importer because an "analysis of the new shipper sales price is particularly important in a review where[, as here,] a company's margin [is] based on a single sale. If the Department determines that the price was not based on normal commercial considerations or is atypical of the respondent's future sales, the sale may be considered not *bona fide*." Bona Fides Mem. at 4. To this end, Commerce placed on the record U.S. Customs and Border Protection ("Customs") data containing all entries of merchandise exported to the United States from the PRC during the POR under U.S. Harmonized Tariff Schedule ("HTSUS") category 0703.20.0010 for "Garlic, Fresh Whole Bulbs." Def.'s Mem. 4.

The Customs data yielded an average unit value ("AUV") of [[ ]] per kilogram and average quantity of [[ ]] kilograms for all [[ ]] entries under this HTSUS heading. Def.'s Mem. 4. The Department then compared Huachao's sales price to its U.S. importer of [[ ]] to this AUV and found that the company's sales price was unusually [[ ]] because it was [[ ]] higher than the AUV. Bona Fides Mem. at 9; Bona Fides Mem. at 4 ("Huachao's sale price of [[ ]] [per kilogram] ranks [[ ]] [POR] entries under [the] HTSUS [heading]."). Furthermore, when one sale for another new shipper whose sale was found not to be bona fide was factored out, Huachao's sales price became the [[ ]] POR sale of whole garlic. Bona Fides Mem. at 4. Therefore, the Department found that the comparison "supports a finding that Huachao's price is atypical" and that its sale was not bona fide. Def.'s Mem. 18.

For plaintiff, however, "the rank among POR entities of a particular sales price, or the mere deviation of that sale price from the AUV, [is] meaningless without additional context." Pl.'s Br. 16. Specifically, plaintiff insists that "Commerce relied upon the ranking of [Huachao's] sale price among POR sales and variance from the AUV without considering the full context of commercial practices of other Chinese fresh garlic exporters." Pl.'s Br. 16. According to plaintiff, this

"context" is revealed by a disaggregation of the Customs data and, in particular, a closer examination of the top 295 sales out of the [[ ]] entries of fresh, whole garlic during the POR. Although it provides no reason why examining only the top 295 sales is superior to examining all entries, Huachao suggests five ways that Commerce should have analyzed this subset of the Customs data that would have illustrated the commercial reasonableness of the company's sale.

[[

Rank	Price	# of Sales		Rank	Price	# of Sales

]]

This table displays the top 295 sales prices for entries of fresh, whole garlic exported from the PRC during the POR under HTSUS category 0703.20.0010. The highlighted entry is Huachao's sale. Modified from Pl.'s Br. 18.

First, plaintiff argues that Commerce should have looked more closely at the top five highest-priced entries of whole garlic. In particular, plaintiff contends that "Commerce did not explain that the [[ ]] POR sale(s) of whole garlic was [[ ]] than the price of Huachao's sale." Pl.'s Br. 17. Furthermore, plaintiff notes, "the next [[ ]] POR sale(s) of whole garlic were [[ ]], or [[ ]] than the price of Huachao's sale." Pl.'s Br. 17. Thus, according to Huachao, had Commerce looked more carefully at the top five sales out of the [[ ]], it would have been evident that "Huachao's price is not the [[ ]] priced sale." Pl.'s Br. 23. Furthermore, plaintiff notes, the "[[ ]] between Huachao's sale and the [[ ]] are the [[ ]] among POR entries." Pl.'s Br. 17.

Second, plaintiff insists that Commerce should have looked at the subsequent sales ranked just below Huachao's sale in the Customs dataset because the Department did not explain that subsequent sales in the rankings [[ ]]. Specifically, in contrast to the [[ ]] Huachao's sale, there are [[ ]] within [[ ]] after Huachao's sale price of [[ ]], (including [[ ]] sales at prices [[ ]] Huachao's

sale price). Pl.'s Br. 17. Thus, according to plaintiff, "[i]n stark contrast to the [[ ]] difference among the top [[ ]] sales, a mere [[ ]] separates sales ranked [[ ]], representing [[ ]] total sales." Pl.'s Br. 17. Therefore, had Commerce looked more carefully at the sales prices below Huachao's, it would have been evident that "Huachao's price . . . is close to the price [[ ]]." Pl.'s Br. 23.

Third, Huachao asserts that Commerce should have compared plaintiff's sales price to the various prices of the largest exporter (by volume) of whole garlic both for the month of plaintiff's sale, [[ ]], as well as for the entire POR.[3] For plaintiff, if the Department had done so, it would have been apparent that "Huachao's [[ ]] entry was only [[ ]] higher than the average price of the largest exporter's [[ ]]." Pl.'s Br. 7. Furthermore, in terms of the largest exporter's POR-wide prices, Huachao points out that its sales price "was [[ ]] than [[ ]] of that exporter['s] POR sales." Pl.'s Br. 7. For this reason, plaintiff insists that "[i]f Huachao's sale is evaluated for commercial reasonableness, surely Commerce must take into account, and consider commercially reasonable, the prices of [[ ]] exporter during the POR of whole garlic bulbs." Pl.'s Br. 24. In other words, "Commerce cannot call prices 'commercially unreasonable' or 'atypical' when there is [[ ]] of garlic that is sold, on average, [[ ]], and also includes sales [[ ]]." Pl.'s Br. 24.

Fourth, plaintiff faults Commerce for ignoring price increases that it claims occurred during the month of Huachao's sale, and argues that Huachao's price should have been compared to the AUV for the month of its sale, rather than to the period-wide AUV. For plaintiff, "monthly AUVs demonstrate that the price of whole bulb garlic [[ ]] over the POR, from [[ ]] per [kilogram] in November 2008, to a [[ ]] per [kilogram] in February 2009, to a [[ ]] per [kilogram] in October 2009." Pl.'s Br. 19. Because Huachao made its sale at [[ ]] per kilogram in October, it attributes its high sales price, in part, to these market forces and therefore suggests disaggregation of the Customs data by month. Once again referring to the largest exporter, Huachao also states that "[t]ellingly, here the [[ ]]—whose nearly [[ ]] of garlic accounted for more than [[ ]]—was only [[ ]] Huachao's AUV for [[ ]] of garlic in [[ ]]." Pl.'s Reply Br. in Supp. of 56.2 Mot. 9 (ECF Dkt. No. 75) ("Pl.'s Reply") (emphasis omitted).

Fifth, plaintiff argues that "[t]o obtain data that reflects the commercial reality for companies that are able to sustain a presence in

[3] While arguing for a comparison between Huachao's price and the prices of the sales of the largest exporter, the company also notes that Huachao and its U.S. importer "are not [[ ]] and a [[ ]]." Pl.'s Reply Br. in Supp. of 56.2 Mot. 12 (ECF Dkt. No. 75) ("Pl.'s Reply").

the U.S. market, Commerce should remove from [the Customs data] the entries of companies subject to AFA rates, China-Wide rates, and other high percentage rates." Pl.'s Br. 20–21 (listing [[ ]] exporters that plaintiff claims should have been excluded from the Customs dataset for purposes of the bona fides analysis and stating that "[i]t is beyond cavil that such companies cannot operate for any significant period of time in the U.S. market because high dumping duties will drive off potential buyers—thus, their prices are atypical, and more than that, they are unrepresentative and extremely distortive"). Furthermore, "[t]hese [[ ]] exporters account for [[ ]] POR entries of subject merchandise at a POR AUV of [[ ]]. Removing these entries results in an AUV of [[ ]] which is [[ ]] the all-inclusive POR AUV." Pl.'s Br. 22. Apparently plaintiff's argument is that, in order to remain in the U.S. market, producers and exporters with high dumping margins will sell their products at a discount from the market price, but because they cannot sell at these low prices indefinitely, they should be excluded from the AUV as atypical.

In response, Commerce counters that Huachao did not raise its arguments about disaggregating the Customs data before the Department, thereby failing to exhaust its administrative remedies. In addition, the Department claims that plaintiff's "arguments are barred by the doctrine of judicial estoppel" because the company argued earlier in the proceeding that the data should not be disaggregated. Def.'s Mem. 20.

As noted, in its November 12, 2010 Preliminary Results, Commerce initially found that Huachao's sale *was* bona fide and set the company's dumping margin at $0.03 per kilogram. Prelim. Results, 75 Fed. Reg. at 69,417, 69,422. The Department also noted that it "plan[ned] to continue to examine all factors relating to the *bona fide* nature of [Huachao's] sale throughout the remainder of this [new shipper review]." Prelim. Bona Fides Mem. at 6. Accordingly, on January 27, 2011, the Department issued to plaintiff a supplemental questionnaire aimed at the issue of whether Huachao's sale was bona fide, to which the company submitted a response on February 14, 2011. On February 18, 2011, the Department then issued a briefing schedule for submissions addressing the bona fides of Huachao's sale. On February 25, 2011, defendant-intervenors filed a case brief disputing the Department's preliminary decision that Huachao's sale was bona fide, and arguing for a finding that Huachao's sale was not bona fide.[4]

[4] More specifically, on February 24 and 25, 2011, defendant-intervenors submitted a rebuttal to Huachao's February 14, 2011 supplemental questionnaire response as well as a case brief disputing the Department's preliminary decision finding Huachao's sale bona fide. On March 3, 2011, Huachao submitted a letter asking that the Department reject both defendant-intervenors' February 24, 2011 submission, on the grounds that it contained

On March 7, 2011, Huachao submitted a rebuttal brief in response to defendant-intervenors' February 25, 2011 case brief. Pl.'s Bona Fide Rebuttal Br. (Mar. 7, 2011) (C.R. 53) ("Pl.'s Rebuttal Br."). Based on these briefs, the Department then issued its Rescission on April 7, 2011.

Although defendant claims that plaintiff should have raised its arguments related to the use of the Customs data in the administrative proceeding below, it is evident that plaintiff had no real opportunity to do so. This is because plaintiff was not afforded an opportunity, subsequent to the issuance of the Rescission, to comment on any findings in the Rescission, in which the Department found, for the first time, that plaintiff's sales price was [[ ]], based on a comparison to the Customs data, and was therefore indicative of a non-bona fide sale. Thus, plaintiff could not have raised arguments relating to the disaggregation of the Customs data in response to Commerce's conclusions based on the AUV before the Rescission was issued because those conclusions were not made until the Rescission itself.

Therefore, plaintiff is correct in arguing that "Huachao did not have an opportunity before the agency to address Commerce['s] non-*bona fide* determination, which was made for the first time in Commerce's final determination." Pl.'s Reply 5. Accordingly, Huachao "was not required to raise this issue before the Department to exhaust administrative remedies because the Department's determination . . . changed between the Preliminary Determination and the Final Determination." *Shantou Red Garden Foodstuff Co. v. United States*, 36 CIT __, __, 815 F. Supp. 2d 1311, 1334 (2012); *see also Qingdao Taifa Grp. Co. v. United States*, 33 CIT __, __, 637 F. Supp. 2d 1231, 1236 (2009) (citing *LTV Steel Co. v. United States*, 21 CIT 838, 868–69, 985 F. Supp. 95, 120 (1997) ("A party . . . may seek judicial review of an issue that it did not raise in a case brief if Commerce did not address

untimely new factual information, and defendant-intervenors' case brief because it relied upon information contained in the February 24, 2011 submission. The information at issue involved the nature of the United States garlic market and the appropriate benchmark to be used to determine the bona fide nature of Huachao's sale. The Department found this information to be relevant to the information provided by Huachao in its supplemental response and therefore concluded that defendant-intervenors' submission was timely rebuttal information.

On March 7, 2011, Huachao then submitted a rebuttal brief in response to defendant-intervenors' February 25, 2011 brief. In its brief, Huachao argued against Commerce's decision to allow defendant-intervenors to raise arguments regarding the [[ ]] of Huachao's entry. In particular, Huachao argues that to make its [[ ]] argument, defendant-intervenors placed untimely new information on the record under the guise of a timely submission of rebuttal information to Huachao's February 14, 2011 supplemental questionnaire response. Therefore, Huachao argued that Commerce should reject defendant-intervenor's arguments due to their speculative nature and reliance on untimely new factual information. Bona Fides Mem. 3. The Department then issued its Rescission on April 7, 2011.

the issue until its final decision, because in such a circumstance the party would not have had a full and fair opportunity to raise the issue at the administrative level."). Thus, the court finds that plaintiff did not fail to exhaust its administrative remedies. *Globe Metallurgical Inc. v. United States*, 35 CIT __, __, 781 F. Supp. 2d 1340, 1357 (2011) (finding that respondents did not have an opportunity to review and challenge one of Commerce's determinations and therefore "application of the exhaustion doctrine would not be appropriate").

As to its judicial estoppel argument, defendant asserts that in Huachao's Rebuttal Brief in Response to the Preliminary Results, the company argued against disaggregating the Customs data and "*supported* Commerce's preliminary use of the AUV and price rank as benchmarks from the complete [Customs] Entry Data for comparison of its sales price." Def.'s Mem. 20–21. That is, in its Rebuttal Brief Huachao stated that there is "no record evidence supporting a dissection of th[e] [Customs] data" and the company "agrees with [Commerce's] refusal to go behind the [Customs] data in its analysis." Pl.'s Rebuttal Br. 5. Therefore, the Department argues, "[g]iven its rebuttal brief argument, and Commerce's subsequent use of the average AUV and AUV price ranks from the [Customs] Entry Data as a whole despite [defendant intervenors'] arguments to the contrary, Huachao should be prevented from making its new conflicting argument before the Court in the first instance." Def.'s Mem. 21.

The court finds that plaintiff is not judicially estopped from making its disaggregation argument here. "'[W]here a party assumes a certain position in a legal proceeding, and succeeds in maintaining that position, he may not thereafter, simply because his interests have changed, assume a contrary position, especially if it be to the prejudice of the party who has acquiesced in the position formerly taken by him.'" *Thai Plastic Bags Indus. Co. v. United States*, 34 CIT __, __, 752 F. Supp. 2d 1316, 1326 (2010) (quoting *New Hampshire v. Maine,* 532 U.S. 742, 749 (2001)). To be judicially estopped from raising an argument, however, "a party's later position must be 'clearly inconsistent' with its earlier position." *New Hampshire,* 532 U.S. at 750 (citations omitted).

Here, it not clear that plaintiff's arguments before this court are inconsistent with its arguments opposing disaggregation in its rebuttal brief because, as noted above, its rebuttal brief was made in support of Commerce's preliminary determination that Huachao's sale *was* bona fide, and its later arguments are not "clearly inconsistent" with those made earlier. That is, in the Rebuttal Brief, plaintiff was specifically contesting defendant-intervenors' suggestion that [[ ]] were misclassified (because they actually represented peeled garlic or some other specialty

product) and therefore these [[ ]] entries should be removed from the Customs data. Pl.'s Rebuttal Br. 3. If the Department were to do so, defendant-intervenors argued, then Huachao's sales price would become the highest in the dataset. Pl.'s Rebuttal Br. 4.

To this argument plaintiff responded that, "[w]hile there may well be inaccuracies in the [Customs] data, the [defendant-intervenors] can point to no record evidence supporting a dissection of those data such that product specifications [(i.e., peeled garlic or specialty merchandise)] and size can be identified. There is simply nothing to back up [defendant intervenors'] claim that certain entries . . . were misclassified." Pl.'s Rebuttal Br. 5. Hence, plaintiff's arguments below and those made here are not "clearly inconsistent." That is, an argument that certain entries should be removed from the data because they were misclassified is hardly at odds with an argument that the data should be grouped differently for analysis. Thus, it is evident that plaintiff cannot be judicially estopped from raising its disaggregation arguments before the court.

With regard to Huachao's substantive arguments, Commerce insists that "[e]ven if the Court excuses the doctrines of exhaustion and judicial estoppel, Huachao's arguments to disaggregate the [Customs] Entry Data have no merit." Def.'s Mem. 21. In particular, the Department's position is that its comparison between plaintiff's price and the AUV is superior to plaintiff's assertion that Huachao's sales price should be compared to the five subsets it suggests. Def.'s Mem. 19.

As a starting point, defendant argues that "[t]his Court has affirmed Commerce's use of complete sets of AUVs from [Customs] data to serve as a benchmark in a *bona fides* analysis, because 'using [the average of] a large sample is a better indicator of normal activity than a comparison of a smaller number of selected sales.'" Def.'s Mem. 21 (quoting *Shandong Chenhe*, 34 CIT at __, Slip Op. 10–129, at 17) (citing *Tianjin Tiancheng*, 29 CIT at 267, 366 F. Supp. 2d at 1256 ("Larger sample sizes are generally preferable when the goal is, as here, to generalize from a sample to a population, because the larger the sample, the less risk run that the sample chosen is extreme or unusual simply by chance.")). Thus, for the Department, a comparison between Huachao's price and the AUV is a better indication of whether Huachao's sale was commercially reasonable because a comparison to the average of [[ ]] data points is more probative than a comparison to a smaller subset of this dataset.

As to plaintiff's suggestion that its price should be compared to the top five highest prices, Commerce responds that "the simple fact that Huachao's price is closer to another price in the [Customs] Entry Data than it is to the average proves nothing," particularly since there are

[[ ]] in this dataset. Def.'s Mem. 22. Furthermore, "[a]n examination of the [Customs] Entry Data demonstrates that there [was] a significant number of sales with a wide range of prices within the data" and therefore a comparison of five "cherry-picked" prices is not a fair "apples-to-apples" comparison. Def.'s Mem. 22.

Plaintiff's suggestion regarding an examination of the sales ranked just below Huachao's price meets with similar disapproval. The Department notes that "Huachao's sales price of [[ ]] is still [[ ]] than the segmented benchmarks it proposes." Def.'s Mem. 23. Indeed, while plaintiff points out that "there are . . . [[ ]] sales at prices [[ ]] Huachao's sale price," Pl.'s Br. 18, it is clear that [[ ]] of these sales were made at [[ ]], or [[ ]] less than Huachao's sales price. Furthermore, these sales constitute only [[ ]] sales out of a total of [[ ]] entries, and therefore are not as probative of commercially reasonable sales as is the AUV. Def.'s Mem. 22 ("[T]he . . . fact that Huachao's price is closer to another price in the [Customs] Entry Data than it is to the average proves nothing."). Hence, Commerce asserts that a comparison with the prices ranked below Huachao's does not support plaintiff's position.

Along the same lines, for the Department, a comparison with the largest exporter's prices, as plaintiff requests, also does not help the company because that "exporter's [AUV] for the [POR] is [[ ]]" in comparison to Huachao's sales price of [[ ]]. Def.'s Mem. 23. In other words, even were the Department to limit its analysis to a comparison with other highly-priced entries, or to the largest Chinese exporter's prices, the company's sales price is still unusually high by comparison.

Similarly, a comparison with the monthly AUV, instead of the POR-wide AUV, does not assist Huachao, according to defendant. This is because "the AUV for October, the month Huachao made its [[ ]] sale, is [[ ]]; indeed, the remaining months during the [POR] also have [[ ]] AUVs than Huachao's sale price." Def.'s Mem. 23. Put another way, even had the Department compared Huachao's sales price only to the AUV for the month of Huachao's entry, the company's price would still have been found to be unusually high.

Finally, the Department also found that "removing the China-wide and adverse facts available rate companies as Huachao proposes, results in an AUV of only [[ ]]." Def.'s Mem. 23. At [[ ]], Huachao's price is still well above that AUV, even removing the entries Huachao has identified as problematic. Therefore, Commerce maintains that this last comparison is equally unhelpful to the company. Thus, although the Department insists that it need not disag-

gregate the data as part of its totality of the circumstances analysis, it further asserts that the comparisons favored by plaintiff do not aid its case.

While not worded in precisely the same way, plaintiff's arguments echo those previously made to this Court that examining data by ranging is more useful than using an AUV. *See, e.g., Jinxiang Chengda*, 37 CIT at __, Slip Op. 13–40, at 10 (rejecting plaintiff's argument that its sales price should have been compared to a "range of prices in order to show that Chengda's transfer sales price was close to at least some similarly-priced entries of peeled garlic, although it was much higher than the AUV"). Thus, respondents in earlier cases have urged that looking at only a portion of a dataset can yield a clearer view of the evidence than an average of the entire set. *See, e.g.*, *id.* at __, Slip Op. 13–40, at 10–11. While it may be that this kind of analysis can yield useful information, the court agrees with defendant that the AUV from the Customs data can also be a useful tool for comparison because it provides a fair representation of prices set by the market overall. *See U.S. Steel Grp. v. United States*, 96 F.3d 1352, 1363 (Fed. Cir. 1996) ("Computing an average is arguably the most basic of all statistical techniques. It permits compression of large quantities of data into a single representative figure capable of easy comprehension and assimilation. In that respect, it is undoubtedly a valuable tool."); *see also Shandong Chenhe*, 34 CIT at __, Slip Op. 10–129 at 19–20 ("[U]sing the average of a large sample is a better indicator of normal activity than a comparison of a smaller number of selected sales."); *Tianjin Tiancheng*, 29 CIT at 267, 366 F. Supp. 2d at 1256 ("[T]he larger the sample, the less risk run that the sample chosen is extreme or unusual simply by chance.") (citation omitted). Here, using the larger sample, the Department demonstrated that plaintiff's sales price of [[ ]] was unusually [[ ]] because it was [[ ]] higher than the AUV of [[ ]]. Bona Fides Mem. at 9.

As to plaintiff's arguments that the Customs data should be disaggregated, defendant has adequately demonstrated that a comparison between segments of the Customs' data and plaintiff's import price would not only be a less useful comparison than the POR-price average in its bona fide analysis, but also that such comparisons only highlight the commercial unreasonableness of Huachao's price.

Initially, it is worth noting that plaintiff has failed to provide an adequate explanation for selecting its proposed subset of entered values. Nonetheless, plaintiff is, in fact, correct that a close examination of (1) the top five sales in the data and (2) the sales ranked immediately below Huachao's price shows that there is a division that

occurs in the top twenty-two price ranks: the prices for ranks [[ ]] are clearly much [[ ]] than the other figures, while the prices for ranks [[ ]] are more closely clustered around approximately [[ ]]. Pl.'s Br. 18. There were, however, [[ ]] during the POR, and therefore Huachao's relative place close to the top of the 295 highest-priced sales (i.e., those ranked from 1 to 22 in the table above) merely demonstrates that Huachao's price is an outlier even among the highest-priced sales. Therefore, this comparison tends to confirm that it was reasonable for Commerce to compare Huachao's price to the average from the entire dataset to determine whether the company "conducted bona fide or commercially reasonable transactions." *Shandong Chenhe*, 34 CIT at __, Slip Op. 10–129, at 5.

Next, Commerce was not required to limit its analysis to a comparison between Huachao's price and the prices of the largest exporter by volume during the POR. While a comparison relying on a range of prices can be a valuable tool for Commerce, plaintiff has failed to provide any argument as to why its sale should be compared to those of the largest exporter. As plaintiff itself acknowledges, "Huachao and its U.S. importer . . . are not [[ ]] and a [[ ]]." Pl.'s Reply 12. Moreover, while plaintiff is correct that its price "was [[ ]] than [[ ]] of that exporter['s] POR sales," Huachao's sales price of [[ ]] was still substantially higher than the largest exporter's average of [[ ]]. Pl.'s Br. 7; Def.'s Mem. 23. Therefore, because Huachao has not provided an adequate explanation as to why a comparison to the sales of the largest exporter yields useful information, and the comparison does not favor plaintiff in any event, it was reasonable for Commerce to reject the comparison.

Finally, plaintiff's claim that the Department should have compared its price to the AUV for the month of [[ ]], instead of the AUV for the POR, or should have removed prices for exporters subject to AFA rates, China-wide rates, and other high percentage rates from the dataset before calculating the AUV fail for a similar reason. Had plaintiff been able to demonstrate that prices in October 2009 were markedly different than those during the remainder of the POR, its proposed comparison might have proven useful. Huachao, though, has only shown that the AUV was somewhat higher in October 2009 at [[ ]] as compared to [[ ]] in November 2008 at the beginning of the POR. This small price increase in October 2009, however, does not explain why plaintiff's price of [[ ]] was almost [[ ]] than October's AUV. Def.'s Mem. 23. Therefore, Huachao's price would still have appeared to be abnormally high if only the October AUV were considered.

Plaintiff has also failed to support with record evidence its argument that sales from producers and exporters with high antidumping rates should be excluded from the dataset because these producers and exporters must sell at unsustainably low prices. Nor has it cited record evidence to support its related claim that companies subject to high dumping rates cannot operate in the U.S. market. Thus, the court is left with plaintiff's unsupported argument that "[i]t is beyond cavil that such companies cannot operate for any significant period of time in the U.S. market." Pl.'s Br. 20. The only record evidence relating to this issue, however, indicates that the majority of entries during the POR were made by companies with high antidumping margins, suggesting that it is possible for a producer or exporter with a high margin to participate in the U.S. market.

Also, as has been seen, this disaggregation would not help plaintiff. Tellingly, removing the companies subject to China-wide and AFA rates, as Huachao proposes, results in an AUV of [[ ]] as compared to Huachao's sales price of [[ ]]. Def.'s Mem. 23. As such, even had Commerce made the comparison plaintiff requests, it would have aided the defendant and not Huachao.

B. Bulb Size

As part of its analysis of Huachao's sales price, Commerce also examined the size of the company's garlic bulbs in relation to their price. To this end, Commerce "requested that Huachao report its bulb size for purposes of selecting the appropriate surrogate value." Bona Fides Mem. at 4. For Commerce, this information is useful because "the Department has consistently relied upon APMC Azadpur price data from India in the calculation of surrogate values. This price data is based on bulb grade which is determined by bulb size; as [[ ]] increase, so do APMC Azadpur's prices." Bona Fides Mem. at 9.

In its response, "Huachao reported that the whole garlic bulbs it sold were between [[ ]] in size; this size being the [[ ]] for whole garlic sold in the United States." Bona Fides Mem. at 5. Using this information, and relying "on the Department's historical acknowledgement of the direct relationship between garlic bulb price and size," Commerce concluded that "the relatively [[ ]] nature of the garlic Huachao sold would lead to the expectation of a [[ ]] sales price. To the contrary, however, Huachao's sale price is very [[ ]] compared to [the] entry data." Bona Fides Mem. at 5. "Therefore, combined with already existing concerns about Huachao's sales price . . . , the relatively [[ ]] size of the garlic leads the Department to conclude that Huachao's sales price is not indicative of a commer-

cially reasonable, *bona fide* sale nor is the price predictive of likely future commercial activity." Bona Fides Mem. at 5.

To plaintiff, however, "Commerce's attempt to cast doubt on the *bona fide* nature of Huachao's sales price—with a brief discussion of [[ ]]—is based entirely upon speculation and completely ignores evidence [[ ]] supporting a [[ ]] whole garlic bulb sales." Pl.'s Br. 26. Furthermore, plaintiff argues, "the agency record 'does not have data about the [[ ]] as it pertains to all [[ ]],' or even as it pertains to [[ ]]." Pl.'s Br. 27 (quoting Bona Fides Mem. at 4). Indeed, in making its bulb size argument, plaintiff asserts that "Commerce speculated that 'some portion of the [Customs] entries for whole garlic *must have been composed of* [[ ]].' This speculation was the sole basis for Commerce's conclusion that . . . Huachao's 'sales price *must be deemed* [[ ]] than the price typically paid, as evidence[d] by the [Customs] data.'" Pl.'s Br. 26 (citations omitted).

In so concluding, according to plaintiff, "Commerce ignored record evidence providing support for the *bona fide* nature of Huachao's sale price. Specifically, in [[ ]] Huachao's importer [[ ]], to which Huachao [[ ]]." Pl.'s Br. 27. For plaintiff, this evidence unequivocally "support[s] a [[ ]] whole garlic bulb sales, namely for [[ ]]." Pl.'s Br. 26.

In response, Commerce acknowledges that "the Department does not have data about the [[ ]] as it pertains to all [[ ]]." Bona Fides Mem. at 4. The defendant did, however, have record evidence about the size of Huachao's shipped garlic bulbs, and therefore insists that because "Huachao shipped the [[ ]] bulb of whole garlic recognized in the American garlic industry," this "supported its finding that Huachao's price is abnormally [[ ]]." Def.'s Mem. 23. The Department defends this conclusion by noting that it "has consistently relied upon the fact that there is a direct relationship between garlic bulb price and size when calculating a margin under [the fresh garlic from the PRC antidumping] order; the greater the size, the greater the price" as demonstrated by the APMC Azadpur pricing data that was placed on the record. Bona Fides Mem. at 4. Therefore, the Department concluded, "given the correspondence between price and size, the fact that Huachao shipped [[ ]] only increases the extent to which its sales price must be deemed [[ ]] than the price typically paid, as evidenced by [Customs] data." Bona Fides Mem. at 9. In other words, because Huachao's entry of whole garlic was comprised of the [[ ]], the unusually high sales price could not be justified by the size of the bulb.

Furthermore, Commerce asserts that "[t]o the extent Huachao otherwise argues that [[ ]] specifically account for its price difference, these arguments were not presented to Commerce in the first instance despite petitioners raising [the [[ ]] issue] in their [post-Preliminary Results] case brief." Def.'s Mem. 24. Even were the court to ignore plaintiff's failure to raise this argument before the agency, however, the Department claims that "Huachao can point to no record evidence to substantiate its arguments other than self-serving statements made by Huachao during [[ ]] with its customer." Def.'s Mem. 24.

First, despite defendant's claim that plaintiff has failed to exhaust its remedies as to its bulb size argument, the court finds that exhaustion is not required in this case for the reasons discussed above. In particular, plaintiff was not afforded an opportunity to comment on the Department's findings regarding bulb size subsequent to the Rescission, where Commerce found for the first time that plaintiff's [[ ]] supported its determination that Huachao's sales price was [[ ]], and therefore indicative of a non-bona fide sale. *See Globe Metallurgical*, 35 CIT at __, 781 F. Supp. 2d at 1357 (finding that respondents did not an opportunity to review and challenge one of Commerce's determinations and therefore "application of the exhaustion doctrine would not be appropriate").

As to the merits of plaintiff's arguments, the court finds that the Department was reasonable in considering Huachao's bulb size in its totality of the circumstances analysis, although the Department's conclusions outrun the facts. *Tianjin Tiancheng*, 29 CIT at 260, 366 F. Supp. 2d at 1250 ("[B]ecause the ultimate goal of the new shipper review is to ensure that the U.S. price side of the antidumping calculation is based on a realistic figure, any factor which indicates that the sale under consideration is not likely to be typical of those which the producer will make in the future is relevant."). While, standing alone, the size of Huachao's garlic bulbs, the [[ ]] in the American garlic industry, would not provide substantial evidence to support Commerce's determination that Huachao's price was unusually high, the Department's bulb size analysis tends to lend some additional support to its price analysis based on the AUV from the Customs data.

As noted, although the Department can point to record evidence to support the notion that Indian domestic prices vary directly with bulb size, Commerce put no evidence on the record to establish this conclusion with respect to U.S. imports from China. Thus, it was not reasonable for Commerce to conclude that, simply because of the [[ ]] size of the bulbs, Huachao's sales price was not indicative of

a commercially reasonable sale. It was reasonable, however, for Commerce to use record evidence of Huachao's [[ ]] and record evidence of the relationship between bulb size and price (i.e., the APMC Azadpur pricing data) to discount any claim that Huachao might make that the size of its garlic bulb justified its high price. Further, plaintiff's argument that its garlic is more valuable, and therefore commanded a higher sales price, because of its "potency" and "growing region" is not supported by any record evidence other than a brief self-serving email exchange purportedly between Huachao and the U.S. importer, and, as such, is not persuasive.[5] Therefore, Commerce's bulb size analysis adds some weight to the conclusion found in the bona fides memorandum that Huachao's sales price was unusually high, and plaintiff's arguments do not detract from the evidence upon which the memorandum is based.

C. Commerce's Finding That Huachao's Sales Price Was So High As to Be Commercially Unreasonable and Not Indicative of the Garlic Industry Was Supported by Substantial Evidence

For all of the foregoing reasons, Commerce's determination that Huachao's sales price was abnormally high, and therefore indicative of a non-bona fide sale, was reasonable and supported by substantial evidence because (1) the Department properly compared Huachao's sales price to the AUV in the Customs data and found that the company's price was abnormally high; (2) Commerce was not required to limit its comparison between Huachao's price and the Customs data to a disaggregated subset of the Customs data (i.e., to the top five sales, to the sales ranked just below Huachao's price, to the monthly AUV for the month of the company's entry, or to the AUV with prices for companies subject to AFA rates, PRC-wide, and other high percentage rates removed) as urged by plaintiff because the AUV for the total dataset was a better indicator of commercial activity; (3) the Department demonstrated that even had it compared Huachao's sales price to the disaggregated subsets of the Customs data, these comparisons would not have justified the high price; and (4) Com-

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[5] This email exchange, the sole support offered by plaintiff regarding the value of its garlic due to its [[ ]], was as follows. The unaffiliated U.S. importer wrote:

[[

]].

To this message, Huachao responded:

[[

]].

Pl.'s Br. 4.

merce's consideration of the size of Huachao's garlic bulb in relation to its sales price lent some support to its finding that Huachao's price was abnormally high, and Huachao's arguments as to the potency of its garlic were not supported by probative record evidence.

III. The Department's Determination That Huachao's Sales Quantity Was Abnormally Low Was Supported by Substantial Evidence

The second part of Commerce's bona fide analysis involved an examination of the volume of Huachao's sale to the unaffiliated U.S. importer. In particular, Commerce "compared Huachao's sales volume to the average of all other entries of whole garlic during the period of review contained in the [Customs] Entry Data." Def.'s Mem. 25. In doing so, Commerce found that, "in relation to the quantity of other entities of subject merchandise during the POR," Huachao's sales quantity of [[ ]] was low. Bona Fides Mem. at 5. Therefore, the Department "continue[d] to identify the sales quantity as indicative of a non-*bona fide* sale." Bona Fides Mem. at 5. Specifically, Commerce found that "the average quantity for [fresh whole garlic] entries was [[ ]] kilograms, while Huachao's quantity was [[ ]] kilograms, ranking in the [[ ]] percentile ([[ ]]) and only [[ ]] of the average POR exported quantity." Bona Fides Mem. at 5. While Commerce acknowledged that "the Department would not normally rely on quantity alone to determine whether a new shipper sale was *bona fide*, and it has not done so in this case," it found that Huachao's low quantity was yet another indication that the company's sale was not bona fide. Bona Fides Mem. at 10.

According to plaintiff, however, "Commerce failed to acknowledge the commercial context of Huachao's sale and refused to further analyze [Customs] data on the record, . . . both of which demonstrate that Huachao's sale was not . . . 'atypical.'" Pl.'s Br. 28. In terms of commercial context, plaintiff first offers the argument that "[[ ]]. Huachao's sale—nearly [[ ]] which is commonly used in international trade and, as the [Customs] data demonstrate, is commonly used in the sale of garlic.'" Pl.'s Br. 28–29 (citations omitted). Therefore, while acknowledging that "Huachao's sales volume indeed is [[ ]] of the average POR exported quantity," plaintiff argues that "this volume corresponds almost perfectly with the volume requiring [[ ]], with the POR average [[ ]]." Pl.'s Br. 29. To support its assertions, plaintiff cites only to its own rebuttal case brief.

Commerce found Huachao's argument unpersuasive, observing that "conspicuously absent from these statements are citations to *any* record evidence, other than to Huachao's own rebuttal brief (which also lacks such citations), regarding the quantity contained in [[

]] containers or the frequency in which [[ ]] containers are used for garlic bulb sales." Def.'s Mem. 26. Indeed, the record indicates that Huachao's entry of [[ ]] was much less than the average quantity of [[ ]] kilograms, but no evidence regarding shipment quantity and container size is on the record to support plaintiff's claimed correlation. Def.' Mem. 26.

Second, plaintiff argues that "Huachao's sale is [[ ]]. This is not a [[ ]] quantity by any measure. Commerce's determination to the contrary is undermined by the fact that there are [[ ]] shipments, and a total of [[ ]] shipments are below [[ ]]." Pl.'s Br. 29 (citations omitted). Furthermore, "[t]he list of exporters shipping these [[ ]] sales almost exclusively includes [[ ]] POR shippers." Pl.'s Br. 30.

Defendant finds this argument equally unpersuasive, stating that "[a] simple absolute statement that there were [[ ]] shipments does nothing to support Huachao's analysis. Nor does the fact that [[ ]] of the [Customs] entries have quantities below [[ ]] kilograms 'undermine' Commerce's conclusion as to quantity", especially since Huachao's shipment was not [[ ]], rather it was [[ ]]. Def.'s Mem. 27. Indeed, "Huachao's calculations result in an incomplete comparison and ignore the fact that the vast majority of shipments made by these exporters involve much [[ ]] quantities, sometimes [[ ]] that of Huachao's single sale, with AUVs far [[ ]] than Huachao's sale price. Huachao's cherry-picking of entries does not render Commerce's determination unsupported by substantial evidence." Def.'s Mem. 28 (citations omitted).

In addition, the Department reiterates "that [this court] has repeatedly held that disaggregation of the data is not required and that 'using a large sample is a better indicator of normal activity than a comparison of smaller number of selected sales.'" Bona Fides Mem. at 10 (citing *Shandong Chenhe*, 34 CIT at __, Slip Op. 10–129, at 17; *Tianjin Tiancheng*, 29 CIT at 260, 366 F. Supp. 2d at 1256). Therefore, "the Department has continued to rely upon the average quantity data, calculated from [Customs] data, for whole garlic entries during the POR as the benchmark for evaluating the normal commercial quantity." Bona Fides Mem. at 10. Hence, "with respect to Huachao's argument that the Department should compare the quantity of Huachao's sale with other entries that are similar in quantity, the Department will not disaggregate the [Customs] data." Bona Fides Mem. at 10. As noted, however, even if it were to do so, a simple finding "that there were [[ ]] shipments does nothing to support Huachao's analysis" as there were a total of [[ ]] during the POR. Def.'s Mem. 27.

Third, plaintiff insists that "Commerce has determined more than once that a 'small quantity test sale is not necessarily contrary to normal business considerations,' especially given the fact that the subject merchandise is subject to a high all-others rate." Pl.'s Br. 31 (citations omitted). Indeed, "[u]nder the circumstances of this case, where the China-wide rate is 376.67% or $4.71 per [kilogram], a sale with a [[ ]] quantity cannot be called commercially unreasonable, atypical, or unrepresentative and highly distortive." Pl.'s Br. 31.

In response, Commerce relies on *Hebei* for the proposition that "invocation of the term 'test sale' does not have a talismanic effect, negating all indications of an atypical transaction." *Hebei New Donghua*, 29 CIT at 610, 374 F. Supp. 2d at 1344. Furthermore, "[w]hen a purported test sale is under review, Commerce is not obligated to overlook evidence suggesting that the U.S. sale 'was made solely for the purpose of establishing a new antidumping deposit rate, without regard to the commercial reasonableness of the sale.'" *Id.* (citation omitted). Indeed, Commerce contends that here, as in *Hebei*, it does "not have 'verifiable indications' of the *bona fides* of Huachao's sale, even assuming it constituted a test sale. Huachao 'made a single sale and then requested the new shipper review' . . . . Thus, the simple fact that Huachao's sale may or may not have been a test sale does not detract from Commerce's determination as to quantity." Def.'s Mem. 27 (quoting *Hebei New Donghua*, 29 CIT at 610, 374 F. Supp. 2d at 1343).

Finally, plaintiff asserts that evidence placed on the record by Huachao also "demonstrates that the quantity of . . . Huachao's U.S. sale was well within the range of its domestic sales [i.e., those in the PRC] during the relevant period." Pl.'s Br. 31. To support this claim, plaintiff provided evidence regarding [[ ]] domestic sales it made as a garlic trader, as distinct from a garlic producer and exporter, in the PRC to demonstrate that [[ ]] of these sales were smaller than the size of its export sale here.

Commerce found, however, that plaintiff only "list[ed] three of its domestic sales" to support this assertion. Def.'s Mem. 28. "However, [[ ]] of Huachao's domestic sales had a quantity [[ ]] that of Huachao's sale at issue here. The next [[ ]] sale quantities of [[ ]] kilograms are [[ ]] Huachao's export sale." Def.'s Mem. 28 (citation omitted). Furthermore, the Department found "that a comparison of Huachao's domestic sales quantities is not appropriate in this review, the best quantity benchmark continuing to be the U.S. [Customs] data for whole garlic" because "the average quantity data, calculated from [Customs] data for whole garlic entries during the POR [is the best] benchmark for evaluating the normal commercial quantity" for

exports into the United States. Bona Fides Mem. at 10. Thus, for the Department, a comparison with the quantities of other sales of whole garlic into the United States is more probative of commercial reasonableness than the quantities of Huachao's home market sales when acting as a trader. Bona Fides Mem. at 10.

The court agrees with defendant that Huachao's arguments regarding the volume of its sale are unpersuasive. First, plaintiff's argument regarding the size of shipping containers is unsupported by any record evidence. Thus, because container sizes are not part of the Customs data, there is no evidence on the record to support a claim that there is a relationship between the volume of garlic per entry and the shipping container size. Nor, for that matter, is it clear to the court that the "entirely filled a 20-foot container" argument has any probative value. That is, even if there were record evidence to support the claim that Huachao shipped a full 20-foot container, what matters here is the relationship of plaintiff's shipment size to the norm, not whether the shipment bears a relationship to a standard container. *See Jinxiang Chengda*, 37 CIT at __, Slip Op. 13–40, at 30.

Equally unpersuasive is plaintiff's argument regarding the [[ ]] smaller volume sales. This argument simply highlights how far removed plaintiff's shipment quantity was from the average. Thus, it adds little weight to plaintiff's claim that its sale was commercially reasonable because [[ ]] out of [[ ]] sales were smaller than the company's sale. Further, Huachao's assertion that its shipped quantity of [[ ]] "is not a [[ ]] quantity by any measure" is not relevant to whether this quantity is reflective of a commercially reasonable sale.

As to plaintiff's contention that a small quantity might be indicative of a "test case", the court "is aware that the size of an entry does not necessarily control Commerce's analysis." *Shandong Chenhe*, 34 CIT at __, Slip Op. 10–129, at 14. Nonetheless, a sale's size "can raise questions as to whether the purchaser would buy the merchandise in the future in the same quantity at the same price." *Id.*; *see also Tianjin Tiancheng*, 29 CIT at 260, 366 F. Supp. 2d at 1250 ("[B]ecause the ultimate goal of the new shipper review is to ensure that the U.S. price side of the antidumping calculation is based on a realistic figure, any factor which indicates that the sale under consideration is not likely to be typical of those which the producer will make in the future is relevant."). Thus, the size of the entry, while not controlling, can play a role in the "totality of the circumstances" analysis.

Although plaintiff argues that "'single sales, even those involving small quantities, are not inherently commercially unreasonable and do not necessarily involve selling practices atypical of the parties'

normal selling practices,'" as defendant points out, plaintiff must do more than simply claim that it made a small test sale. Pl.'s Br. 31 (quoting *Windmill*, 26 CIT at 228, 193 F. Supp. 2d at 1310). This is particularly the case when there are other "indications of an atypical transaction." *Hebei New Donghua*, 29 CIT at 616, 374 F. Supp. 2d at 1344. Rather, there must be "verifiable indications" of the bona fides of a sale. *Id.* Here, there were no indications that Huachao's sale was otherwise bona fide as the Department reasonably determined that Huachao's sales price was unusually high. In other words, standing alone, the low quantity of Huachao's sale would not have established that it was a non-bona fide sale, but, under the totality of the circumstances, the low quantity is yet another indication of a non-bona fide sale.

Finally, the Department properly rejected Huachao's argument regarding the volumes of the company's domestic sales in the PRC. First, it is difficult to *see* how Huachao's domestic sales, where it acted as a garlic trader in China, are relevant when considering a sale into the U.S. where it acted as a garlic producer and exporter. Comparison of sales where the company acted in a different role in its home market would not appear to be probative, particularly where the sales are in a non-market economy country and there is no evidence they were made under market conditions. Furthermore, even were the Department to limit its analysis to a comparison of Huachao's own domestic sales and its export quantity, Huachao's claim that its export quantity was in line with its domestic quantities is entirely unsupported by the record evidence. Indeed, as defendant points out, "[[ ]] of Huachao's domestic sales had a quantity [[ ]] that of Huachao's sale at issue here." Def.'s Mem. 28.

For these reasons, the court finds that Commerce reasonably concluded that Huachao's sales quantity was low because (1) plaintiff's claim regarding shipping container sizes was entirely unsupported by record evidence; (2) plaintiff's unsupported statement that its shipment quantity, while being the [[ ]] smallest quantity out of [[ ]] entries, was a large amount of garlic, and therefore must have been bona fide, did not negate the shipment's comparatively small size; (3) plaintiff's claim that its small shipment quantity could be indicative of a test sale, and therefore was not inherently non-bona fide, was unavailing in light of the absence of other "verifiable indications" of a bona fide sale; and (4) plaintiff's suggestion that its export quantity was in line with its domestic sales quantities when acting as a garlic trader was not a useful comparison, and in any event did not aid plaintiff's case.

IV. The Department's Determination That the Nature of Huachao's Transaction Was Atypical Was Supported by Substantial Evidence

The next part of Commerce's bona fide analysis was an examination of the transaction between Huachao and its U.S. importer to determine "whether or not Huachao's transaction is indicative of typical business practices and future commercial behavior." Bona Feds Mem. at 6. "In its request for a new shipper review, Huachao certified that it was both the exporter and producer of its new shipper sale." Bona Feds Mem. at 6. During the bona fide analysis, however, Commerce found it problematic that Huachao did not normally process garlic for its domestic sales. Rather, prior to its sole sale as a producer and exporter, Huachao was simply a trader of processed garlic, and "has no permanent processing facility or processing workers." Bona Fides Mem. at 6. Specifically, Huachao informed the Department that

> it has traditionally been a domestic garlic trader and . . . does not normally process garlic for its domestic sales and did not process garlic subsequent to the sale under review. Because Huachao required space for processing and packing, as well as additional employees to conduct this work, it rented out temporary space at a garlic farm and hired temporary workers for purposes of processing and packing the garlic under review.[6]

Bona Fides Mem. at 6 (citation omitted). This acknowledgement led to Commerce's finding "that [Huachao's] operation and structure is not normal for a company planning to export garlic to the United States on a regular basis." Def.'s Mem. 30 (citing Bona Fides Mem. at 6). Thus, the Department concluded that "Huachao's function as the processor of its U.S. sale is atypical of its normal business practice." Rescission, 76 Fed. Reg. at 19,324.

In response, Huachao insists that "Commerce points to no record evidence, no case law, no prior agency practice, or any industry commentary to support its determination. Instead, Commerce muses about how Commerce believes Huachao's business model is unworkable and will have to change in the future." Pl.'s Br. 32. In doing so, according to plaintiff, "Commerce ignores Huachao's ability to choose its own business model, and this Court's prior decisions about Huachao's current business model." Pl.'s Br. 32–33. In support of this argument, Huachao claims that its business model is similar to toll-

[6] Specifically, "[f]or the purposes of its United States sale, Huachao purchased fresh garlic from an unaffiliated [[ ]] and [[ ]]. Huachao hired temporary workers to process and pack the garlic." Def.'s Mem. 30 (citing Bona Fides Mem. 6).

ing arrangements[7] that both Commerce and this Court have found to be legitimate business enterprises. Pl.'s Br. 33 ("Commerce ignored earlier pronouncements that similar 'tolling arrangement[s] are often part of a legitimate business enterprise.'" (quoting *Catfish Farmers*, 33 CIT at __, 641 F. Supp. 2d at 1368)).[8]

Defendant points out, however, that "[w]hile Huachao is not required to be an established processor to be eligible for a separate antidumping duty margin, for its sale to be considered *bona fide*, Huachao must show that its sale is indicative of typical business practices and future commercial behavior." Bona Fides Mem. at 6. For Commerce, "[t]he fact that Huachao has no processing space or employees to do the processing indicates that the structure of its new shipper sale cannot be indicative of future commercial behavior." Bona Fides Mem. at 6. This because "[i]t is hardly normal business practice for a company to rely upon temporary facilities and employees if it plans on exporting garlic to the United States on a regular basis. Instead, Huachao would require more permanent processing facilities and human resources, changes that would have a significant effect on the company's operations, costs, and structure." Bona Fides Mem. at 6. Therefore, "[t]he fact that Huachao will have to alter its business operations as it converts itself from a garlic trader to a garlic processor limits the current sale's usefulness in predicting future commercial behavior on the part of Huachao." Bona Fides Mem. at 6.

As to plaintiff's characterization of its transaction as a "tolling arrangement," Commerce found that "neither Huachao's contract with its supplier nor its contract with its customer are similar to tolling arrangements, nor is there any evidence on the record to support such a claim." Def.'s Mem. 31. To the contrary, "[t]he record provides no evidence that these contracts constituted anything other than Huachao's simple, one-time purchase of raw garlic from an unaffiliated supplier, and Huachao's simple, one-time sale of garlic to

[7] "Tolling arrangements" are contracts between raw material companies and processors or manufacturers wherein a raw material or intermediate product from one company is delivered to the production facility of another company in exchange for the equivalent volume of finished products and payment of a processing fee. *See Atar, S.r.L. v. United States*, 35 CIT __, Slip Op. 11–00087, at 2 (July 22, 2011). Thus, under a tolling arrangement, an exporter would not need processing or manufacturing capabilities as it would rely on another company for those services. Here, however, there was no evidence that Huachao entered into such an arrangement with any company. Rather, Huachao purchased garlic, [[ ]], and hired [[ ]].

[8] *Catfish Farmers* involved an antidumping administrative review for frozen fish fillets from the Socialist Republic of Vietnam. There, the court sustained Commerce's "reasonable finding" that an exporter's "tolling arrangement did not, on its face, suggest an illegitimate commercial enterprise because tolling arrangements are often part of legitimate business enterprises." *Catfish Farmers*, 33 CIT at __, 641 F. Supp. 2d at 1369.

an unaffiliated importer." Def.'s Mem. 31. In other words, Commerce claims that there is no record evidence that Huachao's exported merchandise was processed or produced by another company pursuant to an agreement whereby Huachao delivered unprocessed garlic to a processor together with a payment and received in exchange processed garlic. Huachao purchased the garlic and then acted as both the processor and the exporter for its U.S. sale, and therefore the transaction was not similar to a tolling arrangement. As such, Commerce insists that substantial record evidence supports its determination that Huachao's unusual business model was not indicative of a typical export sale.

The court finds that Commerce's conclusions about Huachao's lack of an infrastructure provide some evidence of a non-bona fide sale because it is unknown whether Huachao will be able to duplicate the conditions of its first garlic export (i.e., the temporary [[ ]] with a [[ ]] and [[ ]]) in order to arrive at a similar sales price in the future. While Huachao may be able to reproduce *similar* processing arrangements in the future [[ ]], it is not clear that future arrangements could be made at the same cost to the company. Therefore, the sales price under review may not be a good indicator of future sales prices. In other words, it is evident that the conditions that produced Huachao's sales price were not indicative of the company's regular business activities and may not be reliable indicators "of future commercial behavior." *Hebei New Donghua*, 29 CIT at 613, 374 F. Supp. 2d at 1342.

As with the factors discussed earlier, were the nature of this transaction the sole portion of Huachao's sale considered by Commerce, it would not provide sufficient evidence that Huachao's sale was not commercially reasonable. "Commerce, however, has the authority to consider a variety of factors in determining whether a transaction is commercially reasonable." *Jinxiang Chengda*, 37 CIT at __, Slip Op. 13–40, at 34 (citing *Hebei New Donghua*, 29 CIT at 616–17, 374 F. Supp. 2d at 1343–44; *Windmill*, 26 CIT at 231–32, 193 F. Supp. 2d at 1313– 1314). In order to prevent an exporter from unfairly benefitting from an atypical sale to obtain a low dumping margin, Commerce may review any relevant evidence that suggests that a U.S. sale was commercially unreasonable or atypical of future business practice. *See Tianjin Tiancheng*, 29 CIT at 260, 366 F. Supp. 2d at 1250. Therefore, while the nature of Huachao's transaction, on its own, would not be sufficient to find the company's sale to be non-bona fide, when combined with the unusually high price and abnormally low quantity of its sale, the nature of the transaction tends to support

Commerce's conclusion that the transaction was atypical of Huachao's normal business practices. Thus, the peculiar circumstances presented here could be considered by Commerce in its totality of the circumstances analysis. That is, it was reasonable for Commerce to find that the facts surrounding Huachao's transaction would be unlikely to be repeated in the future.

V. The Department's Determination That the Structure of Huachao's Sale Was Atypical Was Supported by Substantial Evidence

The final part of Commerce's bona fide analysis included an examination of "the cash flow and timeline surrounding the payment by Huachao's [U.S.] customer." Def.'s Mem. 32. To this end,

> the Department requested additional factual information from Huachao's customer, . . . including all 'financial documents that demonstrate all transactions related to the purchase, import and sale of the subject merchandise' as well as 'bank statements' . . . to: (1) obtain greater detail about the cash flow and timeline surrounding the [customer's] payments [for] the merchandise, antidumping duty, ocean freight, and other costs surrounding the transaction; and (2) to perform additional analysis related to the transactions involved in the sale.

Bona Fides Mem. at 6–7. In response, Huachao's U.S. customer "provided the Department with . . . copies of its purchase ledgers . . . [in which it] record[ed] the month, day, and year and below, notes the products purchased and the price it paid." Bona Fides Mem. at 7. For Huachao's entry, however, Commerce found that the customer "did not note the date but rather just the month and year; it was the only entry with this discrepancy." Bona Fides Mem. at 7.

Additionally, the Department found that "while the purchase appears in September 2009, the purchase price . . . listed in the purchase ledger was not, in fact, the price paid by [the unaffiliated U.S. importer] to Huachao for the garlic . . . , but rather the exact amount for which [the importer] reportedly sold the garlic to its customer[] in December 2009." Bona Fides Mem. at 7. In other words, Huachao's unaffiliated U.S. importer erroneously entered its own sales price (i.e., the price at which the importer sold the garlic to its customer) on its purchase ledger, rather than the price it paid Huachao for the garlic.

In addition to the irregularities in the purchase ledger, the Department did not receive all of the information it asked for. In particular, "[a]lthough Commerce requested the importer[']s bank statements

covering the period August 1, 2009 through December 31, 2009, the importer could provide [[ ]] bank statement for the month of December 2009; the importer stated that it could not access the remaining statements because they were '[[ ]].'"

Def.'s Mem. 6 (citation omitted). In the absence of this information "the Department was unable to consider that information for purposes of corroborating the information provided by Huachao itself. [For example,] the missing bank information prevents the Department from checking how [the importer] paid the antidumping duty cash deposit[9] and other aspects of the sales terms between the parties." Bona Fides Mem. at 7. Based on these facts, Commerce concluded that "there are inconsistencies in the information provided by Huachao's customer in the United States, raising doubts about Huachao's description of the sale's structure." Rescission, 76 Fed. Reg. at 19,324.

To plaintiff, "Commerce's discussion of Huachao's unaffiliated importer reveals that Commerce drew inferences adverse to Huachao based upon the acts of its unaffiliated importer." Pl.'s Br. 35. In doing so, according to plaintiff, Commerce "did not explain how one alleged inconsistency [(i.e., the improperly recorded date in the purchase ledger)] was material, inferred the most adverse conclusion from the alleged second inconsistency [(i.e., the entry of the sale price in the purchase ledger)], and overlooked record evidence that fully explains the alleged third inconsistency [(i.e., the inability of the U.S. customer to provide its bank statements)]." Pl.'s Br. 3. Finally, plaintiff argues, "the acts of an unaffiliated importer cannot—as a matter of

[9] The manner in which the cash deposit is paid is important because it plays a role in how the Department calculates dumping margins. Under Commerce's regulations, prior to liquidation importers must certify to Customs whether an exporter or producer has agreed to pay or reimburse the antidumping duties. 19 C.F.R. § 351.402(f)(2) (2009). If an importer fails to file such a certificate, Commerce may presume that the exporter or producer has paid or reimbursed those duties. *Id.* § 351.402(f)(3). If so, Commerce will then reduce the export price by the amount that the exporter or producer has paid or reimbursed the importer. *Id.* § 351.402(f)(1)(i). *See Nereida Trading Co., Inc. v. United States*, 34 CIT __, __, 683 F. Supp. 2d 1348, 1352 n.3 (2010); *All Tools, Inc. v. United States*, 34 CIT __,__, Slip Op. 10–114, at 3 (2010) (citing 19 C.F.R. § 351.402(f)(1)-(3) (2010)) ("The purpose of a non-reimbursement statement is to assure Customs that the importer will not be repaid the antidumping duty by the exporter or producer of the merchandise. If an importer fails to file a non-reimbursement statement, Commerce may presume that the exporter or purchaser did, in fact, reimburse the importer for the antidumping duties paid. In cases where Commerce relies on this presumption, it will treat the duty as if it had been fully reimbursed, and will charge the importer the duty a second time, in effect doubling the duty rate.").

law—result in an *adverse inference*[10] against Huachao, and thus Commerce's concerns about the importer are insufficient to support its *bona fides* determination." Pl.'s Br. 34 (emphasis added).

In response, Commerce asserts that "Huachao's argument that Commerce should not have considered the actions of its U.S. customer is unfounded. Despite Huachao's contentions, Commerce did not apply 'adverse inferences' to Huachao, pursuant to 19 U.S.C. § 1677e, for the importer's 'failure to cooperate.'" Def.'s Mem. 36. To the contrary, "Commerce's conclusions do not result from the application of adverse inferences, but constitute statements of fact regarding the evidence on the record." Def.'s Mem. 36. Moreover, according to defendant, "this Court has affirmed Commerce's examination of [a] customer's behavior and commercial transactions in its *bona fides* analysis." Def.'s Mem. 36 (citing *Hebei New Donghua*, 29 CIT at 616–17, 374 F. Supp. 2d at 1343–44). Hence, "Commerce's analysis of the record evidence to substantiate a plaintiff's claims routinely includes [a consideration of the data] provided by the customer, which is impossible if the importer refuses to provide Commerce with requested information." Def.'s Mem. 36.

As to the particular evidence at issue, defendant supports its conclusions regarding the inconsistencies in the purchase ledger by noting that the Department has "more than 13 months of [the customer's] purchase ledger and only the entry pertaining to the purchase of Huachao's garlic does not include a day, as well as the month and year." Bona Fides Mem. at 14. In addition, Commerce points out that "it is a purchase ledger, but the entry does not reflect [the customer's] purchase price, but rather it exactly matches its sales price; sales prices would not be entered into a purchase ledger." Bona Fides Mem. at 14.

In terms of the missing bank statements, Huachao attempted to explain the unaffiliated importer's inability to produce the evidence by submitting a letter from the importer that stated "[[ ]]". Bona Fides Mem. at 7 (citation omitted). According to Commerce, however, defendant-intervenors "presented factual evidence which indicates that [the bank] does in fact make available balances and transaction

[10] It is unclear why plaintiff discusses "adverse inferences" in the context of a new shipper review. "Adverse inferences" are used in the context of antidumping investigations and periodic reviews if Commerce finds that a respondent has "failed to cooperate by not acting to the best of its ability to comply with a request for information." 19 U.S.C. § 1677e(b). In that case, the Department "may use an inference that is adverse to the interests of that party in selecting from among the facts otherwise available" in order to calculate an antidumping duty rate. *Id.* As such, adverse inferences may play a role in the determination of an antidumping margin, but are not part of the bona fide sales analysis framework.

data for up to 24 statement periods."[11] Bona Fides Mem. at 7. For these reasons, the Department believes it properly considered the information provided by Huachao's customer in finding that there were doubts about the nature of the transaction and the sale's structure. Def.'s Mem. 37.

The court finds that the inconsistencies in Huachao's U.S. customer's responses to Commerce's questionnaires, and its failure to provide all of the information the Department requested, lends additional support to Commerce's finding of a non-bona fide sale under the "totality of the circumstances" test. Once more, were the deficiencies in Huachao's U.S. customer's responses the sole portion of the transaction considered, they would not provide sufficient evidence that plaintiff's sale was not commercially reasonable. Thus, the court does not believe that the inconsistencies in the questionnaire responses coupled with the missing bank statements, standing alone, are sufficient evidence to support a finding that Huachao's sale was not bona fide. As discussed, however, the Department has the authority to examine a variety of factors in determining whether a transaction is commercially reasonable. *Jinxiang Chengda*, 37 CIT at __, Slip Op. 13–40, at 34. Thus, the deficiencies in the responses and the missing information could be considered by Commerce in its totality of the circumstances analysis. Further, based on the incorrect entries in the ledger and the U.S. customer's failure to produce bank statements that were apparently available to it, it was reasonable for Commerce to find that doubts were raised about plaintiff's description of the structure of the sale.

CONCLUSION

In sum, using its totality of the circumstances analysis, Commerce supported with substantial evidence its determination that Huachao's sale was not commercially reasonable, and therefore not bona fide. As part of its determination, the Department reasonably found that (1) Huachao's sales price was abnormally [[ ]]; (2) Commerce was not required to limit its comparison of Huachao's price and the Customs data to a disaggregated subset of the data; (3) Huachao's garlic bulb size was an indication that Huachao's unusually [[ ]] sales price could not be justified based on bulb size; (4) Huachao's sales quantity was [[ ]]; (5) the circumstances surrounding Huachao's transaction were unlikely to be repeated in the future; and (6) the inconsistencies and deficiencies in the records Commerce received

[11] As part of its February 24, 2011 submission of rebuttal factual information, defendant-intervenors included bank account information from plaintiff's U.S. customer's bank stating that "[b]alances and transaction data are available for up to 24 statement periods." Def.-Ints.' Submission of Rebuttal Factual Information Ex. 4 (C.R. 57).

from Huachao's customer were indicative of a non-bona fide sale. In light of these reasonable findings, Commerce's Rescission of Huachao's new shipper review was supported by substantial evidence and was in accordance with law.

Therefore, based on the foregoing, plaintiff's Motion for Judgment on the Agency Record is denied and the Department of Commerce's final determination rescinding plaintiff's new shipper review is sustained.

Dated: May 14, 2013
New York, New York

/s/ Richard K. Eaton
RICHARD K. EATON

Slip Op. 13–73

ROCHE VITAMINS, INC., Plaintiff, v. UNITED STATES OF AMERICA, Defendant.

Before: Richard K. Eaton, Judge
Court No. 04–00175
PUBLIC VERSION

[Determining the classification of a beta-carotene product.]

Dated: June 14, 2013

Erik D. Smithweiss, *Robert B. Silverman*, and *Joseph M. Spraragen*, Grunfeld, Desiderio, Lebowitz, Silverman & Klestadt, LLP, for plaintiff.

Saul Davis, Civil Division, Department of Justice; *Stuart F. Delery*, Acting Assistant Attorney General, and *Barbara S. Williams*, Attorney in Charge; International Trade Field Office, Commercial Litigation Branch, Civil Division, United States Department of Justice, for defendant.

OPINION

Eaton, Judge:

Before the court is Roche Vitamins, Inc.'s ("plaintiff" or "Roche") challenge to the classification by United States Customs and Border Protection ("Customs") of Roche's product "BetaTab 20%" ("the merchandise" or "BetaTab"). The court exercises jurisdiction pursuant to 28 U.S.C. § 1581(a) (2000). The case was tried on July 17 through 19, 2012 and post-trial briefing was completed on November 28, 2012. Based on the findings of fact and conclusions of law set forth below, the court enters judgment for plaintiff, pursuant to USCIT R. 52(a) and 58.

BACKGROUND

Plaintiff challenges Customs' classification of the merchandise, entered on December 16, 2002, under the 2002 Harmonized Tariff Schedule of the United States ("HTSUS") subheading 2106.90.97 as "[f]ood preparations not elsewhere specified or included: [o]ther: [o]ther." Joint Proposed Pretrial Order, Sched. C ¶ 4 (ECF Dkt. No. 93) ("PTO"). Plaintiff, the importer of record, timely filed a protest to the liquidation of the merchandise and, after paying all assessed duties and fees, commenced this action when its protest was denied. PTO ¶¶ 1, 5–6. Plaintiff argues that the "merchandise is properly classifiable as a synthetic organic coloring matter and/or preparations based thereon. [B]eta-carotene, under [HTSUS] subheading [3204.19.35]." Pl.'s Compl. ¶ 13 (ECF Dkt. No. 4). In the alternative, Roche also claims that the merchandise is classifiable under subheading K3204.19.35 of the Pharmaceutical Appendix and under HTSUS subheadings 2936.10.00 and 2936.90.00 as "provitamins."[1] Pl.'s Compl. ¶¶ 16, 19.

On December 23, 2010, this Court denied Roche's motion for summary judgment. *Roche Vitamins, Inc. v. United States*, 34 CIT ___, ___, 750 F. Supp. 2d 1367 (2010) (Wallach, J.) ("*Roche I*"). There, the Court held that genuine issues of fact as to the principal use of the merchandise and the functionality of the merchandise's ingredients other than beta-carotene precluded summary judgment. *Id*. at ___, 750 F. Supp. 2d at 1378, 1382.

During the course of the trial, the court heard testimony from three witnesses called by the plaintiff and one witness called by the United States. Plaintiff's witnesses were Dr. Jean Claude Tritsch, Roche's technical director at the time of importation, Dr. Steven Schwartz, an expert on the bioavailability of carotenoids, and Lynda Doyle, a former employee of Roche's marketing department with knowledge of Roche's marketing strategy for the merchandise. The Government's sole witness was Dr. Robert Russell, a physician specializing in gastroenterology. Following trial, the parties submitted proposed findings of fact and conclusions of law.

LEGAL FRAMEWORK

I. Standard of Review

The court makes its conclusions of law and findings of fact following

[1] Plaintiff's complaint also challenged the classification of its product B-carotene 7% CWS. Pl.'s Compl. ¶ 11. On November 13, 2009, the parties entered a stipulation that B-carotene 7% CWS is classifiable under HTSUS 3204.19.35. Stipulation ¶ 3 (ECF Dkt. No. 48). Thus, the classification of that product is no longer in dispute.

a trial de novo. *See* 28 U.S.C. § 2640(a)(1) (2006) ("The Court of International Trade shall make its determinations upon the basis of the record made before [it]."); *see also United States v. Mead Corp.,* 533 U.S. 218, 233 n.16 (2001) ("The [Court of International Trade] 'may consider any new ground' even if not raised below . . . and 'shall make its determinations upon the basis of the record made before the court,' rather than that developed by Customs." (citations omitted)).

When reviewing Customs' classification decisions, the court applies the HTSUS General Rules of Interpretation ("GRIs") and the HTSUS Additional U.S. Rules of Interpretation ("ARIs") in numerical order.[2] *CamelBak Prods., LLC v. United States*, 649 F.3d 1361, 1364 (Fed. Cir. 2011). GRI 1 mandates that tariff classification initially "be determined according to the terms of the headings and any relative section or chapter notes." "'[A] court first construes the language of the heading, and any section or chapter notes in question, to determine whether the product at issue is classifiable under the heading.'. . . [T]ariff headings are construed without reference to their subheadings [which cannot] either limit or broaden the scope of a heading." *Dependable Packaging Solutions, Inc. v. United States*, 37 CIT ___, ___, Slip. Op. 13–23, at 7 (2013) (quoting *Orlando Food Corp. v. United States*, 140 F.3d 1437, 1440 (Fed. Cir. 1998)). "Absent contrary legislative intent, HTSUS terms are to be construed according to their common and commercial meanings, which are presumed to be the same." *Carl Zeiss, Inc. v. United States*, 195 F.3d 1375, 1379 (Fed. Cir. 1999) (citing *Simod Am. Corp. v. United States*, 872 F.2d 1572, 1576 (Fed. Cir. 1989)). The court "is required to decide the correctness not only of the importer's proposed classification but of the government's classification as well." *See Jarvis Clark Co. v. United States*, 733 F.2d 873, 874 (Fed. Cir. 1984).

Customs' factual determinations are entitled to a presumption of correctness. *See* 28 U.S.C. § 2639(a)(1). "The presumption is a procedural device that allocates the burden of producing evidence . . . , placing the burden on [the plaintiff] to show that there was insufficient evidence for the factual components of [Customs'] decision." *Chrysler Corp. v. United States*, 592 F.3d 1330, 1337 (Fed. Cir. 2010) (citations omitted).

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[2] The GRIs and ARIs are part of the HTSUS statute which "consists of '(A) the General Notes; (B) the General Rules of Interpretation; (C) the Additional U.S. Rules of Interpretation; (D) sections I to XXII, inclusive (encompassing chapters 1 to 99, and including all section and chapter notes, article provisions, and tariff and other treatment accorded thereto); and (E) the Chemical Appendix." *Baxter Healthcare Corp. of P.R. v. United States*, 182 F.3d 1333, 1337 (Fed. Cir. 1999) (citing 19 U.S.C. § 3004(a) (1994)).

II. The Competing Headings

Here, Customs classified the BetaTab under HTSUS heading 2106: "Food preparations not elsewhere specified or included." This provision "is an expansive basket heading that only applies in the absence of another applicable heading." *R.T. Foods, Inc. v. United States*, 36 CIT ___, ___, 887 Fed. Supp. 2d 1351, 1358 (2012). "To *prima facie* fall under [this] heading . . . two criteria must be met: the product[] must be (1) a food preparation, which is (2) not elsewhere specified or included." *Id.* Thus, to overcome the presumption of correctness, Roche must demonstrate either that the evidence does not support classification of the merchandise as a "food preparation," or that the evidence supports classification of the merchandise under a different heading. *See Orlando Food*, 140 F.3d at 1441 ("Inherent in the term 'preparation' is the notion that the object involved is destined for a specific use."); *see also Aromont USA, Inc. v. United States*, 671 F.3d 1310, 1316 (Fed. Cir. 2012); *Arbor Foods, Inc. v. United States*, 30 CIT 670, 677 (2006).

Plaintiff claims the BetaTab is alternatively classifiable as a "coloring matter" under HTSUS heading 3204 (and K3204 by the inclusion of beta-carotene in the Pharmaceutical Appendix) or as a provitamin[3] under HTSUS heading 2936. In *Roche I*, this Court interpreted heading 3204's term "coloring matter" to be a principal use provision. *Roche I*, 34 CIT at ___, 750 F. Supp. 2d at 1375–1377. Because note 2(f) to Chapter 29 (the chapter pertaining to provitamins) excludes "synthetic organic coloring matter" from that chapter, whether classification under heading 2936 is appropriate here also hinges, in part, on whether or not the merchandise is principally used as a "coloring matter." *Id.* at ___, 750 F. Supp. 2d at 1375 ("Note 2(f) . . . cross-references the term 'coloring matter.'"). In other words, if the class or kind of goods commercially fungible with the merchandise is principally used as a "coloring matter," the merchandise will be classifiable under heading 3204 and excluded from 2936 by application of Chapter 29 note 2(f).

Principal use provisions "'call for a [factual] determination as to the group of goods that are commercially fungible with the imported goods'" so as to identify "the 'use which exceeds any other *single* use.'" *Aromont*, 671 F.3d at 1312 (quoting *Primal Lite, Inc. v. United States*, 182 F.3d 1362, 1365 (Fed. Cir. 1999); *Lenox Collections v. United States*, 20 CIT 194, 196 (1996)). This Court customarily uses several

[3] Generally, a provitamin is "[a] substance which is converted into a vitamin within an organism." Oxford English Dictionary 721 (2d ed. 1989); American Heritage Dictionary of the English Language 1412 (4th ed. 2000) ("A vitamin precursor that the body converts to its active form through normal metabolic processes. Carotene, for example, is a provitamin of vitamin A.").

factors, commonly referred to as the "*Carborundum* Factors," to inform its determination as to which goods are "commercially fungible with the imported goods." *Id*. (quoting *Primal Lite*, 182 F.3d at 1365) (internal quotation marks omitted).

> These factors include: use in the same manner as merchandise which defines the class; the general physical characteristics of the merchandise; the economic practicality of so using the import; the expectation of the ultimate purchasers; the channels of trade in which the merchandise moves; the environment of the sale, such as accompanying accessories and the manner in which the merchandise is advertised and displayed; and the recognition in the trade of this use.

Id. at 1313 (citing *United States v. Carborundum Co.,* 536 F.2d 373, 377 (Fed. Cir. 1976)). The actual use of the goods "is evidence of the principal use" but is still only "one of a number of factors." *Id.*

Even if the merchandise is not principally used as a colorant, it is not necessarily classifiable as a provitamin under HTSUS heading 2936. Here, for instance, the BetaTab is not the provitamin beta-carotene in its pure form. Additional stabilizers were added to beta-carotene crystalline during the BetaTab's manufacturing process. Chapter 29 note 1(f) only permits the addition of a stabilizer to provitamins where "necessary for their preservation or transport." *See also* Explanatory Notes to the Harmonized Commodity Description and Coding System, 29.362 (3d ed. 2002) ("Explanatory Notes") ("The products of this heading may be stabilised for the purposes of preservation or transport . . . **provided** that the quantity [of stabilizer] added or the processing in no case exceeds that necessary for their preservation or transport and that the addition or processing does not alter the character of the basic product and render it particularly suitable for specific use rather than for general use.").[4] In other words, if the quantity of a stabilizing agent added to an item of this heading is more than is necessary for transport or preservation,[5] or the nature of the stabilizing agent alters the character of the basic product so as to render it "particularly suitable for specific use," the item may not be classified as a provitamin under HTSUS heading 2936. *See Roche I*, 34 CIT at ___, 750 F. Supp. 2d at 1380.

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[4] The Explanatory Notes, "while not legally binding, are 'persuasive' and are 'generally indicative' of the proper interpretation of [a] tariff provision." *See Lemans Corp. v. United States*, 660 F.3d 1311, 1316 (Fed. Cir. 2011) (quoting *Drygel, Inc. v. United States*, 541 F.3d 1129, 1134 (Fed. Cir. 2008)).

[5] The court held at summary judgment that "the stabilizing ingredients . . . are not in quantities greater than necessary to achieve stabilization and do not alter the molecule of beta-carotene" and the parties did not dispute this point at trial. *Roche I*, 34 CIT at ___, 750 F. Supp. 2d at 1381 n.11.

Merchandise that might otherwise be classified under the headings of Chapter 29 becomes "particularly suitable for specific use," and is thus excluded from those headings, when (1) the ingredients added to it facilitate uses not ordinary to goods of the heading or (2) where the added ingredients alter the chemical's reactive properties in a manner that excludes uses ordinary to goods of the heading. *See, e.g.*, *Degussa Corp. v. United States*, 508 F.3d 1044, 1046 (Fed. Cir. 2007) (finding particularly suitable for a specific use a chemical with modified reactive properties that promoted its incorporation into "certain organic solvents and polymers"). Thus, a product's increased suitability for an *ordinary* application of its chemical component will not exclude it from Chapter 29, so long as the product can still be used as that chemical in other ordinary ways. Added ingredients that make a chemical[6] highly capable of a use that is *not an ordinary use of* chemicals of the heading, however, will render the item "particularly suitable for specific use rather than for general use" and exclude it from classification in the headings of Chapter 29.

III. The Pharmaceutical Appendix

Certain imports are entitled to duty free status by virtue of their inclusion in the Pharmaceutical Appendix. An import is entitled to such status if, when imported from an eligible country and claimed by the importer, "the individual product [is] listed in the Pharmaceutical Appendix," its tariff classification contains "the symbol 'K' [in the] special rates of duty subcolumn for those 8-digit subheadings which contain active ingredients and chemical intermediaries," and it is "used in the prevention, diagnosis, alleviation, treatment, or cure of disease in humans." *Advice Concerning the Addition of Certain Pharmaceutical Products and Chemical Intermediates to the Pharmaceutical Appendix to the Harmonized Tariff Schedule of the United States,* USITC Pub. 3167, at 7, 3 (Apr. 1999) ("*Advice re: Pharm. App'x*"); *BASF Corp. v. United States*, 29 CIT 681, 693–94 n.7, 391 F. Supp. 2d. 1246, 1256 n.7 (2005) ("*BASF I*") ("[The import must be] 'used in the prevention, diagnosis, alleviation, treatment, or cure of disease in humans or animals,' which the [International Trade Commission] identifies as a pharmaceutical or 'drug.'" (quoting *Advice re: Pharm. App'x* at 3)), *aff'd*, 482 F.3d 1324 (Fed. Cir. 2007) ("*BASF II*"); *see also* HTSUS General Note 13 ("Whenever a rate of duty of 'Free' followed by the symbol 'K' in parentheses appears in the 'Special' subcolumn for a heading or subheading, any product (by whatever name known) classifiable in such provision which is the product of a country eligible for tariff treatment under column 1 shall be entered

[6] Beta-carotene is an organic chemical. *See* Tr. 124.

free of duty, *provided* that such product is included in the pharmaceutical appendix to the tariff schedule."). In other words, to enter duty-free, the good must be listed in the Pharmaceutical Appendix, classified in an appropriate subheading, and intended ultimately to be used as or in a pharmaceutical product.

In determining whether the import is used as or in a pharmaceutical product, the "principal use" of the goods for classification purposes is not determinative. As noted, a "principal use" determination for classification purposes calls for the identification of the use "which exceeds any other *single* use," turning not on the actual use of the product, but on the use of the class or kind of goods "commercially fungible" with the product. *Aromont*, 671 F.3d at 1312. Duty-free status under the Pharmaceutical Appendix, however, turns on whether consumers of the product itself intend to use it in a pharmaceutical manner. *See BASF II*, 482 F.3d at 1326 (denying a beta-carotene product duty-free status because it was not "disputed that [the] product is not intended for vitamin or other pharmaceutical use, but is intended for use as a food colorant").

The structure of the HTSUS makes this distinction clear. There are numerous headings and subheadings that call for a non-pharmaceutical principal use, but which, nevertheless, also contain the symbol "K" in their special rates of duty subcolumn. *See, e.g.*, HTSUS 3203.00.80; 3204.13.60; 3204.13.80; 3204.90.00. Inclusion of the symbol, therefore, indicates that Congress intended that some imports with a non-pharmaceutical "principal use" are entitled to duty free status under the Pharmaceutical Appendix nonetheless. Were that not the case, the inclusion of the symbol "K" in these subheadings would be a dead letter in every such instance. Moreover, such an interpretation would run afoul of "one of the most basic interpretive canons, that '[a] statute should be construed so that effect is given to all its provisions, so that no part will be inoperative, superfluous, void or insignificant.'" *Corley v. United States*, 556 U.S. 303, 314 (2009) (citation omitted).

FINDINGS OF FACT

As an initial matter, the court finds that, having had the opportunity to observe their demeanor during direct and cross-examination, all four witnesses testified credibly at trial.

I. Principal Use of the Merchandise

The stipulated facts and evidence adduced at trial, when analyzed under the rubric of the *Carborundum* factors, establish that the principal use of the merchandise is as a source of provitamin A in foods or vitamin products, rather than as a coloring matter.

First, the merchandise is actually used in the same manner as other vitamin and provitamin formulations intended for use in the domestic manufacture of vitamin supplements and fortified foods. Beta-carotene products are used to provide provitamin A activity in the manufacture of direct compression tablets, gel capsules, and nutrient powders. Put another way, these products are used, regardless of coloring ability, in the manufacture of the types of goods sold as vitamin supplements at drugstores and retailers like GNC or Vitamin Shoppe. Tr. 623–24. The products are also used in fortified food products, such as food bars and cereals, for coloration and provitamin activity, or for provitamin activity alone. Tr. 606–09, 612–13. BetaTab was developed for use in vitamin products and its actual use during the relevant time period was predominantly as a source of provitamin A for vitamin products. PTO ¶ 31; Tr. 615. The "vast majority of" the merchandise has been used for vitamin products. PTO ¶ 30.

Next, the general physical characteristics of the merchandise lend themselves to a principal use as a vitamin supplement. The merchandise "is a mixture containing beta-carotene, antioxidants, gelatin, sucrose and corn starch." PTO ¶ 20. Beta-carotene crystalline, which makes up twenty percent of the mixture, is an organic colorant with provitamin A activity. PTO ¶ 8, 10, 22. The merchandise can be used as a source of vitamin A in foods, beverages, and vitamin products, or as a colorant. PTO ¶ 23, 29. Further, it is a water miscible version of provitamin A. Tr. 726. The merchandise, however, has a higher concentration of beta-carotene than other products used primarily for coloring and, unlike some of those products, is only dispersible in water above twenty degrees Celsius. PTO ¶ 27, 37. The high concentration and high bioavailability of beta-carotene in the merchandise makes it preferable for use in dietary supplement tablets. Tr. 704–07. In most cases, a higher potency beta-carotene product is preferred for the manufacture of tablets in the dietary supplement industry. Tr. 155–56. Moreover, the merchandise was developed by Roche specifically "for use in high potency and anti-oxidative vitamin tablets." Tr. 291.

Use of the BetaTab as an ingredient to provide provitamin A activity, rather than as a colorant, is commercially practical. The majority of the merchandise sold by Roche in 2002 was sold for nutritional use. Tr. 615; Pl.'s Ex. 42. Other beta-carotene products that do not provide coloration, such as Roche's B-Carotene 10% B, are sold for nutritional use to large food producers. Tr. 612–13; Pl.'s Ex. 42. BASF, a significant competitor of Roche, also sold beta-carotene products primarily for use in the manufacture of tablets and capsules. Tr. 616–19. The

BetaTab is marketed for use as a vitamin A source in vitamin products and "the vast majority of" the merchandise has been used for vitamin products. PTO ¶ 28, 30. The merchandise can, however, also be used in an economically practical manner as a colorant. Tr. 573–576. As such, this factor is not very probative.

The ultimate purchasers of the BetaTab do not draw a bright-line distinction between its use as colorant and its use as a vitamin. Roche's customers understand that beta-carotene products have a dual function as both a colorant and a source of provitamin A activity. Tr. 577. Accordingly, purchasers expect the merchandise to provide both nutrition and coloration simultaneously. Tr. 577. Thus, this factor is also not particularly probative.

The channels of trade in which the merchandise moves and the recognition of the use in the trade indicate a principal use as a provitamin product. The beta-carotene used in the manufacture of the merchandise is produced domestically by Roche, sent abroad for processing, and then imported as a mixture with the additional components. PTO ¶ 40. Manufacturers of vitamin tablets are considered to be part of the dietary supplement industry and not part of the food industry. Tr. 621–22. There is a recognized market for direct compression tablets and capsules. *See* Tr. 640. The merchandise was targeted for sale in that market by the Roche sales employees and "recommended strictly for nutrition." Tr. 640–41. Roche's research and development reports list only other beta-carotene products that are not used as colorants as products competitive with the merchandise. Tr. 302–03; Def.'s Ex. H6 at 6. Roche's annual sales report for 2002 identifies the merchandise, and no other merchandise, as sold through Roche's "Human Nutrition Health" division. Tr. 252; Def.'s Ex. G.

The environment of sale and advertising strongly indicate that the BetaTab is principally used as a source of provitamin A. The merchandise "was not produced or marketed for sale as a colorant during the relevant time period" and Roche's marketing materials make no mention of the merchandise's "use as a food colorant." PTO ¶ 31, 34. Those materials also lack any indication of the color intensity the merchandise would be expected to produce if used as a colorant. PTO ¶ 34. The merchandise is marketed as "tablet grade" so as to direct sales of the product by Roche employees to the "dietary supplement industry." Tr. 535. The term "tablet grade" indicates that the merchandise can be used in the manufacture of direct compression tablets. Tr. 262–63, 535. Even though Roche's sales employees would work directly with customers in order to determine which of Roche's various beta-carotene products would best suit their needs, and those

employees did not necessarily rely on color charts and stability testing to recommend products, Roche personnel tended to sell the merchandise to customers that intended to use it in direct compression tablets and capsules. Tr. 539, 597–98.

II. The Merchandise is Not Particularly Suited for a Specific Use

The additional ingredients added to the mixture do not make the BetaTab particularly suited for specific use outside of the ordinary uses of beta-carotene. First, a stabilizing matrix of some kind is necessary for any beta-carotene product. In its pure crystalline form, beta-carotene is unstable and susceptible to oxidation, which destroys its healthful properties and usefulness as a colorant. PTO ¶ 11, 14–15. Beta-carotene must be processed and combined with other ingredients to be commercially usable as either a provitamin or a colorant. PTO ¶ 11.

Roche's manufacturing process does not change the BetaTab's functionality as a provitamin. The manufacturing process Roche uses to create the merchandise does not change the character of the beta-carotene as provitamin A. Tr. 726. The process used to create the BetaTab, that is, the technology by which Roche adds additional ingredients that envelop the beta-carotene crystalline in a matrix, is common throughout the industry for several different types of vitamin. Tr. 42. That same technology is used to produce all Roche beta-carotene forms. Tr. 43. There is no evidence that the merchandise's non-beta-carotene ingredients enhance absorption or bioavailability of the beta-carotene in a manner greater than any other stabilizing matrix. Tr. 331–35, 357, 379, 389, 393, 472–73, 715–17. Moreover, an increase in the bioavailability of a provitamin product does not change its use as a provitamin. Provitamins for human consumption are intended to be ingested and processed by the body to yield vitamin activity. The increased bioavailability of a particular provitamin merely improves that ordinary use of goods within the class of provitamins.

That the additional ingredients make the BetaTab highly suitable for tableting does not make the merchandise particularly suitable for a specific use. Although highly suitable for tableting, the merchandise contains no ingredients specifically prepared for tableting. Tr. 164–66. That suitability is not at odds with use as a provitamin or with the product's other uses. The additional ingredients, or matrices, of the various Roche products are "basically the same" for lower potency products suitable for human consumption that are used for coloration purposes as for higher potency products that are used for vitamin and nutritional products. Tr. 350, 349–57. Other Roche products, prima-

rily used as colorants, also have characteristics that make them highly suitable for tableting. Tr. 403. Some of those products are used to make tablets for nutritional use. Tr. 425–28. The merchandise is well suited for fortifying foods with provitamin A. Tr. 446–47. Other, less potent, Roche beta-carotene products are also well suited for fortifying foods. Tr. 448–449.

Finally, the tableting process is a step that transforms the merchandise, which is essentially a bulk beta-carotene ingredient, into a final product for sale. The merchandise's increased suitability to be used in the creation of tablets for retail sale is a particular kind of use within the uses common to members of the provitamin category.

III. The Merchandise is Used as an Ingredient in Products Designed to Promote Health

The merchandise is primarily used to create vitamin supplements and fortified foods. As noted, "the vast majority of" the merchandise has been used for vitamin products and the merchandise is principally used in that manner. PTO ¶ 30. The product was sold through Roche's "Human Nutrition Health" division. Tr. 252; Def.'s Ex. G. Dietary supplements are intended to provide customers with nutrients that they are not otherwise ingesting in sufficient amounts for optimal health. Tr. 374–75. Like most supplements, the merchandise is a "formulation that is meant to maintain general health or well-being." Tr. 478. Although the product would not normally be used in the medical treatment of vitamin A deficiency, it is used with the purpose of maintaining healthy levels of vitamin A. Tr. 730. In addition to helping those who consume it to avoid vitamin A deficiency, research suggests that provitamin A may have a prophylactic effect against certain cancers. Tr. 731–32. Thus, the BetaTab is used in a manner designed to promote human health.

CONCLUSIONS OF LAW

I. The Merchandise is Properly Classified under HTSUS Heading 2936

As determined at trial, the merchandise is principally used a source of provitamin A in foods or vitamin products, rather than as a "coloring matter." Consequently, the BetaTab cannot be classified under Heading 3204. As noted, in order to be classified under HTSUS heading 3204, an imported good must be principally used as a "coloring matter." *Roche I*, 34 CIT at ___, 750 F. Supp. 2d at 1375–78. Thus, the merchandise cannot be classified under Heading 3204. Because the merchandise cannot be classified under subheading 3204.19.35, the court does not reach whether the BetaTab would

qualify for duty-free entry under that subheading as a result of its inclusion in the Pharmaceutical Appendix.

The merchandise is a "provitamin" covered by Heading 2936.[7] There is no dispute that beta-carotene is provitamin A. It was demonstrated as a matter of fact at trial that the BetaTab's additional non-beta-carotene ingredients, added as stabilizers, do not make the merchandise particularly suitable for specific use.[8] Consequently, the addition of the stabilizing ingredients is permissible under note 1(f) to Chapter 29, and does not exclude the merchandise from classification under Heading 2936. As a result, the merchandise is included in the class of goods covered by Heading 2936 and its subheadings.

Because the merchandise is classifiable under another heading, Roche has overcome the presumption of correctness to which Customs' classification was entitled. As noted, to fall under Customs' selected heading, Heading 2106, an imported good must be both (1) a food preparation, and (2) not elsewhere specified or included. The trial evidence demonstrated that the merchandise is a provitamin and is not particularly suited to specific use, rendering it classifiable within Heading 2936. As such, the merchandise is "elsewhere included." Therefore, Roche has demonstrated that BetaTab fails the second requirement for classification in Heading 2106 and that Customs' decision to classify the BetaTab in that heading is incorrect.

II. The Merchandise is Properly Classified under HTSUS Subheading 2936.10.00

Under GRI 6, "the classification of goods in the subheadings of a heading shall be determined according to the terms of those subheadings and any related subheading notes" and by application of the other GRIs. Within Heading 2936, there are only two potentially

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[7] Heading 2936 covers: "Provitamins and vitamins, natural or reproduced by synthesis (including natural concentrates), derivatives thereof used primarily as vitamins, and intermixtures of the foregoing, whether or not in any solvent."

[8] Although it did not have the burden of proof, the defendant attempted to demonstrate at trial that the stabilizing ingredients made the pelletized crystals more suitable for absorption by the human intestines than would otherwise be the case. The defendant's purpose was to demonstrate that the stabilizers made the BetaTab particularly suitable for a particular use. The defendant, however, did not succeed. There was no evidence produced at trial that the stabilizing ingredients made the merchandise more absorbable by the intestines than provitamin A would be if stabilized by other ingredients. Hence, even if increased bioavailability were sufficient to exclude classification under Chapter 29, the facts necessary for that proposition were not established at trial.

applicable subheadings: 2936.10.00[9] and 2936.90.00.[10] Subheading 2936.10.00 covers "[p]rovitamins, unmixed" and 2936.90 is a basket category covering "[o]ther, including natural concentrates." Thus, because the BetaTab consists of provitamin A with added stabilizing ingredients, selection of the appropriate subheading turns on the construction of the term "unmixed." [11]

The heading language, common to both 2936.10.00 and 2936.90.00 confirms this conclusion. That language, "intermixtures of the foregoing, whether or not in any solvent," makes clear the congressional intention that goods of the heading are to be treated differently from other ingredients for purposes of what is a "mixture." The phrase "of the foregoing" limits the ordinarily broad term "intermixture" to combinations of "[p]rovitamins and vitamins, natural or reproduced by synthesis (including natural concentrates), derivatives thereof used primarily as vitamins." The phrase "whether or not in any solvent" further indicates that Congress did not intend the terms "mixture" and "intermixtures" to include the combination a provitamin of the heading and substances outside the heading. Otherwise, the express inclusion of solvents would be surplusage, as any solvent-provitamin combination would be an "intermixture." *Marx v. Gen. Revenue Corp.*, 133 S. Ct. 1166, 1178 (2013) ("[T]he canon against surplusage is strongest when an interpretation would render superfluous another part of the same statutory scheme.").

That this narrower understanding of the term "mixture" carries down to the subheading level is shown by the structure of the subheadings. All of 2936's subheadings refer to a plural noun or conjunction followed by: ", unmixed" with the exception of 2936.90.00, the catch-all. *Compare* HTSUS 2936.90.00 ("Other, including natural concentrates"), *with* HTSUS 2936.10.00 ("Provitamins"), HTSUS 2936.21.00 ("Vitamin A"), 2936.22.00 ("Vitamin B1"), 2936.23.00 ("Vitamin B2"), 2936.24.00 ("Vitamin B3 or Vitamin B5"), 2936.25.00 ("Vitamin B6"), 2936.26.00 ("Vitamin B12"), 2936.27.00 ("Vitamin C"), 2936.28.00 ("Vitamin E"), *and* 2936.29.00 ("Other vitamins and their derivatives"). Thus, if the term "unmixed" were construed to include mixtures of the named vitamins and provitamins of the heading with

[9] HTSUS 2936.10.00 reads in full: "Provitamins and vitamins, natural or reproduced by synthesis (including natural concentrates), derivatives thereof used primarily as vitamins, and intermixtures of the foregoing, whether or not in any solvent: Provitamins, unmixed."

[10] HTSUS 2936.90.00 reads in full: "Provitamins and vitamins, natural or reproduced by synthesis (including natural concentrates), derivatives thereof used primarily as vitamins, and intermixtures of the foregoing, whether or not in any solvent: Other, including natural concentrates."

[11] It is worth noting that all of the subheadings of heading 2936 carry a duty rate of "Free."

any other substance, then the addition of any of the water, stabilizers, solvents, antidusting agents, colorings, and odoriferous substances expressly permitted by notes 1(d) through (g) to Chapter 29, would prohibit classification of those substances under their eo nomine[12] subheadings. That is, under that interpretation, any vitamin or provitamin requiring the addition of those substances for transport, safety, or stabilization would automatically be pushed into the basket subheading. Such a reading makes little sense. Thus, the subheadings and the Chapter notes, read together, indicate that the term "unmixed" contained in the subheadings of Heading 2936 is intended to mean "unmixed with the other vitamins and provitamins of this heading."

Accordingly, the additional stabilizing ingredients added to the beta-carotene crystalline to create the BetaTab do not render the product a mixture for purposes of subheading 2936.10.00. Therefore, because BetaTab is a provitamin compound, subheading 2936.10.00 is the correct subheading and the merchandise is properly classified thereunder.

CONCLUSION

For the reasons stated above, the court concludes that the correct tariff classification for the BetaTab 20% is HTSUS subheading 2936.10.00 and the merchandise is subject to a duty rate of "Free." Judgment will enter accordingly.

Dated: June 14, 2013
New York, New York

/*s*
RICHARD K. EATON

Slip Op. 13–80

TAIAN ZIYANG FOOD COMPANY, LTD., et al., Plaintiffs, v. UNITED STATES, Defendant, and FRESH GARLIC PRODUCERS ASSOCIATION, et al., Defendant-Intervenors

Consol. Court No. 05–00399

[Sustaining U.S. Department of Commerce's third remand determination in administrative review of antidumping duty order covering fresh garlic from the People's Republic of China]

Dated: June 24, 2013

[12] "An *eo nomine* provision is one 'in which an item is identified by name.'" *Arko Foods Int'l, Inc. v. United States*, 33 CIT __, __, 679 F. Supp. 2d 1369, 1375 n.24 (2009) (quoting *Len–Ron Mfg. Co. v. United States,* 334 F.3d 1304, 1308 (Fed. Cir. 2003)).

Mark E. Pardo, Grunfeld, Desiderio, Lebowitz, Silverman & Klestadt LLP, of Washington, D.C., argued for Plaintiffs Zhengzhou Harmoni Spice Co., Ltd., Jinan Yipin Corporation, Ltd., Linshu Dading Private Agricultural Products Co., Ltd., and Sunny Import & Export Co., Ltd.

Richard P. Schroeder, Commercial Litigation Branch, Civil Division, U.S. Department of Justice, of Washington, D.C., argued for Defendant. With him on the brief were *Stuart F. Delery*, Acting Assistant Attorney General, Civil Division, and *Jeanne E. Davidson*, Director, and *Reginald T. Blades, Jr.*, Assistant Director, Commercial Litigation Branch. Of counsel on the brief was *George Kivork*, Office of the Chief Counsel for Import Administration, U.S. Department of Commerce, of Washington, D.C.

Michael J. Coursey, Kelley Drye & Warren, LLP, of Washington, D.C., argued for Defendant-Intervenors Fresh Garlic Producers Association, Christopher Ranch L.L.C., The Garlic Company, Valley Garlic, and Vessey and Company, Inc. With him on the brief was *John M. Herrmann*.

OPINION

RIDGWAY, Judge:

In this consolidated action, the plaintiff Chinese producers and exporters of fresh garlic challenged the final results of the U.S. Department of Commerce's ninth administrative review of the antidumping duty order covering fresh garlic from the People's Republic of China. *See generally Taian Ziyang Food Co. v. United States*, 33 CIT ____, 637 F. Supp. 2d 1093 (2009) ("*Taian Ziyang I*"); *Taian Ziyang Food Co. v. United States*, 35 CIT ____, 783 F. Supp. 2d 1292 (2011) ("*Taian Ziyang II*").

Taian Ziyang I analyzed each of the 10 issues that the plaintiff Chinese producers raised, sustaining Commerce's determination as to three of the issues and remanding the remaining seven to the agency for further consideration. *See generally Taian Ziyang I*, 33 CIT at ____, ____, 637 F. Supp. 2d at 1100–02, 1166.

Taian Ziyang II reviewed Commerce's remand determination (the Second Remand Determination), filed pursuant to *Taian Ziyang I*. *See generally* Final Results of Redetermination Pursuant to Court Remand ("Second Remand Determination"). [1] As to four of the seven issues addressed therein, there were no objections. *Taian Ziyang II* sustained the Second Remand Determination as to those four issues, and, upon analysis, remanded the other three to Commerce for further consideration. *See generally Taian Ziyang II*, 35 CIT at ____, ____, 783 F. Supp. 2d at 1302, 1343.

Now pending before the court is Commerce's Third Remand Deter-

[1] The Government was granted a voluntary remand at the outset of this action, to allow Commerce to correct its omission of certain data from its labor wage rate calculation. *See Taian Ziyang I*, 33 CIT at ____, 637 F. Supp. 2d at 1104. The result of that voluntary remand was Commerce's First Remand Determination. *See* Final Results of Redetermination Pursuant to Court Remand ("First Remand Determination").

mination, filed pursuant to *Taian Ziyang II*. *See generally* Final Remand Results of Third Redetermination Pursuant to Remand ("Third Remand Determination"). [2] The Domestic Producers (*i.e.*, the Fresh Garlic Producers Association and its four constituent members [3]), defendant-intervenors in this action, challenge the Third Remand Determination as to two of the three issues addressed therein. *See generally* Defendant-Intervenors' Comments on Third Remand Redetermination ("Def.-Ints.' Brief"); Defendant-Intervenors' Reply to Plaintiffs' and Defendant's Response Comments on Third Remand Redetermination ("Def.-Ints.' Reply Brief"). For their part, the Government and the four GDLSK Plaintiffs – *i.e.*, Zhengzhou Harmoni Spice Co., Ltd. ("Harmoni"), Jinan Yipin Corporation, Ltd. ("Jinan Yipin"), Linshu Dading Private Agricultural Products Co., Ltd. ("Linshu Dading"), and Sunny Import & Export Co., Ltd. ("Sunny") – urge that the Third Remand Determination be sustained in all respects. *See generally* Defendant's Response to Comments Regarding Redetermination Pursuant to Court Remand ("Def.'s Response Brief"); GDLSK Plaintiffs' Response Comments Regarding the Department's Third Remand Redetermination ("Pls.' Response Brief").

Jurisdiction lies under 28 U.S.C. § 1581(c) (2000). [4] For the reasons detailed below, Commerce's Third Remand Determination is sustained.

I. *Background*

Seven Chinese producers and exporters of fresh garlic brought this action to contest various aspects of the Final Results of Commerce's ninth administrative review of the antidumping duty order on fresh garlic from China, which covered the period from November 1, 2002 through October 31, 2003. *See generally Taian Ziyang I*, 33 CIT ____, 637 F. Supp. 2d 1093; Fresh Garlic from the People's Republic of China: Final Results of Antidumping Duty Administrative Review, 70 Fed. Reg. 34,082 (June 13, 2005) ("Final Results"); Notice of Amended Final Results of Antidumping Duty Administrative Review: Garlic from the People's Republic of China, 70 Fed. Reg. 56,639 (Sept. 28,

[2] Throughout its Third Remand Determination, Commerce mistakenly refers to *Taian Ziyang II*, 35 CIT ____, 783 F. Supp. 2d 1292 (2011), as "*Taian Ziyang III*." *See* Third Remand Determination at 1–2.

[3] The four constituent members of the Fresh Garlic Producers Association are Christopher Ranch, L.L.C., The Garlic Company, Valley Garlic, and Vessey and Company, Inc.

[4] All citations to federal statutes are to the 2000 edition of the United States Code. Similarly, all citations to federal regulations are to the 2002 edition of the Code of Federal Regulations.

2005) ("Amended Final Results"); Final Results of Redetermination Pursuant to Court Remand ("First Remand Determination").[5]

Taian Ziyang I analyzed each of the 10 issues that the Chinese producers raised, sustaining Commerce's determination as to three of the issues, and remanding the remaining seven to the agency for further consideration. *See generally Taian Ziyang I*, 33 CIT at ____, ____, 637 F. Supp. 2d at 1100–02, 1166. Specifically, *Taian Ziyang I* sustained Commerce's use of "adverse facts available" in calculating the dumping margins for Taian Ziyang Food Company, Ltd. ("Ziyang") and Taian Fook Huat Tong Kee Foodstuffs Co., Ltd. ("FHTK"). *See id*., 33 CIT at ____, ____, 637 F. Supp. 2d at 1124, 1166.[6] *Taian Ziyang I* similarly sustained Commerce's valuation of cold storage (challenged by the GDLSK Plaintiffs), as well as Commerce's calculation of surrogate financial ratios (challenged by Jinxiang Dong Yun Freezing Storage Co., Ltd. ("Dong Yun")). *See id*., 33 CIT at ____, ____, 637 F. Supp. 2d at 1144, 1166. In contrast, *Taian Ziyang I* remanded for further consideration Commerce's valuation of certain "factors of production" necessary for the cultivation and export of fresh garlic – in particular, (1) garlic seed, (2) irrigation water, (3) labor, (4) leased land, (5) cardboard packing cartons, (6) plastic jars and lids, and (7) ocean freight. *See id*., 33 CIT at ____, ____, ____, ____, ____, ____, ____, ____, 637 F. Supp. 2d at 1127, 1133, 1138, 1141, 1151–52, 1157, 1162, 1166.

In its Second Remand Determination, Commerce revalued irrigation expenses, leased land, ocean freight, and labor. *See* Second Remand Determination at 1–2, 11–16, 16–40, 40–41, 50–53, 60–73, 78–79. On the other hand, Commerce continued to value garlic seed, cardboard packing cartons, and plastic jars and lids as it had in the Final Results. *See id*. at 1–2, 4–11, 41–46, 46–50, 54–60, 7376, 76–78. As a result of its reconsideration in the course of the second remand, Commerce recalculated the weighted-average antidumping duty margin for Harmoni as 0.00% (down from 8.79%), for Jinan Yipin as 1.04% (down from 13.21%), for Linshu Dading as 4.34% (down from 7.97%), for Sunny as 4.22% (down from 9.17%), and for Dong Yun as

[5] In the Amended Final Results, Commerce corrected certain ministerial errors. *See Taian Ziyang I*, 33 CIT at ____, 637 F. Supp. 2d at 1103–04. In addition, as explained in note 1 above, the First Remand Determination corrected Commerce's omission of certain data from its labor wage rate calculation. *See id*., 33 CIT at ____, 637 F. Supp. 2d at 1104; n.1, *supra*.

[6] The sole issue that Ziyang raised in this action was its challenge to Commerce's use of "adverse facts available," which was resolved in favor of Commerce in *Taian Ziyang I*. *See Taian Ziyang I*, 33 CIT at ____, ____, 637 F. Supp. 2d at 1100–01, 1124. Ziyang thus has had no stake in the subsequent proceedings, and its dumping margin remains 12.58%. *See* First Remand Determination at 19.

15.49% (down from 31.26%). *See id*. at 79; Final Results, 70 Fed. Reg. at 34,085; First Remand Determination at 19. FHTK's margin remained unchanged at 15.75%. *See* Second Remand Determination at 79; First Remand Determination at 19.[7]

Commerce's Second Remand Determination was the subject of *Taian Ziyang II*. *See generally Taian Ziyang II*, 35 CIT at ____, 783 F. Supp. 2d at 1292. As to four of the seven issues (*i.e.*, the surrogate values for garlic seed, irrigation costs, land lease costs, and ocean freight expenses), there were no objections to the Second Remand Determination, and Commerce's determinations were sustained. *See generally id*., 35 CIT at ____, ____, ____, ____, 783 F. Supp. 2d at 1305, 1308, 1311, 1343 (sustaining Second Remand Determination as to garlic seed, irrigation costs, land lease costs, and ocean freight expenses, respectively). However, the agency's treatment of the three remaining issues – *i.e.*, the surrogate value for cardboard packing cartons, the surrogate value for plastic jars and lids, and labor expenses – remained in dispute. In light of the GDLSK Plaintiffs' arguments and the Government's request for a voluntary remand, *Taian Ziyang II* once again remanded to Commerce the issue of labor

[7] In addition to its challenge to Commerce's use of "adverse facts available" (which was resolved in the agency's favor in *Taian Ziyang I*, as discussed above), FHTK also contested the surrogate value that Commerce used for garlic seed, an issue that *Taian Ziyang I* remanded and Commerce's Second Remand Determination addressed. *See Taian Ziyang I*, 33 CIT at ____, 637 F. Supp. 2d at 1124–27; Second Remand Determination at 4–11. However, FHTK filed no comments on Commerce's draft Second Remand Determination; nor did FHTK comment on the Second Remand Determination that Commerce filed with the court. *See id*. at 3; *Taian Ziyang II*, 35 CIT at ____n.5, ____, 783 F. Supp. 2d at 1298 n.5, 1305. *Taian Ziyang II* subsequently upheld the Second Remand Determination as to the surrogate value for garlic seed. *See id*., 35 CIT at ____, 783 F. Supp. 2d at 1302–05. Thus, as the Second Remand Determination indicates, FHTK's margin remains 15.75%; and FHTK had no stake in the most recent remand. *See* Second Remand Determination at 79.

Dong Yun initially contested four issues – the surrogate financial ratios that Commerce used, as well as the values used for land lease costs and irrigation expenses, and the wage rate. *See Taian Ziyang I*, 33 CIT at ____, 637 F. Supp. 2d at 1101. As discussed above, *Taian Ziyang I* sustained Commerce as to the surrogate financial ratios. *See id*., 33 CIT at ____, 637 F. Supp. 2d at 1166. But the other three issues were remanded to Commerce. *See id*., 33 CIT at ____, ____, ____, 637 F. Supp. 2d at 1133, 1138, 1141. On remand, Commerce reconsidered its values for irrigation expenses and land lease costs, and the new values were sustained in *Taian Ziyang II*. *See* Second Remand Determination at 11–16, 40–41; *Taian Ziyang II*, 35 CIT at ____, ____, 783 F. Supp. 2d at 1305–08, 1310–11. Although the Second Remand Determination adhered to the wage rate methodology that Commerce had previously used, Dong Yun failed to file comments on the agency's draft remand results. *See* Second Remand Determination at 1–2, 3, 16–40. Nor did Dong Yun comment on the Second Remand Determination that Commerce filed with the court. *See Taian Ziyang II*, 35 CIT at ____ n.5, ____, 783 F. Supp. 2d at 1298 n.5, 1310. Thus, Dong Yun too had no stake in the most recent remand; and its margin remains 15.49%, as the Second Remand Determination indicates. *See* Second Remand Determination at 79.

costs. *See generally id*., 35 CIT at ____, 783 F. Supp. 2d at 1310. Similarly, the issues of cardboard packing cartons and plastic jars and lids also were remanded to Commerce yet again. *See generally id*., 35 CIT at ____, ____, 783 F. Supp. 2d at 1333, 1339 (remanding issues of cardboard packing cartons, and plastic jars and lids, respectively).

In its Third Remand Determination, Commerce has now revised its calculation of the labor rate in accordance with the agency's new methodology. *See* Third Remand Determination at 1, 4–11 (relying on Antidumping Methodologies in Proceedings Involving Non-Market Economies: Valuing the Factor of Production: Labor, 76 Fed. Reg. 36,092 (June 21, 2011); also reconsidering valuation of labor data reflected in surrogate financial ratios, and concluding that no changes are necessary). In addition, to value cardboard packing cartons as well as plastic jars and lids for purposes of the Third Remand Determination, Commerce has implicitly adopted the fundamental reasoning of *Taian Ziyang II* and has therefore used the domestic Indian price quotes that the GDLSK Plaintiffs had placed on the administrative record, in lieu of the Indian import statistics that the agency had relied on in its prior determinations in this case. *See* Third Remand Determination at 1, 3–4, 11.[8] As a result of these changes, the Third Remand Determination now calculates the margin for each of the four GDLSK Plaintiffs (*i.e.*, Harmoni, Jinan Yipin, Linshu Dading, and Sunny) to be 0.0%.[9]

Although the Domestic Producers (*i.e.*, the Fresh Garlic Producers Association and its four constituent members) filed no comments on either the draft or final versions of the Second Remand Determination,[10] and although they filed no comments on the draft of the Third Remand Determination which Commerce provided to them, the Domestic Producers nevertheless have filed comments with the court

[8] The Third Remand Determination states that Commerce has decided to use the domestic price quotes "under protest." *See* Third Remand Determination at 1, 3–4. As explained in note 17 below, however, *Taian Ziyang II* did not impose any outcome or result on Commerce. *See* n.17, *infra*.

[9] As noted above, Commerce already had previously calculated Harmoni's margin to be 0.00% in Commerce's Second Remand Determination. *See* Second Remand Determination at 79.

[10] *See* Second Remand Determination at 3 (indicating that Domestic Producers filed no comments on draft of Second Remand Determination); *Taian Ziyang II*, 35 CIT at ____ n.5, 783 F. Supp. 2d at 1298 n.5 (noting that Domestic Producers filed no comments with court on Second Remand Determination); *see also id*., 35 CIT at ____ n.24, 783 F. Supp. 2d at 1318 n.24 (noting Domestic Producers' failure to address valuation of plastic jars and lids in other prior stages of this proceeding); *id*., 35 CIT at ____ n.44, 783 F. Supp. 2d at 1333 n.44 (noting Domestic Producers' failure to address valuation of cardboard packing cartons in other prior stages of this proceeding).

objecting to the Third Remand Determination's use of price quotes in the valuation of cardboard packing cartons and plastic jars and lids. *See* Third Remand Determination at 3 (stating that no party filed comments on draft of Third Remand Determination); *see generally* Def.-Ints.' Brief; Def.-Ints.' Reply Brief.[11] Specifically, the Domestic Producers argue that the valuation of cardboard packing cartons and the valuation of plastic jars and lids must be remanded to Commerce for a third time, "with instructions [to] . . . provide a reasoned basis for its reliance on the price quotes" and to "identify substantial evidence in support of its determination." Def.-Ints.' Brief at 3; Def.-Ints.' Reply Brief at 2.[12]

In contrast, the Government and the GDLSK Plaintiffs urge that the Third Remand Determination be sustained in all respects. *See generally* Def.'s Response Brief; Pls.' Response Brief.

II. *Standard of Review*

In an action reviewing an antidumping determination by Commerce, the agency's determination must be upheld except to the extent that it is 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); *see also NMB Singapore Ltd. v. United States*, 557 F.3d 1316, 1319 (Fed. Cir. 2009). Substantial evidence is "more than a mere scintilla"; rather, it is "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Universal Camera Corp. v. Nat'l Labor Relations Bd.*, 340 U.S. 474, 477 (1951) (*quoting Consol. Edison Co. v. Nat'l Labor Relations Bd.*, 305 U.S. 197, 229 (1938)); *see also Mittal Steel Point Lisas Ltd. v. United States*, 548 F.3d 1375, 1380 (Fed. Cir. 2008) (same). Moreover, 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.*

[11] Curiously, the Domestic Producers have not objected to Commerce's use of domestic Indian price quotes in valuing cardboard packing cartons and plastic jars and lids in *Jinan Yipin*, a companion case involving the tenth administrative review of the antidumping duty order at issue in this action. *See Jinan Yipin Corp. v. United States*, No. 06–00189 (CIT filed June 5, 2006); Final Remand Results of Redetermination Pursuant to Second Remand at 6 (CIT filed March 29, 2012) (No. 06–00189) (noting that Domestic Producers' comments on draft remand results were limited to valuation of garlic bulb); *id*. at 23–24 (discussing agency's decision on remand to use domestic price quotes to value cardboard packing cartons, as well as plastic jars and lids); Defendant-Intervenors' Comments Regarding Second Remand Redetermination (CIT filed June 8, 2012) (No. 06–00189) (commenting only on valuation of garlic bulb).

[12] The Domestic Producers do not take issue with the Third Remand Determination's revised labor rate calculation. *See* Def.-Ints.' Brief at 2 n.2.

United States, 44 F.3d 978, 985 (Fed. Cir. 1994) (*quoting Universal Camera Corp.*, 340 U.S. at 487–88); *see also Mittal Steel*, 548 F.3d at 1380–81 (same). That said, the mere fact that it may be possible to draw two inconsistent conclusions from the record does not prevent Commerce'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. 607, 620 (1966).

Finally, while Commerce must explain the bases for its decisions, "its explanations do not have to be perfect." *NMB Singapore*, 557 F.3d at 1319. Nevertheless, "the path of Commerce's decision must be reasonably discernable," to support judicial review. *Id*. (*citing Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983)); *see generally* 19 U.S.C. § 1677f(i)(3)(A) (requiring Commerce to "include in a final determination . . . an explanation of the basis for its determination").

III. *Analysis*

As *Taian Ziyang II* explained, dumping occurs when goods are imported into the United States and sold at a price lower than their "normal value," resulting in material injury (or the threat of material injury) to the U.S. industry. *See Taian Ziyang II*, 35 CIT at ____, 783 F. Supp. 2d at 1299 (*citing* 19 U.S.C. §§ 1673, 1677(34), 1677b(a)); *see generally id*., 35 CIT at ____, 783 F. Supp. 2d at 1299–1302. The difference between the normal value of the goods and the U.S. price is the "dumping margin." *See* 19 U.S.C. § 1677(35). When normal value is compared to the U.S. price and dumping is found, antidumping duties equal to the dumping margin are imposed to offset the dumping. *See* 19 U.S.C. § 1673.

Normal value is typically calculated using either the price in the exporting market (*i.e.*, the price in the "home market" where the goods are produced) or the cost of production of the goods, when the exporting country is a market economy country. *See generally* 19 U.S.C. § 1677b.[13] However, where – as here – the exporting country has a non-market economy ("NME"), there is often concern that the factors of production used to produce the goods at issue are under state control, and that home market sales may not be reliable indicators of normal value. *See* 19 U.S.C. § 1677(18)(A).

[13] In addition, in certain market economy cases, Commerce may calculate normal value using the price in a third country (*i.e.*, a country other than the exporting country or the United States). *See*, *e.g.*, *RHP Bearings Ltd. v. United States*, 288 F.3d 1334, 1338 (Fed. Cir. 2002) (discussing 19 U.S.C. §§ 1677b(a)(1)(B)(ii), 1677b(a)(1)(C)); *see also Ningbo Dafa Chem. Fiber Co. v. United States*, 580 F.3d 1247, 1251 n.1 (Fed. Cir. 2009) (explaining exception).

In cases such as this, where Commerce concludes that concerns about the sufficiency or reliability of the available data do not permit the normal value of the goods to be determined in the typical manner, Commerce "determine[s] the normal value of the subject merchandise on the basis of the value of the factors of production," including "an amount for general expenses and profit plus the cost of containers, coverings, and other expenses." *See* 19 U.S.C. § 1677b(c)(1); *see generally Ningbo Dafa Chem. Fiber Co. v. United States*, 580 F.3d 1247, 1250–51 (Fed. Cir. 2009) (briefly summarizing "factors of production" methodology).[14] The antidumping statute requires Commerce to value factors of production "based on the *best available information* regarding the values of such factors" in an appropriate surrogate market economy country – in this case, India. *See* 19 U.S.C. § 1677b(c)(1) (emphasis added); *see also Shakeproof Assembly Components v. United States*, 268 F.3d 1376, 1382 (Fed. Cir. 2001); *Ningbo*, 580 F.3d at 1254 (emphasizing that statute mandates that Commerce "shall" use "best available information" in valuing factors of production).

In determining which data constitute the "best available information," Commerce generally looks to the criteria set forth in its "Policy Bulletin 04.1," also known as the "NME Surrogate Country Policy Bulletin." Policy Bulletin 04.1 explains:

> In assessing data and data sources, it is [Commerce's] stated practice to use investigation or review period-wide price averages, prices specific to the input in question, prices that are net of taxes and import duties, prices that are contemporaneous with the period of investigation or review, and publicly available data.

See Import Administration Policy Bulletin 04.1, "Non-Market Economy Surrogate Country Selection Process," at "Data Considerations" (March 1, 2004) [15]; *see also* Second Remand Determination at 42 (quoting Policy Bulletin and stating that it reflects agency's "well-established practice for determining the reliability and appropriateness of surrogate values").

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[14] Factors of production "include, but are not limited to . . . hours of labor required, . . . quantities of raw materials employed, . . . amounts of energy and other utilities consumed, and . . . representative capital cost, including depreciation." *See* 19 U.S.C. § 1677b(c)(3); *see also Dorbest Ltd. v. United States*, 604 F.3d 1363, 1367 (Fed. Cir. 2010) (discussing factors of production).

[15] As *Taian Ziyang II* explained, Policy Bulletin 04.1 clearly states that the five specified criteria – *i.e.*, "investigation or review period-wide price averages, prices specific to the input in question, prices that are net of taxes and import duties, prices that are contemporaneous with the period of investigation or review, and publicly available data" – were

Within this general framework, the statute "accords Commerce wide discretion in the valuation of factors of production in the application of [the statute's] guidelines." *See Shakeproof*, 268 F.3d at 1381 (internal quotation marks and citation omitted); *see also Ad Hoc Shrimp Trade Action Committee v. United States*, 618 F.3d 1316, 1320 (Fed. Cir. 2010) (same); *Nation Ford Chem. Co. v. United States*, 166 F.3d 1373, 1377 (Fed. Cir. 1999) (same). Commerce is recognized as the "master of antidumping law." *See Thai Pineapple Public Co. v. United States*, 187 F.3d 1362, 1365 (Fed. Cir. 1999); *see also Shakeproof*, 268 F.3d at 1381 (acknowledging "Commerce's special expertise"). And "[t]he process of constructing foreign market value for a producer in a non-market economy country is difficult and necessarily imprecise." *Id*.

Nevertheless, Commerce's discretion is not boundless. In exercising its discretion, Commerce is constrained by the purpose of the antidumping statute, which is "to determine antidumping margins 'as accurately as possible.'" *See Shakeproof*, 268 F.3d at 1382 (*quoting Lasko Metal Products, Inc. v. United States*, 43 F.3d 1442, 1446 (Fed. Cir. 1994)). And, Commerce's discretion notwithstanding, "a surrogate value must be as representative of the situation in the [nonmarket economy] country as is feasible." *See Nation Ford*, 166 F.3d at 1377 (internal quotation marks and citation omitted). Thus, "[i]n determining the valuation of . . . factors of production, the critical question is whether the methodology used by Commerce is based on *the best available information* and establishes antidumping margins *as accurately as possible*." *See Ningbo*, 580 F.3d at 1257 (emphases added) (*quoting Shakeproof*, 268 F.3d at 1382) (internal quotation marks omitted).

In the present case, pursuant to the instructions in *Taian Ziyang II*, Commerce's Third Remand Determination reconsidered and revised the surrogate value for labor, as well as the surrogate values for cardboard packing cartons and plastic jars and lids. As discussed in greater detail below, all three revised determinations must be sustained.

A. *Surrogate Value for Labor*

The antidumping statute provides that, in non-market economy cases such as this, the surrogate data used to calculate the value of factors of production must, to the extent possible, come from market

developed to serve as a "tiebreaker," if necessary, in Commerce's identification of a surrogate country. *See Taian Ziyang II*, 35 CIT at ____ n.8, 783 F. Supp. 2d at 1300 n.8. The criteria were not promulgated for the purpose of guiding Commerce's selection from among alternative data sources *after* a surrogate country has been identified. *Id*. Nevertheless, Commerce has used the criteria for that purpose here and in many other cases. *Id*.

economy countries that are at "a level of economic development comparable to that of the non-market economy country" at issue – in this case, China. *See* 19 U.S.C. § 1677b(c)(4)(A). The antidumping statute further provides that, in such cases, the surrogate data must, to the extent possible, come from market economy countries that are "significant producers of comparable merchandise." *See id*.

For most factors of production, Commerce typically uses values from a single market economy country (known as the "surrogate country" – here, India) that Commerce has determined to be both (a) economically comparable to the non-market economy country in question and (b) a significant producer of the goods at issue. *See* 19 C.F.R. § 351.408(c)(2). However, as *Taian Ziyang I* and *Taian Ziyang II* explained, Commerce in the past has treated the cost of labor quite differently than other factors of production. *See Taian Ziyang I*, 33 CIT at ____, 637 F. Supp. 2d at 1134; *Taian Ziyang II*, 35 CIT at ____, 783 F. Supp. 2d at 1308; *see generally Dorbest Ltd. v. United States*, 604 F.3d 1363, 1368 (Fed. Cir. 2010).

Concerned about "wide variances in wage rates between comparable economies," Commerce historically has valued the cost of labor in an NME country case by using a regression-based wage rate "reflective of the observed relationship between wages and national income in a variety of market economy countries." *See Taian Ziyang I*, 33 CIT at ____, 637 F. Supp. 2d at 1134 (internal quotation marks and citations omitted). Thus, in the past, "[u]nlike its valuation of other factors of production in [a non-market economy country] case, Commerce [has based] its surrogate wage rate on data from a broad 'basket' of countries, and [has] not limit[ed] itself to market economy countries at a level of economic development comparable to the NME country in question." *See id*., 33 CIT at ____, 637 F. Supp. 2d at 1134.

In the Final Results in this case, Commerce calculated the respondent Chinese producers' labor costs using the agency's standard regression-based wage rate calculation methodology, as set forth in the agency's regulations. *See Taian Ziyang I*, 33 CIT at ____, 637 F. Supp. 2d at 1134–35; 19 C.F.R. § 351.408(c)(3). After correcting several clerical errors in the initial calculations in the Final Results (which yielded a surrogate wage rate of $0.93), Commerce's First Remand Determination recalculated the applicable wage rate for this case at $0.85. *See Taian Ziyang I*, 33 CIT at ____, 637 F. Supp. 2d at 1135.

Relying heavily on *Allied Pacific* (which held Commerce's regulation to be inconsistent with the statute), *Taian Ziyang I* remanded the issue of the valuation of the labor factor of production to Commerce for further consideration. *See Taian Ziyang I*, 33 CIT at ____, ____,

____, 637 F. Supp. 2d at 1134, 1135–36, 1138; *Allied Pacific Food (Dalian) Co. v. United States*, 32 CIT 1328, 1351–65, 587 F. Supp. 2d 1330, 1351–61 (2008). On remand, Commerce nevertheless continued to use a regression-based methodology, albeit one that was slightly revised. *See generally* Second Remand Determination at 16–40, 60–73. The resulting calculation produced a surrogate wage rate of $0.77. *See id*. at 17 n.18.

In the meantime, however, the Court of Appeals handed down its decision in *Dorbest*, striking down Commerce's regulation as inconsistent with the plain language of the statute. *See generally Dorbest*, 604 F.3d at 1366, 1369–73. The Court of Appeals concluded that the agency's regulation "improperly require[d] using data from both economically comparable and economically dissimilar countries, and . . . improperly use[d] data from both countries that produce comparable merchandise and countries that do not." *See id*., 604 F.3d at 1372 (discussing 19 C.F.R. § 351.408(c)(3)). The Government therefore sought a voluntary remand to allow Commerce to recalculate the surrogate value for labor expenses in a manner consistent with *Dorbest*, which *Taian Ziyang II* granted. *See generally Taian Ziyang II*, 35 CIT at ____, 783 F. Supp. 2d at 1310.

In the course of the most recent remand, Commerce reconsidered its approach to the calculation of surrogate values for labor expenses, in light of the Court of Appeals' decision in *Dorbest*, as well as the decision in *Shandong Rongxin*. *See* Third Remand Determination at 4–5; *Dorbest*, 604 F.3d at 1369–73; *Shandong Rongxin Import & Export Co. v. United States*, 35 CIT ____, ____, 774 F. Supp. 2d 1307, 1315–16 (2011). Concluding that "relying on multiple countries to calculate the wage rate is no longer the best approach," Commerce altered its methodology, to rely on industry-specific labor cost data from the primary surrogate country – in this case, India. *See* Third Remand Determination at 5; Antidumping Methodologies in Proceedings Involving Non-Market Economies: Valuing the Factor of Production: Labor, 76 Fed. Reg. 36,092 (June 21, 2011). As the Third Remand Determination observes, such an approach "is fully consistent with how [Commerce] values all other [factors of production], and results in the use of a uniform basis for [factor of production] valuation – a single surrogate country." Third Remand Determination at 5.

For purposes of the Third Remand Determination here, Commerce relied on 2003 data (as reported in a 2005 publication of the International Labour Organization ("ILO")), because those data were "the most contemporaneous data that were available" between November 1, 2003 and September 3, 2005 – *i.e.*, "during the conduct of the underlying administrative review." *See* Third Remand Determination

at 6 (explaining, *inter alia*, that, on remand, agency placed on the record "additional industry specific labor cost data," and that agency used labor cost data for India "reported in the ILO Chapter 6A data").

Specifically, Commerce selected "the industry-specific Indian data that includes 'Processing and preserving of fruits and vegetables' (provided under Sub-Classification 15 'Manufacture of food products and beverages' of the International Standard Industrial Classification of all Economic Activities ('ISIC') Revision 3 standard)." *See* Third Remand Determination at 7. Commerce then "converted the hourly labor cost data, which was denominated in Indian Rupees, to U.S. dollars . . . based on the exchange rates in effect on the dates of the U.S. sales." *Id*. at 6–7. Using that methodology, Commerce calculated a revised labor rate of $0.51 per hour. *Id*. at 7.

As noted above, neither the GDLSK Plaintiffs nor the Domestic Producers has objected to Commerce's revised wage rate calculation as set forth in the Third Remand Determination. *See* Pls.' Response Brief at 6 (urging court to "affirm Commerce's Third Remand Determination" in its entirety); Def.-Ints.' Brief at 2 n.2 (advising that Domestic Producers "have no comments on the analysis . . . regarding the surrogate valuation of labor"); *see also* Def.'s Response Brief at 11–12 (urging that Commerce's determination on labor expenses be sustained). Commerce's determination is accordingly sustained.

B. *Surrogate Value for Cardboard Packing Cartons*

In the Final Results in this case, Commerce valued the cardboard cartons that are used to pack and ship garlic based on Indian import statistics taken from the World Trade Atlas for the Indian tariff subheading 4819.1001, which covers cartons, boxes, and cases made of corrugated paper and paperboard. *See Taian Ziyang I*, 33 CIT at ____, 637 F. Supp. 2d at 1144. In so doing, the Final Results rejected the other alternative source of data on the record – four domestic Indian price quotes submitted by the GDLSK Plaintiffs, which were obtained within the period of review (and within one week of one another) from four different Indian box vendors in four different cities, for basic cardboard packing cartons like those used by the Chinese producers. *See Taian Ziyang II*, 35 CIT at ____, 783 F. Supp. 2d at 1312. The Final Results rejected the domestic price quotes because they are not considered "publicly available information" and because, according to the Final Results, they were not "representative" (that is, they assertedly did not reflect prices throughout the period of review). *See id*., 35 CIT at ____, 783 F. Supp. 2d at 1312; Policy Bulletin 04.1.

As *Taian Ziyang I* observed, however, although the price quotes are "not without problems," the Final Results significantly "overstated any potential concerns as to the reliability of the domestic Indian box price quotes that the agency rejected, [and] significantly understated the patent flaws and defects in the Indian import statistics on which the agency relied." *See Taian Ziyang I*, 33 CIT at ____, ____, 637 F. Supp. 2d at 1144, 1151 (emphases omitted). Detailing the numerous problems with Commerce's calculus, *Taian Ziyang I* remanded the issue to the agency for further consideration. *See generally id*., 33 CIT at ____, 637 F. Supp. 2d at 1144–52.

Commerce's Second Remand Determination "add[ed] virtually nothing to this case" on the issue of the use of Indian import statistics *versus* domestic price quotes. *See Taian Ziyang II*, 35 CIT at ____, 783 F. Supp. 2d at 1316; *see generally id*., 35 CIT at ____, 783 F. Supp. 2d at 1316–33. As *Taian Ziyang II* summed up the situation, the Second Remand Determination "[did] little more than rehash the exact same points that were made in the Final Results (and found wanting in [*Taian Ziyang I*])." *See id*., 35 CIT at ____, 783 F. Supp. 2d at 1317. Commerce yet again sought to exaggerate the alleged shortcomings of the domestic price quotes, while simultaneously ignoring the obvious (and admitted) problems inherent in the Indian import statistics on which the agency continued to rely. *See id*., 35 CIT at ____, 783 F. Supp. 2d at 1316–33.

Noting that Commerce had seemingly chosen "*admittedly distorted* Indian import statistics over *potentially 'perfect'* price quotes," *Taian Ziyang II* held that the Second Remand Determination "failed to adequately explain the agency's determination that the Indian import statistics constitute[d] the 'best available information' for use in calculating the surrogate value of basic cardboard packing cartons, in light of the acknowledged infirmities in the import statistics." *See Taian Ziyang II*, 35 CIT at ____, ____, 783 F. Supp. 2d at 1327, 1332. *Taian Ziyang II* similarly faulted Commerce for failing to "adequately explain[] why the Indian import statistics [were] preferable to the domestic price quotes, the other source of information on the existing record." *See id*., 35 CIT at ____, 783 F. Supp. 2d at 1332. *Taian Ziyang II* further held that "Commerce's determination that the Indian import statistics constitute the 'best available information' (as compared to the domestic price quotes) is not supported by substantial evidence in the administrative record." *See id*., 35 CIT at ____, 783 F. Supp. 2d at 1332. The issue was therefore remanded once more, and the agency was cautioned not to simply recycle its earlier arguments, because

the agency was "unlikely to get another bite at the apple." *See id*., 35 CIT at ____, 783 F. Supp. 2d at 1333.[16]

Commerce's Third Remand Determination followed. As to the surrogate value for cardboard packing cartons, Commerce implicitly adopted the fundamental reasoning of *Taian Ziyang II* (and, in turn, *Taian Ziyang I*). The Third Remand Determination states:

> The Court found [in *Taian Ziyang II*] that Commerce had chosen "*admittedly distorted* Indian import statistics over *potentially* '*perfect* ' price quotes." While the Department disagrees with this conclusion, the Department is cognizant of the Court's admonition that the Department is not likely to "get another bite of the apple on this issue." Accordingly, . . . the Department has determined, under protest, to use the price quote surrogate values provided on the record by the plaintiffs during the underlying proceeding for this final remand redetermination. Using these price quotes, the surrogate value for cardboard boxes is 44.20 rupees per kilogram ("Rs/kg") . . . .

Third Remand Determination at 3–4 (footnotes omitted); *see also id*. at 1 (stating that Commerce "has applied, under protest, the price quotes . . . to value . . . cardboard cartons"); Pls.' Response Brief at 5–6 (stating that Third Remand Determination "accepted the Court's well-reasoned and clearly explained findings with respect to the available surrogate values" for cardboard packing cartons); Def.'s Response Brief at 9–11 (explaining that "the Remand Results are consistent with the Court's holding" in *Taian Ziyang II*, and that "[i]n light of the Court's concerns about the import statistics, . . . Commerce reasonably adopted plaintiffs' approach and used the domestic price quotes").[17]

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[16] Among other things, *Taian Ziyang II* instructed Commerce to reopen the administrative record on remand, to allow the submission of further "evidence concerning the domestic price quotes and the Indian import statistics (as well as alternative sets of data, if any, that may be appropriate)." *See Taian Ziyang II*, 35 CIT at ____, 783 F. Supp. 2d at 1333; *see also id*., 35 CIT at ____, 783 F. Supp. 2d at 1339 (directing agency to reopen record on plastic jars and lids). It is, however, undisputed that Commerce did not reopen the record. *See* Third Remand Determination at 3–4 (stating that "rather than reopen the record, [Commerce] has determined, under protest, to use the price quote[s]").

[17] The quoted language from the Third Remand Determination – particularly the phrase "under protest" – can be read to suggest that *Taian Ziyang II* imposed an outcome or result on Commerce, and ordered the agency to use the domestic price quotes in valuing cardboard packing cartons. Nothing could be further from the truth. *See*, *e.g.*, *Taian Ziyang II*, 35 CIT at ____ n.45, 783 F. Supp. 2d at 1332 n.45 (noting that "[i]f Commerce could establish on remand that the inclusion of the more expensive products and the air freight charges have no significant distortive effect on the Indian import statistics, it might be possible to sustain the agency's determination that the import statistics constitute the 'best available

Arguing that the Third Remand Determination "does not include further analysis or justification for [Commerce's] reliance on the price quotes submitted by the [GDLSK] Plaintiffs," the Domestic Producers characterize Commerce's use of the domestic price quotes as a "capitulation," and assert that the agency has failed to "provide a reasoned basis for its reliance on the price quotes submitted by the Plaintiffs" and that use of the price quotes is not "supported by substantial evidence." Def.-Ints.' Brief at 2–3; *see also* Def.-Ints.' Reply Brief at 2–4.

As discussed below, the Domestic Producers failed to exhaust their administrative remedies, and are therefore precluded from raising their arguments in this forum. However, even if their arguments were considered on the merits, the Domestic Producers would not prevail.

1. *Exhaustion of Administrative Remedies*

The Government points out that the draft of the Third Remand Determination that Commerce provided to both the GDLSK Plaintiffs and the Domestic Producers was "materially identical" to the final version of the Third Remand Determination filed with the court, and thus reflected Commerce's decision to value cardboard packing cartons using the domestic price quotes (rather than the Indian import statistics). *See* Def.'s Response Brief at 9; *see also id*. at 5, Tab A ("Draft Results of Third Redetermination Pursuant to Remand") at 3–4. The Domestic Producers nevertheless failed to file any comments on the draft. *See* Third Remand Determination at 3 (stating that Commerce received no comments on draft of Third Remand Determination); Def.'s Response Brief at 4–5, 7, 8; Pls.' Response Brief at 2, 3.

information'"); *id*., 35 CIT at ____, 783 F. Supp. 2d at 1331 (suggesting that, on remand, Commerce address the "serious unanswered questions about the extent to which the import statistics are distorted by the inclusion of gift and speciality boxes . . . and about the extent to which the import statistics are distorted by the inclusion of charges for air freight"; suggesting that Commerce also consider obtaining evidence concerning the accuracy of the price quotes). In the course of the third remand, Commerce thus was free to use either the import statistics or the price quotes (or even some other data), provided that the agency properly articulated its rationale and supported its determination with substantial evidence.

The quoted language from the Third Remand Determination also reflects a fundamental error in logic. In the excerpt, Commerce first acknowledges that *Taian Ziyang II* cautioned that a *fourth remand* was unlikely; but then – rather than putting the *third remand* to good use through further analysis and/or eliciting additional evidence for the record – Commerce elected to adopt the domestic price quotes (in lieu of the Indian import statistics). *See* Third Remand Determination at 3–4. This is classic *non sequitur*. As a matter of logic, there is nothing about the low probability of a *fourth remand* that counsels a litigant not to avail himself of a *third remand*; indeed, one would reasonably expect the opposite. In other words, one would reasonably expect that a litigant who understands that he may have just "one last shot" to give it his "best shot."

The Domestic Producers raised their objections to Commerce's use of the domestic price quotes for the first time in their opening brief filed with the court commenting on the Third Remand Determination. *See* Def.-Ints.' Brief at 2–4; *see also* Pls.' Response Brief at 2. The Domestic Producers thus failed to properly exhaust their administrative remedies. *See* Def.'s Response Brief at 2, 6–9; Pls.' Response Brief at 2–5.

As a general matter, the doctrine of exhaustion holds that "no one is entitled to judicial relief for a supposed or threatened injury until the prescribed administrative remedy has been exhausted." *Sandvik Steel Co. v. United States*, 164 F.3d 596, 599 (Fed. Cir. 1998) (*quoting McKart v. United States*, 395 U.S. 185, 193 (1969)) (internal quotation marks omitted). Thus, it is a well-settled principle of administrative law that "[a] reviewing court usurps the agency's function when it sets aside [an agency] determination upon a ground not theretofore presented and deprives the [agency] of an opportunity to consider the matter, make its ruling, and state the reasons for its action." *Unemployment Compensation Comm'n of Alaska v. Aragon*, 329 U.S. 143, 155 (1946); *see*, *e.g.*, *Rhone Poulenc, Inc. v. United States*, 899 F.2d 1185, 1191 (Fed. Cir. 1990).

The prescribed avenue for challenging remand results requires that a party first file comments on the draft results at the administrative level, setting forth the party's objections. *See Mittal Steel*, 548 F.3d at 1383–84 (holding that party failed to exhaust administrative remedies by not raising issue in comments on draft remand results); *AIMCOR v. United States*, 141 F.3d 1098, 1111–12 (Fed. Cir. 1998) (same). "If a party does not exhaust available administrative remedies, 'judicial review of [Commerce's actions] is inappropriate.'" *Consol. Bearings Co. v. United States*, 348 F.3d 997, 1003 (Fed. Cir. 2003) (*quoting Sharp Corp. v. United States*, 837 F.2d 1058, 1062 (Fed. Cir. 1988)). "'[T]he [Court of International Trade] generally takes a "strict view" of the requirement that parties exhaust their administrative remedies.'" *Yangzhou Bestpak Gifts & Crafts Co. v. United States*, ____ F.3d ____, ____, 2013 WL 2150836 * 10 (Fed. Cir. 2013) (*quoting Corus Staal BV v. United States*, 502 F.3d 1370, 1379 (Fed. Cir. 2007) (citations omitted)).

Requiring exhaustion even in a discretionary, non-jurisdictional context is generally sound policy, because it allows the agency to apply its expertise, to correct its own mistakes, and to compile an adequate record to support judicial review, advancing the dual purposes of protecting agency authority and promoting judicial efficiency. *See Woodford v. Ngo*, 548 U.S. 81, 89 (2006) (discussing two main purposes of doctrine of exhaustion, *i.e.*, protecting "administrative

agency authority" and promoting judicial economy); *Richey v. United States*, 322 F.3d 1317, 1326 (Fed. Cir. 2003) (same). Accordingly, in actions challenging determinations in antidumping administrative reviews, the Court of International Trade requires litigants to exhaust administrative remedies "where appropriate." 28 U.S.C. § 2637(d); *see also Corus Staal*, 502 F.3d at 1379 (stating that 28 U.S.C. § 2637(d) "indicates a congressional intent that, absent a strong contrary reason," court should require exhaustion of administrative remedies); *McCarthy v. Madigan*, 503 U.S. 140, 144 (1992) (explaining that, even "where Congress has not clearly required exhaustion, sound judicial discretion governs").

In this case, the policy considerations that underpin the doctrine of exhaustion cut squarely against the Domestic Producers.[18] Because the Domestic Producers failed to assert their objections to Com-

[18] There are a limited number of narrow exceptions to the requirement that a party exhaust its administrative remedies. *See*, *e.g.*, 5 J. Stein, G. Mitchell, & B. Mezines, *Administrative Law* § 49.02, at 49–47 (2012) (summarizing exceptions to requirement of exhaustion, including inadequacy of administrative remedy, impending irreparable harm, *ultra vires* agency action, futility, and pure legal question); *see also* 2 R. Pierce, *Administrative Law Treatise* §§ 15.2–15.8, 15.10 (5th ed. 2010) (summarizing doctrine of exhaustion and discussing exceptions); 4 C. Koch, *Administrative Law and Practice* § 12:22 (3d ed. 2010) (discussing exceptions); *SeAH Steel Corp. v. United States*, 35 CIT ____, ____, 764 F. Supp. 2d 1322, 1325–26 (2011) (summarizing exceptions); *Corus Staal BV v. United States*, 30 CIT 1040, 1050 n.11 (2006), *aff'd* 502 F.3d 1370 (Fed. Cir. 2007) (same); *Ta Chen Stainless Steel Pipe, Ltd. v. United States*, 28 CIT 627, 645 n.18, 342 F. Supp. 2d 1191,1206 n.18 (2004) (same).

However, the Domestic Producers do not seek to claim the benefit of any of the established exceptions. *See* Recording of Oral Argument at 10:00–10:20 (Domestic Producers' counsel advising that Domestic Producers do not invoke any exception to requirement of exhaustion); Pls.' Brief at 4–5 (noting that Domestic Producers "make no effort to argue that any exception to the exhaustion doctrine applies"). Nor do the facts suggest that the Domestic Producers could avail themselves of any of the recognized exceptions. *See* Def.'s Response Brief at 8–9 (explaining that "none of the very limited exceptions to the exhaustion doctrine apply" here); Pls.' Response Brief at 4 (same). Instead, the Domestic Producers argue that the exhaustion requirement has no application in this situation, because – the Domestic Producers contend – the gravamen of their objections is that the Third Remand Determination does not satisfy the standard of review and does not comply with the terms of the remand set forth in *Taian Ziyang II*. *See* Def.-Ints.' Reply Brief at 2–3. Thus, for example, the Domestic Producers assert that "even if [the Domestic Producers] had filed no comments [with the court] on the Third [Remand] Determination, this Court would be required to find that the redetermination is supported by substantial evidence in order to sustain it." *Id*. at 2. It is telling, however, that the Domestic Producers cite no authority for the proposition that they advance. And it is not at all clear that a court is required to determine whether an agency determination that is not (properly) in dispute is supported by substantial evidence and is otherwise in accordance with law. It is generally the case that, when remand results are filed with the court and no party submits comments, the court simply enters an order noting the fact and sustaining the remand results – without making any findings. In short, there is no merit to the Domestic Producers' claim that they were not required to exhaust administrative remedies by raising their objections at the administrative level. But, in any event, as outlined more fully below, Commerce's Third

merce's use of domestic price quotes to value cardboard packing cartons by filing comments on the draft of the Third Remand Determination, the agency was not put on timely notice of the Domestic Producers' objections. The Domestic Producers thus deprived Commerce of the opportunity to address the Domestic Producers' concerns (by, for example, elaborating on the agency's rationale for relying on price quotes, rather than import statistics, to value cardboard packing cartons, and detailing the record evidence supporting the agency's determination). *See* Def.'s Response Brief at 7, 8–9; Pls.' Response Brief at 3–4.

In sum, because the Domestic Producers failed to timely raise their objections at the administrative level, they cannot now be heard to criticize the Third Remand Determination's use of domestic price quotes to value cardboard packing cartons. By their silence, the Domestic Producers waived their right to press that issue in this forum. *See AIMCOR*, 141 F.3d at 1111–12.

2. *The Sufficiency of Commerce's Rationale*

Even if the Domestic Producers' challenges to the Third Remand Determination's valuation of cardboard packing cartons were not barred by the doctrine of exhaustion, they would nevertheless gain no purchase.

The Domestic Producers first contest the sufficiency of Commerce's rationale, asserting that the Third Remand Determination lacks "a reasoned basis for [the agency's] reliance on the price quotes submitted by the [GDLSK] Plaintiffs" in lieu of the Indian import statistics used in the agency's previous determinations. Def.-Ints.' Brief at 3; *see generally id*. at 2–4; Def.-Ints.' Reply Brief at 2–4. The Domestic Producers point to the summary nature of the section of the Third Remand Determination that addresses the valuation of cardboard packing cartons, contrasting the relative brevity of that section with Commerce's "lengthy discussion and analysis" of the agency's revised wage rate methodology. *See* Def.-Ints.' Brief at 2–3. The Domestic Producers argue that the court's "comprehensive and detailed opinion[s]" in this matter "set out an analytical framework for the agency." *See* Def.-Ints.' Reply Brief at 3. But, according to the Domestic Producers, "[r]ather than undertaking this analysis," Commerce effectively abdicated its decisionmaking role, stating "simply" that it had "determined, under protest, to use the price quote surrogate values provided on the record." *See id*. (*quoting* Third Remand Determina-

Remand Determination in fact does comply with the remand instructions in *Taian Ziyang II* and satisfies the applicable standard of review.

tion at 3); *see also id*. at 3–4.[19]

As the Court of Appeals for the D.C. Circuit has explained, the requirement that an agency articulate the rationale for its determinations "is inherent in the doctrine of judicial review which places only limited discretion in the reviewing court." *WAIT Radio v. FCC*, 418 F.2d 1153, 1156 (D.C. Cir. 1969). However, even where an agency's findings "could have been more explicit" and its analysis of the reasons for its findings "could have been more detailed," judicial review "does not demand expansive discussion or rigid adherence to [any] specific formula." *Nucor Corp. v. United States*, 414 F.3d 1331, 1339 (Fed. Cir. 2005). "[B]usy agency staffs are not expected to dot 'i's' and cross 't's.'" *WAIT Radio*, 418 F.2d at 1156. In evaluating the sufficiency of an agency's rationale, courts "recognize the presumption of regularity" and "adhere to 'salutary principles of judicial restraint.'" *Id*. (*citing* and *quoting Braniff Airways, Inc. v. CAB*, 379 F.2d 453, 460, 463 (D.C. Cir. 1967)). Thus, there is no "quantifiable formula for deciding when an agency . . . has crossed the line from the tolerably terse to the intolerably mute." *Id*., 418 F.2d at 1157. "Courts are indulgent toward administrative action to the extent of affirming [a determination] where the agency's path can be 'discerned' even if the [determination] 'leaves much to be desired.'" *Id*., 418 F.2d at 1156 (*quoting Colorado Interstate Gas Co. v. FPC*, 324 U.S. 581, 595 (1945)).

The agency determination at issue here may be "tolerably terse"; but it cannot be said to be "intolerably mute." It is true that – as the Domestic Producers contend – the Third Remand Determination "did not state in so many words" that Commerce was adopting the rationale set forth in *Taian Ziyang I* and *Taian Ziyang II*. *See Nucor Corp.*, 414 F.3d at 1339. That is nevertheless "the plain import" of Commerce's statement. *Id*. As the GDLSK Plaintiffs explain, Commerce "fully explained its decision when it referenced *Taian Ziyang II* and then stated it had determined 'to use the price quote surrogate values provided on the record by the plaintiffs.'" Pls.' Response Brief at 5; *see also id*. at 5–6 (stating that Third Remand Determination "accepted the Court's well-reasoned and clearly explained findings with respect to the available surrogate values" for cardboard packing cartons); Def.'s Response Brief at 9–11 (same). "Where an agency has not made

[19] The Domestic Producers further argue:

> While this Court's prior opinions set out an analytical framework that could be applied by [Commerce] in relying on a different surrogate value for cardboard cartons . . . , [Commerce] did not apply that framework. Rather, [Commerce] indicated that 'under protest' it would rely upon the price quotes submitted by the Plaintiffs, and failed to provide an analysis for that determination that demonstrates that it is supported by substantial evidence.

Def.-Ints.' Reply Brief at 3–4 (*citing* Third Remand Determination at 3–4).

a particular determination *explicitly*, the agency's ruling nonetheless may be sustained as long as 'the path of the agency may be reasonably discerned.'" *Nucor Corp.*, 414 F.3d at 1339 (*quoting Ceramica Regiomontana, S.A. v. United States*, 810 F.2d 1137, 1139 (Fed. Cir. 1987), *quoting Bowman Transportation, Inc. v. Arkansas-Best Freight System, Inc.*, 419 U.S. 281, 286 (1974)) (emphasis added); *see also Wheatland Tube Co. v. Dongbu Steel Co.*, 161 F.3d 1365, 1369–70 (Fed. Cir. 1998) (stating that "[a]n *explicit* explanation is not necessary . . . where the agency's decisional path is reasonably discernible"; "Although Commerce did not explain [its rationale] directly . . . , its decisional path . . . is readily apparent") (emphasis added). In this case – as in *Nucor* – "the agency's path is clear, even though it did not set forth its conclusion . . . explicitly." *Nucor Corp.*, 414 F.3d at 1339.

To be sure, Commerce's reasoning in the section of the Third Remand Determination on cardboard packing cartons "is not a paragon of clarity." *See Bowman Transportation*, 419 U.S. at 290. Had Commerce spelled out its rationale "in a more considered manner . . . , [judicial] review would have been greatly facilitated" – and it is possible that the need for such review might even have been obviated entirely. *Id*. And yet, "[w]hile a more substantial explanation from Commerce might have been helpful to [the court] or preferable to [the Domestic Producers], its absence . . . is not grounds for [reversal]," where – as here – it is possible to "reasonably discern the path of Commerce's decision." *NMB Singapore*, 557 F.3d at 1323.

This is not a case where it is necessary to try to "guess" at the reasoning underlying Commerce's determination. *See*, *e.g.*, *SEC v. Chenery Corp.*, 332 U.S. 194, 196–97 (1947) (stating that "[i]t will not do for a court to be compelled to guess at the theory underlying the agency's action"); *Greater Boston Television Corp. v. FCC*, 444 F.2d 841, 851 (D.C. Cir. 1970) (explaining that court "must not be left to guess as to the agency's findings or reasons"). The Domestic Producers do not profess to harbor any doubts as to Commerce's rationale for adopting the domestic price quotes to value cardboard packing cartons. Nor could the Domestic Producers credibly make such a claim. The Domestic Producers' argument thus seeks to elevate form over substance.

Moreover, this is not a case where the court is improperly "supply-[ing] a reasoned basis for the agency's action that the agency itself has not given." *See State Farm*, 463 U.S. at 43 (*citing Chenery*, 332 U.S. at 196). Quite to the contrary, it is Commerce that has implicitly adopted – and incorporated by reference into the Third Remand Determination – the court's analysis of the relative merits of the Indian import statistics and the domestic price quotes, as set forth in

detail in *Taian Ziyang I* and *Taian Ziyang II*. *See* Third Remand Determination at 3–4; *see generally Taian Ziyang I*, 33 CIT at ____, 637 F. Supp. 2d at 1144–52; *Taian Ziyang II*, 35 CIT at ____, 783 F. Supp. 2d at 1311–33.

Nor is this a case where the record would admit of multiple possible rationales for the agency's action. *See Rogers Radio Communications Services, Inc. v. FCC*, 751 F.2d 408, 418 (D.C. Cir. 1985) (remanding issue to agency where, *inter alia*, record revealed several potential bases for agency's action, leaving court "unable to clearly discern the agency's path"). As summarized in section III.B.3 below, and as set forth in greater detail in *Taian Ziyang I* and *Taian Ziyang II*, the administrative record on this issue reflects candid admissions by Commerce as to at least two significant flaws in the Indian import statistics that the agency previously used to value cardboard packing cartons, while – at the same time – the record is utterly devoid of evidence that the domestic price quotes are in any way unreliable. Accordingly, particularly when the Third Remand Determination is read in the context of the administrative record as a whole,[20] there is zero uncertainty concerning the bases for Commerce's ultimate decision to rely on the domestic price quotes (rather than the import statistics).

Under these circumstances, it would serve little purpose to remand this action to seek to compel Commerce to expressly state that which the Third Remand Determination indisputably implies. The Domes-

[20] In attempting to discern an agency's path of decisionmaking, a court is not confined solely to the text of the agency's stated rationale. Thus, for example, the court may also consider the administrative record in the proceeding at issue, and even documents from other proceedings. *See*, *e.g.*, *United Parcel Service, Inc. v. U.S. Postal Service*, 184 F.3d 827, 840 (D.C. Cir. 1999) (explaining that, in *Direct Marketing Association*, "as in the instant case, the [agency's] approach was '*discernable from the evidentiary record* upon which the recommendation [was] based'") (*quoting Direct Marketing Ass'n v. U.S. Postal Service*, 778 F.2d 96, 111 (2d Cir. 1985) (emphasis added)); *Direct Marketing Ass'n*, 778 F.2d at 108 (concluding that agency's rationale was "a reasonable one which can be 'clearly discerned,' *from the record hearings*") (*quoting Bowman Transportation*, 419 U.S. at 286) (emphasis added); *Rogers Radio*, 751 F.2d at 418 (concluding that court could not "clearly discern the agency's path *from the several opinions below and the voluminous record itself*") (emphasis added); *Alaska Dep't of Environmental Conservation v. EPA*, 540 U.S. 461, 497 (2004) (holding rationale for agency's "skeletal" orders to be sufficient when "read together with *accompanying explanatory correspondence*") (emphasis added); *New Jersey Zinc Co. v. FERC*, 843 F.2d 1497, 1500–01 (D.C. Cir. 1988) (Bader Ginsburg, J.) (finding agency rationale sufficient when read in light of order in prior case).

Accordingly, in seeking to discern the path of Commerce's reasoning in adopting the domestic price quotes to value cardboard packing cartons, the inquiry need not begin and end with the Third Remand Determination itself. Instead, it is permissible to read Commerce's statements in light of the entirety of the administrative record compiled by the agency, and the opinions of the court (which were referenced in the Third Remand Determination itself).

tic Producers' challenge to the sufficiency of Commerce's rationale for use of the domestic price quotes must be rejected.

3. *The Substantiality of the Evidence*

Apart from their challenge to the sufficiency of Commerce's rationale for using the domestic price quotes to value cardboard packing cartons (discussed immediately above), the Domestic Producers also argue that the agency's decision to use the price quotes is not supported by substantial evidence. *See* Def.-Ints.' Brief at 3–4; Def.-Ints.' Reply Brief at 2, 4. The Domestic Producers fare no better on this claim. *See generally* Pls.' Response Brief at 5–6; Def.'s Response Brief at 9–11.

As summarized below, and as set forth at length and in exhaustive detail in *Taian Ziyang I* and *Taian Ziyang II*, the record evidence – viewed through the lens of Commerce's criteria in Policy Bulletin 04.1 – weighs solidly in favor of the price quotes. *See Taian Ziyang I*, 33 CIT at ____, 637 F. Supp. 2d at 1144–52 (analyzing merits of domestic price quotes *versus* Indian import statistics for valuation of cardboard packing cartons); *Taian Ziyang II*, 35 CIT at ____, 783 F. Supp. 2d at 131133 (same); section III, *supra* (in the introductory section, discussing criteria established in Policy Bulletin 04.1, including "product specificity," "contemporaneity," "representativeness," and "public availability," in addition to whether prices are "net of taxes and import duties").

As *Taian Ziyang II* explained, of the five criteria set forth in Policy Bulletin 04.1, "product specificity" logically must be the most important. *See Taian Ziyang II*, 35 CIT at ____, 783 F. Supp. 2d at 1330.[21] And it is undisputed that, as discussed in *Taian Ziyang I* and *Taian Ziyang II*, the four domestic price quotes on the record of this proceeding are highly "specific to the input in question" – that is, the cardboard packing cartons actually used by the Chinese producers.

[21] To underscore the significance of this point, *Taian Ziyang II* took it to its logical extreme: To illustrate . . . , Commerce here could not reasonably base its surrogate value for cardboard packing cartons on Indian import statistics for fishing rods (for instance), even if those import statistics – in the words of Policy Bulletin 04.1 – unquestionably reflected "review period-wide price averages" and were indisputably "publicly available data" that were fully "contemporaneous with the period of . . . review" and "net of taxes and duties." Commerce could not do so because, even if the Indian import statistics for fishing rods were absolutely perfect in every other way, the import statistics would not be sufficiently "product specific."

Taian Ziyang II, 35 CIT at ____, 783 F. Supp. 2d at 1330 (footnote omitted). If a set of data is not sufficiently "product specific," it is of no import whether or not the data satisfy the other criteria set forth in Policy Bulletin 04.1. *See*, *e.g.*, *Hebei Metals & Minerals Import & Export Corp. v. United States*, 29 CIT 288, 300, 366 F. Supp. 2d 1264, 1273–74 (2005) (explaining that, where agency failed to demonstrate that import statistics were sufficiently "product specific," it was irrelevant whether statistics satisfied other criteria).

See Taian Ziyang I, 33 CIT at ____, ____, 637 F. Supp. 2d at 1144, 1152; *Taian Ziyang II*, 35 CIT at ____, 783 F. Supp. 2d at 1312; *see also Taian Ziyang I*, 33 CIT at ____, 637 F. Supp. 2d at 1151.

The undisputed record evidence similarly establishes that the four domestic price quotes are, in the words of Policy Bulletin 04.1, fully "contemporaneous with the period of . . . review." *See Taian Ziyang I*, 33 CIT at ____, ____ & n.57, ____, 637 F. Supp. 2d at 1144, 1145 & n.57, 1146; *Taian Ziyang II*, 35 CIT at ____, ____, ____, 783 F. Supp. 2d at 1312, 1316–17, 1326.[22]

In its determinations in this proceeding prior to the Third Remand Determination, the reservations expressed by Commerce have focused exclusively on the "representativeness" and "public availability" of the price quotes. *See Taian Ziyang I*, 33 CIT at ____, 637 F. Supp. 2d at 1145–47; *Taian Ziyang II*, 35 CIT at ____, ____, ____, 783 F. Supp. 2d at 1312, 1316, 1318–23. But, as documented in *Taian Ziyang I* and *Taian Ziyang II*, those concerns lacked any basis in the evidence on the record of this proceeding.

Like "contemporaneity," Commerce's "representativeness" criterion relates to the timing of price information. In contrast to the contemporaneity criterion (which concerns whether the price information is from within the review period at issue), the focus of the representativeness criterion is on whether the information reflects "review period-wide price averages," rather than prices for a more limited period of time. *See Taian Ziyang I*, 33 CIT at ____, 637 F. Supp. 2d at 1145; *Taian Ziyang II*, 35 CIT at ____, ____, 783 F. Supp. 2d at 1312–13, 1320. Commerce's concern about price quotes for a more limited period of time – like the price quotes at issue here, which were all dated within a week of one another – is the possibility that the pricing information may be distorted (and therefore unreliable) due to "temporary market fluctuations." *See Taian Ziyang I*, 33 CIT at ____, 637 F. Supp. 2d at 1145; *Taian Ziyang II*, 35 CIT at ____, 783 F. Supp. 2d at 1312–13. However, as *Taian Ziyang I* and *Taian Ziyang II* noted, the administrative record in this proceeding is barren of any evidence whatsoever that might suggest that prices for cardboard packing cartons are subject to any significant volatility. *See Taian Ziyang I*, 33 CIT at ____, 637 F. Supp. 2d at 1146; *Taian Ziyang II*, 35 CIT at ____ n.28, ____, 783 F. Supp. 2d at 1321 n.28, 1321–23.[23]

[22] Although there was some confusion concerning the contemporaneity of the domestic price quotes, the record establishes that all four are fully contemporaneous (*i.e.*, from within the period of review). *See Taian Ziyang I*, 33 CIT at ____ n.57, 637 F. Supp. 2d at 1145 n.57; *Taian Ziyang II*, 35 CIT at ____ & n.21, 783 F. Supp. 2d at 1316 & n.21.

[23] As *Taian Ziyang II* noted, the suggestion that prices for cardboard packing cartons are subject to any significant fluctuation "does not . . . necessarily comport with common sense." *Taian Ziyang II*, 35 CIT at ____, 783 F. Supp. 2d at 1322. *Taian Ziyang II* further explained:

The record is equally definitive on "public availability." As *Taian Ziyang I* observed, there is room for debate as to the precise meaning of "public availability." *See generally Taian Ziyang* I, 33 CIT at ____, 637 F. Supp. 2d at 1146. But there is no question that the focus of Commerce's concern about information that is not publicly available is the potential for manipulation. *See id*., 33 CIT at ____, 637 F. Supp. 2d at 1146; *Taian Ziyang II*, 35 CIT at ____, ____, 783 F. Supp. 2d at 1312, 1318. And it is undisputed that there is not even a scintilla of evidence on the record here to suggest that the four price quotes are in any way the product of manipulation or distortion, or tainted by collusion. No evidence whatsoever. *See Taian Ziyang I*, 33 CIT at ____, 637 F. Supp. 2d at 1146–47; *Taian Ziyang II*, 35 CIT at ____, ____, 783 F. Supp. 2d at 1312, 1318.[24]

The record evidence favoring use of the Indian import statistics pales by comparison to the evidence supporting the domestic price quotes. It is true that the import statistics are publicly available information. And it is similarly undisputed that the import statistics are both contemporaneous and representative as well. On the other

> [I]t seems reasonable to assume that some commodities (or factors of production) fluctuate in price, seasonally and/or in response to established market forces such as supply and demand. It is common knowledge, for example, that agricultural produce prices generally tend to fluctuate based on seasonal availability, and that mineral prices may fluctuate in accordance with supply and demand. On the other hand, it is not at all obvious why the price of basic cardboard packing cartons would be subject to appreciable fluctuation over the course of a single year (*i.e.*, the period of review). And, contrary to Commerce's assertions in the Second Remand Determination, it is certainly not obvious why the price of basic cardboard packing cartons would be "*highly* susceptible" to fluctuation.

Taian Ziyang II, 35 CIT at ____, 783 F. Supp. 2d at 1322; *see generally id*., 35 CIT at ____, 783 F. Supp. 2d at 1321–23.

[24] As *Taian Ziyang II* pointed out, the Domestic Producers had an obvious incentive to affirmatively challenge the price quotes if they believed the price quotes to be inaccurate. Presumably, if the price quotes did not fairly reflect the price of cardboard packing cartons throughout the period of review, or seemed to be in some way distorted, the Domestic Producers would have been the first to say so. Significantly, however, although the Domestic Producers placed the Indian import statistics on the record of this proceeding, they conspicuously never sought to present any evidence to suggest that the domestic price quotes on the record were manipulated or are in any way not representative of prices through the duration of the period of review. Nor did the Domestic Producers ever make any such claims. *See generally Taian Ziyang II*, 35 CIT at ____ n.24, 783 F. Supp. 2d at 1318 n.24. *Taian Ziyang II* made the further point that the nature of the four domestic price quotes at issue here should serve to assuage, at least to some degree, any concerns about potential "manipulation." If one were inclined to forge or manipulate price data, presumably one would produce data that were more clearly decisive – in other words, one would generate a greater number of price quotes, and those price quotes would span the full duration of the period of review. As *Taian Ziyang II* put it, "[v]iewed through this lens, the seeming imperfections in the price quotes are actually indicia of authenticity." *See generally Taian Ziyang II*, 35 CIT at ____ n.24, 783 F. Supp. 2d at 1318 n.24.

hand, the record evidence on product specificity – the most important of Commerce's criteria – is damning.

In short, it is undisputed that the import statistics on the record are plagued by two serious infirmities. First, because the scope of the tariff heading on which the statistics are based is very broad,[25] the values reflected in the import statistics are inflated by the inclusion of (unknown, potentially vast) quantities of more expensive gift, specialty, and other types of non-packing boxes that bear no resemblance to the basic cardboard packing cartons that the Chinese producers use to pack and ship garlic. *See Taian Ziyang I*, 33 CIT at ____, ____, 637 F. Supp. 2d at 1149, 1151; *Taian Ziyang II*, 35 CIT at ____, ____, ____, 783 F. Supp. 2d at 1314, 1323–24, 1326–27. [26] And, second, although garlic producers source their packing cartons domestically, the import statistics include freight charges; and such charges – particularly charges for transportation by air – only further distort (*i.e.*, inflate) the values reflected in the import statistics. *See Taian Ziyang I*, 33 CIT at ____ n.61, ____, ____, 637 F. Supp. 2d at 1148 n.61, 1149, 1150–51; *Taian Ziyang II*, 35 CIT at ____, ____, ____, 783 F. Supp. 2d at 1315, 1324–25, 1326–27. [27]

Surveying the state of the administrative record (as outlined above), *Taian Ziyang II* put it bluntly: "[I]n contrast to the Indian import statistics (which are admittedly 'imperfect'), there is no affirmative evidence that the domestic price quotes are in any way 'imperfect.'" *See Taian Ziyang II*, 35 CIT at ____, 783 F. Supp. 2d at 1327. In other words, while the record evidence indisputably establishes that the values reflected in the Indian import statistics are (at least to some extent) inflated and thus do not accurately reflect the card-

[25] Indian tariff subheading 4819.1001 – the subheading for which Commerce has import statistics – covers gift, specialty, and many other types of non-packing boxes, in addition to the sort of plain cardboard packing cartons that the Chinese producers use. *See* section III.B, *supra*; *Taian Ziyang I*, 33 CIT at ____, ____, 637 F. Supp. 2d at 1144, 1149.

[26] That the values reflected in the import statistics are inflated by the inclusion of gift and specialty boxes is not in dispute. There is no question that the basic cardboard packing cartons that the Chinese producers use are less expensive (and, in some instances, likely much less expensive) than the gift, specialty, and other non-packing boxes that are included in the import statistics. However, it is not possible to state with any precision the full extent of the distortion attributable to the more expensive boxes, because the record evidence on the quantity of such boxes reflected in the statistics (relative to the quantity of basic cardboard packing cartons) is simply inconclusive. *See generally Taian Ziyang I*, 33 CIT at ____, 637 F. Supp. 2d at 1149–50; *Taian Ziyang II*, 35 CIT at ____, ____, 783 F. Supp. 2d at 1314–15, 1331.

[27] *See generally Taian Ziyang I*, 33 CIT at ____, 637 F. Supp. 2d at 1150–51 (questioning logic of assumption that, rather than sourcing basic cardboard packing cartons domestically, merchant would purchase cartons that were *imported* – much less *imported by air*); *Taian Ziyang II*, 35 CIT at ____ & n.19, 783 F. Supp. 2d at 1315 & n.19 (same).

board packing cartons at issue, there is no record evidence – absolutely none – to indicate that the domestic price quotes are in any way distorted or otherwise inaccurate.

The bottom line is that, to the extent that Commerce has a general policy that privileges the use of import statistics over price quotes due to concerns about the reliability of the latter, the agency's skepticism may well be justified, and – all other things being equal – its policy would be entitled to great weight and would likely carry the day. *See generally Taian Ziyang I*, 33 CIT at ____, 637 F. Supp. 2d at 1145. But, given the facts of this specific case, all things are decidedly not equal.[28]

Commerce's determination on the valuation of cardboard packing cartons in *this action* must be grounded in the *evidence* on *this record*. And the evidence on domestic price quotes *versus* import statistics is not in equipoise. While neither the Domestic Producers nor Commerce ever adduced even an iota of actual evidence to impeach the accuracy and reliability of the domestic price quotes, Commerce itself has candidly conceded that the values reflected in the import statistics are inflated. *See*, *e.g.*, Second Remand Determination at 75 (admitting that "the [import statistics] do not perfectly represent the inputs of the GDLSK [Plaintiffs] because the Indian import data include [1] specialty boxes, and [2] boxes transported by air").[29]

Under these circumstances, Commerce's decision in the Third Remand Determination to value cardboard packing cartons using the

[28] The situation would be quite different if the tariff subheading reflected in the import statistics were relatively narrow (and thus relatively "specific" to the input being valued), and if the effect of air freight charges could be reasonably estimated. Similarly, the situation would be different if there were any evidence at all on the record to undermine the reliability of the price quotes.

Here, however, Commerce itself has admitted that the import statistics include a broad range of products that are very much unlike the basic cardboard packing cartons here. And Commerce has also conceded that the import statistics are further distorted by air freight charges, though the extent of that distortion has not been established. In contrast, there is not even a shred of actual record evidence to cast doubt on the reliability of the domestic price quotes. On these specific facts, Commerce's policy preference for the use of import statistics over price quotes cannot prevail.

[29] *See also* Second Remand Determination at 42 (acknowledging that trade intelligence data submitted by GDLSK Plaintiffs indicate that Indian import statistics for subheading 4819.1001 included "certain specialty packing products" and products "shipped by air"); *id*. at 45 (conceding that "the Indian import data . . . are less specific" than domestic price quotes); *id*. at 46 (acknowledging that "the data obtained through Indian import statistics . . . include specialty boxes, and boxes transported by air"); Issues and Decision Memorandum at 38–39 (admitting that "[Commerce's] analysis of the trade intelligence data provided by the GDLSK [Plaintiffs] indicated that there are many different types of boxes covered by [the Indian import statistics]," and that "different boxes for different purposes have entered India under [the tariff subheading used in the Indian import statistics]"); *id*. at 40 (acknowledging that Indian import statistics reflect cartons imported by air).

domestic price quotes (rather than the Indian import statistics) is plainly supported by substantial evidence. Commerce's decision therefore must be sustained.

C. *Surrogate Value for Plastic Jars and Lids*

In the Final Results in this case, Commerce valued plastic jars and lids using a surrogate value derived from World Trade Atlas statistics for imports into India under two broad "basket" provisions of the Indian tariff system – specifically, subheading 3923.3000 (covering "carboys, bottles, flasks and similar plastic items") and subheading 3923.5000 (covering "stoppers, lids, caps and other closures of plastics"). *See Taian Ziyang II*, 35 CIT at ____, 783 F. Supp. 2d at 1152. As with the Final Results on cardboard packing cartons, the Final Results on plastic jars and lids found the use of Indian import statistics preferable to four domestic price quotes submitted by the GDLSK Plaintiffs, which were obtained from three different Indian vendors in three different cities and are for jars and lids comparable to those used by the Chinese producers here. *See id*., 35 CIT at ____, 783 F. Supp. 2d at 1333.[30]

In rejecting the domestic price quotes, the Final Results cited concerns about the "public availability" of the price quotes, as well as their "contemporaneity," and their "representativeness." *See Taian Ziyang I*, 33 CIT at ____, 637 F. Supp. 2d at 1153–54. *Taian Ziyang I* analyzed all of the grounds cited in the Final Results as a basis for rejecting the price quotes, and found each of them wanting. *See id*., 33 CIT at ____, 637 F. Supp. 2d at 1153–54. *Taian Ziyang I* acknowledged that "[n]o doubt the various concerns . . . outlined in the Final Results diminish, at least to some limited extent, the utility of the domestic Indian price quotes for jars and lids." *See id*., 33 CIT at ____, 637 F. Supp. 2d at 1154. However, *Taian Ziyang I* concluded that the Final Results failed to adequately analyze the relative merits of the domestic price quotes and the seemingly much more seriously flawed Indian import statistics on which the Final Results relied, and therefore remanded the issue to Commerce for further consideration. *See id*., 33 CIT at ____, 637 F. Supp. 2d at 1157.

Much like the Second Remand Determination's treatment of cardboard packing cartons (discussed above), the Second Remand Determination's treatment of plastic jars and lids "[did] virtually nothing to advance the ball" on the use of Indian import statistics *versus* domestic price quotes. *See Taian Ziyang II*, 35 CIT at ____, 783 F. Supp. 2d

[30] The price quotes for plastic jars and lids are dated October 8, 2004, November 6, 2004, and November 22, 2004. *See Taian Ziyang I*, 33 CIT at ____ n.64, 637 F. Supp. 2d at 1153 n.64. Thus, all four price quotes post-date the period of review by at least 11 months.

at 1336; *see generally id*., 35 CIT at ____, 783 F. Supp. 2d at 1336–39. Commerce continued to overstate the alleged problems with the domestic quotes and, at the same time, continued to downplay the obvious (and admitted) problems inherent in the Indian import statistics on which the agency continued to rely. *See id*., 35 CIT at ____, 783 F. Supp. 2d at 1338–39.

Observing that the Second Remand Determination seemingly had once again chosen "*admittedly distorted* Indian import statistics over *potentially 'perfect'* price quotes," *Taian Ziyang II* held that the Second Remand Determination failed to adequately explain the agency's determination that the Indian import statistics constituted the "best available information" for use in calculating the surrogate value of plastic jars and lids, in light of the admitted infirmities in the import statistics. *See Taian Ziyang II*, 35 CIT at ____, 783 F. Supp. 2d at 1339. *Taian Ziyang II* similarly criticized Commerce for failing to adequately explain why the Indian import statistics were preferable to the domestic price quotes, the other source of information on the record. *See id*., 35 CIT at ____, 783 F. Supp. 2d at 1339. *Taian Ziyang II* further held that "the Second Remand Determination's conclusions that the Indian import statistics are 'sufficiently specific' and constitute the 'best available information' for use in valuing plastic jars and lids are unexplained, are not rational, and lack any sound basis in the existing administrative record, and therefore cannot be sustained." *See id*., 35 CIT at ____, 783 F. Supp. 2d at 1339. The issue was therefore remanded once again, and – as it had with cardboard packing cartons – *Taian Ziyang II* advised Commerce to use the remand wisely, because a fourth remand was unlikely. *See id*., 35 CIT at ____, 783 F. Supp. 2d at 1339.

In its Third Remand Determination, Commerce reversed course (as it did vis-a-vis the valuation of cardboard packing cartons), and used the domestic price quotes – rather than Indian import statistics – to value plastic jars and lids. Commerce explained:

> The Court found [in *Taian Ziyang II*] that Commerce had chosen "*admittedly distorted* Indian import statistics over *potentially 'perfect'* price quotes." While the Department disagrees with this conclusion, the Department is cognizant of the Court's admonition that the Department is not likely to "get another bite of the apple on this issue." Accordingly, . . . the Department has determined, under protest, to use the price quote surrogate values provided on the record by the plaintiffs during the underlying proceeding for this final remand redetermination. Using these price quotes, . . . the surrogate value used for plastic jars and lids is 179.14 Rs/kg [rupees per kilogram].

Third Remand Determination at 3–4 (footnotes omitted); *see also id*. at 1 (stating that Commerce "has applied, under protest, the price quotes . . . to value . . . plastic jars and lids"); Pls.' Response Brief at 5–6 (stating that Third Remand Determination "accepted the Court's well-reasoned and clearly explained findings with respect to the available surrogate values" for plastic jars and lids); Def.'s Response Brief at 9–11 (explaining that "the Remand Results are consistent with the Court's holding" in *Taian Ziyang II*, and that "[i]n light of the Court's concerns about the import statistics, . . . Commerce reasonably adopted plaintiffs' approach and used the domestic price quotes").[31]

The Domestic Producers' attack on the Third Remand Determination's treatment of the valuation of plastic jars and lids parallels the Domestic Producers' challenge to the valuation of cardboard packing cartons. Specifically, asserting that the Third Remand Determination "does not include further analysis or justification for [Commerce's] reliance on the price quotes submitted by the [GDLSK] Plaintiffs," the Domestic Producers contend that Commerce "has essentially (and improperly) delegated [its] authority [to find facts in support of its determination] to the Court." Def.-Ints.' Brief at 2–3. The Domestic Producers conclude that the Third Remand Determination fails to "provide a reasoned basis for [Commerce's] reliance on the price quotes submitted by the Plaintiffs" and that the agency's use of the price quotes to value plastic jars and lids is not "supported by substantial evidence." *Id*.; *see also* Def.-Ints.' Reply Brief at 2–4.

Again, as outlined below, the Domestic Producers' failure to exhaust their administrative remedies bars them from raising their arguments here. In any event, their arguments have no substantive merit.

1. *Exhaustion of Administrative Remedies*

The draft of the Third Remand Determination that Commerce provided to both the GDLSK Plaintiffs and the Domestic Producers was "materially identical" to the final version of the Third Remand Determination filed with the court, and thus reflected Commerce's decision to value plastic jars and lids using the domestic price quotes

[31] The quoted language from the Third Remand Determination – particularly the phrase "under protest" – can be read to suggest that *Taian Ziyang II* imposed an outcome or result on Commerce, and ordered the agency to use the domestic price quotes in valuing plastic jars and lids. That is not the case. *See generally* n.17, *supra* (discussing same point in context of cardboard packing cartons); *Taian Ziyang II*, 35 CIT at ____, 783 F. Supp. 2d at 1339 (suggesting further development of record on remand, including additional "evidence concerning the domestic price quotes and the Indian import statistics (as well as alternative sets of data, if any, that may be appropriate")); *see also* n.17, *supra* (noting *non sequitur* in Commerce's rationale).

(rather than the Indian import statistics). *See* Def.'s Response Brief at 9; *see also id*. at 5, Tab A ("Draft Results of Third Redetermination Pursuant to Remand") at 3–4. The Domestic Producers nevertheless failed to file any comments on the draft. *See* Third Remand Determination at 3 (stating that Commerce received no comments on draft of Third Remand Determination); Def.'s Response Brief at 4–5, 7, 8; Pls.' Response Brief at 2, 3. The Domestic Producers raised their objections to Commerce's use of the domestic price quotes for the first time in their opening brief filed with the court commenting on the Third Remand Determination. *See* Def.-Ints.' Brief at 2–4; *see also* Pls.' Response Brief at 2. The Domestic Producers thus failed to properly exhaust their administrative remedies. *See* Def.'s Response Brief at 2, 6–9; Pls.' Response Brief at 2–5; *see generally* section III.B.1, *supra*.

The Domestic Producers seek to avoid the requirement of exhaustion by relying on the same legal theory that they advanced as to cardboard packing cartons. The Domestic Producers argue, in essence, that the exhaustion requirement has no application here, because – the Domestic Producers contend – the gravamen of their objections is that the Third Remand Determination does not satisfy the standard of review and does not comply with the terms of the remand set forth in *Taian Ziyang II*. *See* Def.-Ints.' Reply Brief at 2–3. The Domestic Producers thus assert that, even if they had filed no brief in this action, the court nonetheless would be required to analyze the Third Remand Determination to ascertain whether it articulated a sufficient rationale for the use of domestic price quotes in the valuation of plastic jars, and whether the determination to use the price quotes is supported by substantial evidence. As explained above, however, the Domestic Producers' argument is in vain. *See* n.18, *supra* (analyzing and rejecting same argument in context of cardboard packing cartons).

Thus, as with their concerns about the use of price quotes in the valuation of cardboard packing cartons, the Domestic Producers' failure to raise their objections to the valuation of plastic jars and lids at the administrative level precludes the Domestic Producers from raising the issue here.

2. *The Sufficiency of Commerce's Rationale*

Even if the Domestic Producers' challenges to the Third Remand Determination's valuation of plastic jars and lids were not barred by the doctrine of exhaustion, they would not succeed on the merits.

The Domestic Producers' challenge to the sufficiency of Commerce's rationale for the use of price quotes in valuing plastic jars and lids is based on the same argument the Domestic Producers raised in at-

tacking Commerce's rationale on the valuation of cardboard packing cartons. Specifically, the Domestic Producers assert that the Third Remand Determination lacks "a reasoned basis for [the agency's] reliance on the price quotes submitted by the [GDLSK] Plaintiffs" in lieu of the Indian import statistics used in the agency's previous determinations. Def.-Ints.' Brief at 3; *see generally id*. at 2–4; Def.-Ints.' Reply Brief at 2–4.

As explained above, however, while the Third Remand Determination's rather "cryptic" explanation of Commerce's rationale "is hardly a model worthy of retention," it is sufficient under the law. *See* section III.B.2, *supra* (analyzing challenge to adequacy of agency's stated rationale for valuation of cardboard packing cartons); *New Jersey Zinc Co. v. FERC*, 843 F.2d 1497, 1500–01 (D.C. Cir. 1988) (Bader Ginsburg, J.).

Although the Third Remand Determination does not expressly state that Commerce is (in effect) adopting the rationale suggested by *Taian Ziyang I* and *Taian Ziyang II*, Commerce's intent is clear – particularly when the statement of rationale in the Third Remand Determination is read in light of the administrative record as a whole, and the opinions of the court (which the Third Remand Determination references). *See* n.20, *supra* (explaining that, in attempting to discern agency's path of decisionmaking, court need not confine itself solely to text of agency's stated rationale); *see*, *e.g.*, *Wheatland Tube*, 161 F.3d at 1370 (stating that "[a]n *explicit* explanation is not necessary . . . where the agency's decisional path is reasonably discernible") (emphasis added)[32]; *see also* Pls.' Response Brief at 5–6 (stating that Third Remand Determination "accepted the Court's well-reasoned and clearly explained findings with respect to the available surrogate values" for plastic jars and lids); Def.'s Response Brief at 9–11 (same).

Significantly, the Domestic Producers do not claim to be "in the dark" concerning the bases for Commerce's decision to use the domestic price quotes to value plastic jars and lids in the Third Remand Determination. Their challenge to the sufficiency of Commerce's rationale is thus purely formalistic. Under these circumstances, a fourth remand would be a waste of the time and resources of all concerned. The Domestic Producers' arguments contesting Commerce's rationale for use of the domestic price quotes must therefore be rejected.

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[32] *See also Nucor Corp.*, 414 F.3d at 1339 (stating that, "[w]here an agency has not made a particular determination *explicitly*, the agency's ruling nonetheless may be sustained as long as 'the path of the agency may be reasonably discerned.'") (*quoting Ceramica Regiomontana*, 810 F.2d at 1139, *quoting Bowman Transportation*, 419 U.S. at 286) (emphasis added).

3. *The Substantiality of the Evidence*

Just as the Domestic Producers have argued that the decision in the Third Remand Determination to use price quotes to value cardboard packing cartons is not supported by substantial evidence, they level the same charge at Commerce's reliance on price quotes in valuing plastic jars and lids. *See* Def.-Ints.' Brief at 3–4; Def.-Ints.' Reply Brief at 2, 4. The argument is no more successful here. *See generally* Pls.' Response Brief at 5–6; Def.'s Response Brief at 9–11.

As outlined below, and as set forth at length and in painstaking detail in *Taian Ziyang I* and *Taian Ziyang II*, the record evidence solidly favors use of the price quotes. *See Taian Ziyang I*, 33 CIT at ____, 637 F. Supp. 2d at 1152–57 (analyzing merits of domestic price quotes *versus* Indian import statistics for valuation of plastic jars and lids); *Taian Ziyang II*, 35 CIT at ____, 783 F. Supp. 2d at 1333–39 (same).

As discussed above, *Taian Ziyang II* explained that – of the five criteria set forth in Policy Bulletin 04.1 – "product specificity" logically must be the most important. *See Taian Ziyang II*, 35 CIT at ____, 783 F. Supp. 2d at 1330.[33] And it is undisputed that, as discussed in *Taian Ziyang I* and *Taian Ziyang II*, the four domestic price quotes on the record of this proceeding are highly "specific to the input in question" – that is, the plastic jars and lids used by the Chinese producers here. *See Taian Ziyang I*, 33 CIT at ____, ____, 637 F. Supp. 2d at 1155, 1157; *Taian Ziyang II*, 35 CIT at ____, ____, 783 F. Supp. 2d at 1333–34, 1336.[34]

In its determinations in this proceeding prior to the Third Remand Determination, Commerce's concerns focused on the "contemporaneity," "representativeness," and "public availability" of the price quotes. *See Taian Ziyang I*, 33 CIT at ____, 637 F. Supp. 2d at 1153–54; *Taian Ziyang II*, 35 CIT at ____, 783 F. Supp. 2d at 1334. But, as documented in *Taian Ziyang I and Taian Ziyang II, those concerns had no evidentiary foundation in the administrative record of this proceeding*.

As to Commerce's "contemporaneity" and "representativeness" criteria, it is true that the four domestic price quotes fall well outside the period of review. *See Taian Ziyang I*, 33 CIT at ____ & n.64, 637 F.

[33] *See generally* section III.B.3, *supra* (discussing extreme example which illustrates overriding significance of "product specificity").

[34] Although there was some confusion concerning the number of price quotes for plastic jars and lids submitted by the GDLSK Plaintiffs, the record establishes that there are, in fact, a total of *four* price quotes from *three* Indian vendors. *See Taian Ziyang I*, 33 CIT at ____ & n.64, 637 F. Supp. 2d at 1152–53 & n.64; *Taian Ziyang II*, 35 CIT at ____ nn.45–46, 783 F. Supp. 2d at 1334 nn.45–46.

Supp. 2d at 1153–54 & n.64; *Taian Ziyang II*, 35 CIT at ____ & n.46, 783 F. Supp. 2d at 1334 & n.46. However, the policy considerations that underpin the contemporaneity and representativeness criteria go to whether the proferred pricing information accurately reflects prices for the input (here, plastic jars and lids) during the period of review.

In the case at bar, Commerce was concerned that, because the price quotes were obtained well after the period of review, they might not accurately reflect actual prices during the period of review; and, in addition, Commerce was concerned that price quotes from a limited period (rather than a full year, the length of the period of review) might be distorted (and therefore unreliable) due to "temporary market fluctuations." *See Taian Ziyang I*, 33 CIT at ____, 637 F. Supp. 2d at 115354; *Taian Ziyang II*, 35 CIT at ____, 783 F. Supp. 2d at 1334–35. As *Taian Ziyang I* and *Taian Ziyang II* noted, however, there is no evidence whatsoever on the record of this proceeding to indicate that prices for plastic jars and lids are subject to any appreciable fluctuation. *See Taian Ziyang I*, 33 CIT at ____, 637 F. Supp. 2d at 1154; *Taian Ziyang II*, 35 CIT at ____, 783 F. Supp. 2d at 1335.[35] In other words, there is nothing on the record that even intimates that the price quotes do not accurately represent prices for jars and lids during the period of review here. The concerns about the contemporaneity and representativeness of data that are reflected in Policy Bulletin 04.1 are entirely reasonable, as a theoretical matter. But, in this particular case, the record evidence on the price quotes for plastic jars and lids does not bear out those concerns.

The record is no less clear on the matter of "public availability." As discussed above, Commerce's concern about information that is not publicly available is the risk of manipulation. *See* section III.B.3, *supra* (explaining policy basis for "public availability" criterion). But the record here includes no evidence that can be read even to suggest that the price quotes for jars and lids are in any way the product of manipulation or collusion. *See Taian Ziyang I*, 33 CIT at ____, 637 F. Supp. 2d at 1153; *Taian Ziyang II*, 35 CIT at ____, 783 F. Supp. 2d at 1334.[36]

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[35] For the reasons discussed above, there is no apparent reason to expect that plastic jars and lids (any more than cardboard packing cartons) would be susceptible to significant price fluctuations. *See* n.23, *supra*.

[36] The Domestic Producers had a clear incentive to affirmatively challenge the price quotes if the Domestic Producers believed them to be inaccurate. Presumably, if the price quotes did not fairly represent prices throughout the period of review, or if they appeared to be in some way distorted or manipulated, the Domestic Producers would have been the first to say so. It is therefore telling that, although the Domestic Producers placed the Indian import statistics on the record here, they have never sought to present any evidence to cast doubt on the accuracy of the price quotes. Nor have the Domestic Producers ever claimed

The record evidence supporting use of the Indian import statistics is not nearly as strong as that favoring the price quotes. The import statistics are publicly available, as well as contemporaneous and representative. But the evidence on product specificity – the most important of Commerce's criteria – tells a very different story.

Like the import statistics previously used to value cardboard packing cartons, the import statistics that the Final Results used to value plastic jars and lids suffer from two critical defects. The Indian import statistics for plastic jars and lids are much less product-specific than the domestic price quotes, both because the import statistics include a very broad range of "specialty" and other plastic products that bear no resemblance to the simple, basic plastic jars at issue in this case,[37] and because (like the import statistics for cardboard packing cartons) they include charges for air freight.[38] *See Taian Ziyang I*, 33 CIT at ____, ____, 637 F. Supp. 2d at 1152–53, 1155–56 (discussing inflation attributable to highly diverse group of products captured by import statistics); *id*., 33 CIT at ____, ____, ____, 637 F. Supp. 2d at 1152–53, 1155, 1156 (discussing inflation attributable to air freight charges); *Taian Ziyang II*, 35 CIT at ____, ____, ____ & n.51, 783 F. Supp. 2d at 1333, 1336, 1337–38 & n.51 (discussing inflation attributable to highly diverse group of products captured by import statistics); *id*., 35 CIT at ____, ____ & n.51, 783 F. Supp. 2d

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that the price quotes are not accurate. *See Taian Ziyang II*, 35 CIT at ____ n.44, ____ n.50, 783 F. Supp. 2d at 1333 n.44, 1337 n.50.

Moreover, the nature of the four domestic price quotes should lay to rest any concerns about potential "manipulation." If one were inclined to forge or manipulate price data, presumably one would produce data that were more clearly decisive – in other words, one would generate a greater number of price quotes, and those price quotes would be dated within the period of review and would span the full duration of that period. Viewed through this perspective, the seeming flaws in the price quotes are actually indicia of authenticity and reliability. *See Taian Ziyang II*, 35 CIT at ____ n.44, ____ n.50, 783 F. Supp. 2d at 1333 n.44, 1337 n.50.

[37] As explained above, Indian tariff subheadings 3923.3000 and 3923.5000 – the subheadings for which Commerce has import statistics – cover many different types of "specialty" and other plastic products, in addition to the sort of simple, basic plastic jars that the Chinese producers use. *See Taian Ziyang I*, 33 CIT at ____, ____, 637 F. Supp. 2d at 1152, 1155–56; *Taian Ziyang II*, 35 CIT at ____, 783 F. Supp. 2d at 1333.

[38] *See generally Taian Ziyang I*, 33 CIT at , 637 F. Supp. 2d at 1156–57 (questioning logic of assumption that merchant would purchase cartons that were *imported* – much less *imported by air*).

at 1336, 1338 & n.51 (discussing inflation attributable to air freight charges).[39]

In its Second Remand Determination, Commerce unequivocally admitted that the Indian import statistics reflect inflated values as a surrogate for the plastic jars and lids at issue here, both because the import statistics "include a broad range of products that are different from the plastic jars used to pack garlic," and because the import statistics "include[ ] products that, unlike those the GDLSK [Plaintiffs] used, were shipped by air." *See* Second Remand Determination at 77; *see also id*. at 49–50 (same).[40] As such, the facts here are straightforward, compelling, and uncontroverted. While the record evidence indisputably establishes that the values reflected in the Indian import statistics are (at least to some extent) inflated and thus do not accurately reflect the basic plastic jars and lids at issue, there is no record evidence – absolutely none – to indicate that the domestic price quotes are in any way distorted or otherwise inaccurate.

Under these circumstances, Commerce's decision in the Third Remand Determination to value plastic jars and lids using the domestic price quotes (rather than Indian import statistics) is clearly supported by substantial evidence. That decision therefore must be sustained.

IV. *Conclusion*

For all the reasons set forth above, Commerce's Third Remand Determination must be sustained. Judgment will enter accordingly.

Dated: June 24, 2013
New York, New York

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

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[39] There is no dispute that the values reflected in the import statistics are inflated by "specialty" and other plastic products that are very different from (and more elaborate than) the simple, basic plastic jars at issue here. There is no dispute that the plastic jars and lids that the Chinese producers use are less expensive (and, in some instances, likely much less expensive) than other plastic products that are included in the import statistics. However, it is not possible to state with any precision the full extent of the distortion attributable to the other plastic products, because the record evidence on the quantity of such products reflected in the statistics (relative to the quantity of basic plastic jars) is simply inconclusive. *See generally Taian Ziyang II*, 35 CIT at ____, ____, 783 F. Supp. 2d at 1337–38, 1339.

[40] *See also* Issues and Decision Memorandum at 41 (noting GDLSK Plaintiffs' arguments that, due to "basket" nature of the tariff subheadings reflected in Indian import statistics at issue, import statistics include "specialty products such as hair cosmetics and centrifuge tubes that do not resemble the plastic jars and lids" used to pack garlic, and that Indian import statistics include air freight charges); *id*. at 43 (conceding that Indian import statistics include products imported by air).

Slip Op. 13–81

HOME MERIDIAN INTERNATIONAL, INC. D/B/A SAMUEL LAWRENCE FURNITURE CO. and PULASKI FURNITURE CO.; and IMPORT SERVICES, INC., Plaintiffs, GREAT RICH (HK) ENTERPRISES CO., LTD., DONGGUAN LIAOBUSHANGDUN HUADA FURNITURE FACTORY, NANHAI BAIYI WOODWORK CO., LTD., and DALIAN HUAFENG FURNITURE GROUP CO., LTD., Consolidated Plaintiffs, v. UNITED STATES, Defendant, AMERICAN FURNITURE MANUFACTURERS COMMITTEE FOR LEGAL TRADE and VAUGHAN-BASSETT FURNITURE COMPANY, INC., Intervenor Defendants.

Before: Jane A. Restani, Judge
Consol. Court No. 11–00325
Public Version

[Final Results of Redetermination in antidumping review remanded to Commerce.]

Dated: June 25, 2013

Kristin H. Mowry, *Jeffrey S. Grimson*, *Jill A. Cramer*, *Rebecca M. Janz*, *Sarah M. Wyss*, and *Susan L. Brooks*, Mowry & Grimson, PLLC, of Washington, DC, for Plaintiffs and Consolidated Plaintiffs Great Rich (HK) Enterprises Co., Ltd. and Dongguan Liaobushangdun Huada Furniture Factory.

Ned H. Marshak, *Bruce M. Mitchell*, and *Mark E. Pardo*, Grunfeld Desiderio Lebowitz Silverman & Klestadt, LLP, of New York, NY and Washington, DC, for Consolidated Plaintiff Nanhai Baiyi Woodwork Co., Ltd.

Lizbeth R. Levinson and *Ronald M. Wisla*, Kutak Rock LLP, of Washington, DC, for Consolidated Plaintiff Dalian Huafeng Furniture Group Co., Ltd.

Carrie A. Dunsmore and *Joshua E. Kurland*, Trial Attorneys, Commercial Litigation Branch, Civil Division, U.S. Department of Justice, of Washington, DC, for Defendant. With her on the brief were *Stuart F. Delery*, Acting Assistant Attorney General, *Jeanne E. Davidson*, Director, and *Patricia M. McCarthy*, Assistant Director. Of Counsel on the brief was *Shana A. Hofstetter*, Attorney, Office of the Chief Counsel for Import Administration, U.S. Department of Commerce, of Washington, DC.

J. Michael Taylor, *Daniel L. Schneiderman*, *Joseph W. Dorn*, *Mark T. Wasden*, *Prentiss L. Smith*, *Sarah K. Davis*, King & Spalding, LLP, of Washington, DC, for Intervenor Defendants.

OPINION AND ORDER

Restani, Judge:

This matter is before the court following a remand to the Department of Commerce ("Commerce") in *Home Meridian Int'l, Inc. v. United States*, 865 F. Supp. 2d 1311 (CIT 2012). This case involves challenges to Commerce's final results in the fifth antidumping duty ("AD") review of certain wooden bedroom furniture ("WBF") from the People's Republic of China ("PRC"). *See Wooden Bedroom Furniture from the People's Republic of China: Final Results and Final Rescission in Part*, 76 Fed. Reg. 49,729, 49,729 (Dep't Commerce Aug. 11, 2011). The court determines that for the reasons below, Commerce

failed to comply with the court's remand order with respect to the valuation of Huafeng Furniture Group Co., Ltd.'s ("Huafeng") factors of production ("FOPs") and the use of Insular Rattan and Native Products' ("Insular Rattan") financial statement.

BACKGROUND

The court assumes familiarity with the facts of this case as set out in the previous opinion, although they are summarized briefly below. *See generally Home Meridian*, 865 F. Supp. 2d at 1315–20, 1326–27.

In its previous order, the court instructed Commerce to address six issues raised by Plaintiffs and Intervenor Defendants in their motions for judgment on the agency record. Specifically, the court ordered Commerce to: 1) reconsider whether surrogate values or market-economy ("ME") purchases should be used in valuing Huafeng's FOPs for wood inputs; 2) reclassify Huafeng's poly foam input; 3) explain its reliance on 2008 gross-national income ("GNI") data for labor wage rates; 4) support its finding that Insular Rattan's financial statements are acceptable for financial ratio calculations; 5) investigate whether combination rates are proper; and 6) explain its differing use of zeroing in administrative reviews and investigations. *See Home Meridian*, 865 F. Supp. 2d at 1332. On remand, Commerce: 1) continued to rely upon surrogate values to calculate normal value based on Huafeng's FOPs; 2) reclassified poly foam input as cellular plastic; 3) continued to rely on 2008 GNI data in calculating labor wage rates; 4) found Insular Rattan's financial statements to be reliable and acceptable; 5) determined that combination rates were not appropriate; and 6) explained its use of zeroing in reviews. *See* Final Results of Redetermination Pursuant to Court Order (Dep't Commerce Feb. 25, 2013) ("*Remand Results*"), Dkt. No. 97.

Plaintiffs Home Meridian International, Inc. and Import Services, Inc., as well as Consolidated Plaintiffs Great Rich (HK) Enterprises Co., Ltd. and Dongguan Liaobushangdun Huada Furniture Factory (collectively "HMI"), continue to challenge Commerce's decision to use certain surrogate values. Plaintiffs argue that Huafeng's pre-period of review ME input purchases must be used to value Huafeng's FOPs. *See* Cmts. of Home Meridian Int'l, Inc. d/b/a Samuel Lawrence Furniture Co. and Pulaski Furniture Co.; Import Servs., Inc.; Great Rich (HK) Enters. Co., Ltd.; & Dongguan Liaobushangdun Huada Furniture Factory on Dep't of Commerce Feb. 25, 2013 Final Results of Redetermination Pursuant to Ct. Order ("HMI Cmts.") 2–29. HMI also contends that Commerce has perpetuated a ministerial error in its surrogate value calculations. *Id.* at 30. Intervenor Defendants American Furniture Manufacturers Committee for Legal Trade and

Vaughan-Bassett Furniture Co., Inc. (collectively "AFMC") argue that Commerce's reliance upon Insular Rattan's financial statement is unsupported by substantial evidence and contrary to agency practice. *See* AFMC's Cmts. Concerning Commerce's Final Results of Redetermination Pursuant to Court Remand ("AFMC Cmts.") 2–7. Defendant United States responds that Commerce's determinations on both issues are supported by substantial evidence and in accordance with law. *See* Def.'s Resp. to Pls.' Remand Cmts. ("Def.'s Resp.") 3–17.[1]

JURISDICTION AND STANDARD OF REVIEW

The court has jurisdiction pursuant to 28 U.S.C. § 1581(c). The court will not uphold a determination by Commerce if it is "unsupported by substantial evidence on the record, or otherwise not in accordance with law." 19 U.S.C. § 1516a(b)(1)(B)(i).

DISCUSSION

I. Value of Huafeng's Wood Inputs

HMI contends that Commerce violated the applicable statutory and regulatory framework when it used surrogate values to calculate the normal value of Huafeng's products. HMI Cmts. 3–29. HMI insists that Commerce was required to use Huafeng's ME purchases, all of which were made prior to the period of review ("POR"). *Id.* Additionally, HMI asserts that even if Commerce's methodology were permitted by the applicable statute and regulation, substantial evidence fails to support Commerce's selection of surrogate values as the best information available when compared with Huafeng's ME purchase prices. *Id.* Defendant asserts that Commerce has a reasonable practice of not using pre-POR ME input purchases in calculating normal value and that the chosen surrogate values constituted the best available information on the record. Def.'s Resp. 3–12. The court concludes that HMI's interpretations of the applicable statute and Commerce regulation are not mandated because both the statute and regulation are ambiguous. HMI's claim that Commerce lacked substantial evidence to support its decision, however, has merit.

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[1] No other consolidated plaintiff filed comments on the *Remand Results*. Additionally, no party has challenged Commerce's determinations regarding poly foam, labor wage rates, or zeroing. Accordingly, those determinations by Commerce are sustained. The parties also voluntarily dismissed the claim related to combination rates. *See* Stipulation of Dismissal of Count Five (Combination Duty Rates) of Compl., Dkt. No. 100.

In non-market economy ("NME")[2] AD cases,[3] Commerce "shall determine the normal value of the subject merchandise on the basis of the value of the factors of production utilized in producing the merchandise."[4] 19 U.S.C. § 1677b(c)(1). Among other costs, the factors of production include "quantities of raw materials employed." *Id.* § 1677b(c)(3). In calculating normal value, "the valuation of the factors of production shall be based on the best available information regarding the values of such factors in a market economy country or countries considered to be appropriate by the administering authority." *Id.* § 1677b(c)(1). Furthermore, Commerce "shall utilize, to the extent possible, the prices or costs of factors of production in one or more market economy countries that are — (A) at a level of economic development comparable to that of the nonmarket economy country, and (B) significant producers of comparable merchandise." *Id.* § 1677b(c)(4).[5]

"Nowhere does the statute speak directly to any methodology Commerce must employ to value the factors of production, indeed the very

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[2] Commerce considers the PRC to be an NME within the definition of the statute, and no party has challenged that designation in this case. *See* 19 U.S.C. § 1677(18); *Remand Results* at 5.

[3] Dumping is defined as the sale of goods at less than fair value, calculated by a fair comparison between the export price or constructed export price and normal value. *See* 19 U.S.C. §§ 1677(34), 1677b(a).

[4] In market economy cases, Commerce typically calculates normal value based on the price of the goods in the domestic market of the investigated entity. *See* 19 U.S.C. § 1677b(a)(1). Where this is not possible, the prices of the goods in a surrogate third-country market are used, or alternatively, Commerce constructs a normal value by calculating the total costs of production, including an allowance for general expenses and profits. *See id.* These two methodologies ultimately target two types of pricing behavior, international price discrimination (using the home market or third-country price methodology) and below-cost sales (using the constructed value methodology). *See Ad Hoc Shrimp Trad Action Comm. v. United States*, 596 F.3d 1365, 1371 (Fed. Cir. 2010) (recognizing that the NME methodology does not relate to price discrimination but rather costs); *see also* John H. Jackson et al., *Legal Problems of International Economic Relations* 756–58 (5th ed. 2008).

[5] As explained below, Commerce's current methodology is a blend of the use of surrogate values, authorized in subsection (c) of the statute, and the use of actual costs for the producer, similar to subsections (e) and (f). In the parallel context of constructed value in ME cases, the statute requires that "[c]osts shall normally be calculated based on the records of the exporter or producer of the merchandise, if such records are kept in accordance with the generally accepted accounting principles of the exporting country . . . and reasonably reflect the costs associated with the production and sale of the merchandise." 19 U.S.C. § 1677b(f)(1)(A). This provision applies to subsections (b) and (e) of the section, covering cost of production and constructed value. *Id.* § 1677b(f). The NME AD methodology is analogous to the constructed value methodology, and the subsection addressing the NME methodology previously included a specific reference to subsection (e), 19 U.S.C. § 1677b(c)(1) (1988), which was deleted by the Uruguay Rounds Agreement Act in 1994. *See* Uruguay Round Agreements Act, 103 Pub. L. 465, 108 Stat. 4809, 4882–83 (1994). The legislative history indicates that the modification to this subsection was not intended to be substantive. S. Rep. No. 103–412, at 73 (1994).

structure of the statute suggests Congress intended to vest discretion in Commerce by providing only a framework within which to work." *Shakeproof Assembly Components Div. of Ill. Tool Works, Inc. v. United States*, 59 F. Supp. 2d 1354, 1357 (CIT 1999); *see QVD Food Co. v. United States*, 658 F.3d 1318, 1323 (Fed. Cir. 2011) (recognizing that Commerce is entitled to deference in interpreting the undefined term "best available information"). Nonetheless, selection of the best available information must be in line with the overall purpose of the antidumping statute, which the Federal Circuit has explained to be "determining current margins as accurately as possible." *Rhone Poulenc, Inc v. United States*, 899 F.2d 1185, 1191 (Fed. Cir. 1990); *see also Lasko Metal Prods., Inc. v. United States*, 43 F.3d 1442, 1443 (Fed. Cir. 1994) ("*Lasko II*") ("[T]here is much in the statute that supports the notion that it is Commerce's duty to determine margins as accurately as possible, and to use the best information available to it in doing so."). In calculating normal value in the NME context, the particular aim of the statute is to determine the non-distorted cost of producing such goods. *See Lasko Metal Prods., Inc. v. United States*, 810 F. Supp. 314, 316–17 (CIT 1992) ("*Lasko I*").

A. *Commerce's Methodology*

In applying this framework, Commerce has confronted situations in which an NME producer sourced its inputs from an ME supplier, paying for the goods in a convertible, ME currency. The court previously has held that the statute is silent regarding the methodology that Commerce must use under these circumstances; it also has held, however, that an interpretation prohibiting Commerce from considering actual prices paid by the producer, while possible, would conflict with the statute's purpose. *Lasko I*, 810 F. Supp. at 317–18; *see also Lasko II*, 43 F.3d at 1446 ("In this case, the best available information on what the supplies used by the Chinese manufacturers would cost in a market economy country was the price charged for those supplies on the international market."). To account for this gap in the law, Commerce has promulgated a regulation:

> The Secretary normally will use publicly available information to value factors. However, where a factor is purchased from a market economy supplier and paid for in a market economy currency, the Secretary normally will use the price paid to the market economy supplier. In those instances where a portion of the factor is purchased from a market economy supplier and the remainder from a nonmarket economy supplier, the Secretary normally will value the factor using the price paid to the market economy supplier.

19 C.F.R. § 351.408(c)(1) (2012). Additionally, Commerce has established a general hierarchy for selecting the best available information that it will use to value an entity's FOPs:

> We generally seek to value factors using (in order of preference): (1) Prices paid by the NME manufacturer for items imported from a market economy; (2) prices in the primary surrogate country of domestically produced or imported materials; (3) prices in one or more secondary surrogate countries reported by the industry producing subject merchandise in the secondary country or countries; and (4) prices in one or more secondary surrogate countries from sources other than the industry producing the subject merchandise.

Final Determination of Sales at Less Than Fair Value: Sparklers From the People's Republic of China, 56 Fed. Reg. 20,588, 20,590 (Dep't Commerce May 6, 1991). In fact, Commerce has gone even further in stating that "using surrogate values when market-based values are available would, in fact, be contrary to the intent of the law." *Final Determinations of Sales at Less Than Fair Value: Oscillating Fans and Ceiling Fans From the People's Republic of China*, 56 Fed. Reg. 55,271, 55,275 (Dep't Commerce Oct. 25, 1991) ("*Oscillating Fans*").

Commerce has further refined the meaning of when "[Commerce] normally will use" ME supplier data, as stated in 19 C.F.R. § 351.408(c)(1). Specifically, Commerce will "disregard[] the prices of inputs that could not possibly have been used in the production of subject merchandise during the period of investigation or review." *Antidumping Methodologies: Market Economy Inputs, Expected Non-Market Economy Wages, Duty Drawback; and Request for Comments*, 71 Fed. Reg. 61,716, 61,716 (Dep't Commerce Oct. 19, 2006) ("*AD Methodologies*"). This focus on inputs used in production is in line with Commerce's preference of using contemporaneous ME purchases because Commerce "presumes that a factor purchased and paid for from an ME supplier is *used* by the respondent during that period." *Issues and Decision Memorandum for the Antidumping Duty Investigation of Certain Frozen and Canned Warmwater Shrimp from the Socialist Republic of Vietnam*, A-552–802, POI: 4/1/03–9/30/03 (Nov. 29, 2004), Cmt. 8 (emphasis added), *available at* http://ia.ita.doc.gov/frn/summary/vietnam/04–26977–1.pdf (last visited June 25, 2013). Additionally, Commerce has previously rejected non-contemporaneous ME purchases in favor of contemporaneous surrogate values, at least when non-contemporaneous ME inputs did not comprise 100 percent of the inputs actually used in production

during the POR. *See Home Meridian*, 865 F. Supp. 2d at 1317 n.5 (collecting Commerce determinations). Where, however, the NME producer sources at least 33 percent of its inputs from an ME supplier during the POR, Commerce will use the weighted average of those actual purchases to value the *entire* input, including purchases from NME suppliers. *AD Methodologies*, 71 Fed. Reg. at 61,717–18 (discussing extensively what percentage of input purchases are necessary to render the prices "meaningful" in valuing a company's entire input purchase).[6] In summary, Commerce will normally use ME purchases to value inputs provided that the purchases were made and the inputs were used during the POR. Where only surrogate values are being compared, rather than choosing between surrogate and ME values, Commerce has a practice of selecting the best available information based on several factors including contemporaneity, specificity, and tax-exclusivity. *See Remand Results* at 6.

The court previously has upheld certain applications of Commerce's so-called mix-and-match methodology, finding that "[t]he cost for raw materials from a market economy supplier, paid in convertible currencies, provides Commerce with the closest approximation of the cost of producing the goods in a market economy country." *Lasko I*, 810 F. Supp. at 317 (rejecting a claim that Commerce was required by the statute to use only surrogate values); *see also Lasko II*, 43 F.3d at 1445 (contrasting ME prices and surrogate values, the latter of which Commerce uses in its "factors of production methodology to *estimate* [normal value] for the merchandise in question" (emphasis in original)). In explaining why the methodology was reasonable, the court noted that the "[c]osts of production in a surrogate country will never perfectly approximate what the costs in an NME would be in an open market situation. Any inaccuracies in the mix-and-match approach likely stem from surrogate values analysis, not Commerce's attempt to improve upon it" by using purchase prices from ME suppliers. *Lakso I*, 810 F. Supp. at 317 n.4; *see also Shakeproof Assembly Components Div. of Ill. Tool Works, Inc. v. United States*, 268 F.3d 1376, 1382–83 (Fed. Cir. 2001) (recognizing that because surrogate values are at best estimates, the best available information for valuing

[6] The *AD Methodologies* policy statement is not directly applicable here because it dealt with establishing the percentage of ME input purchases during the POR needed to allow Commerce to use those prices to value the NME-sourced inputs. *See* 71 Fed. Reg. at 61,717. The primary issue addressed in that statement was whether a small percentage of ME-supplied inputs was reflective of the price of the total inputs purchased because it was not possible for the entire amount of inputs to be sourced at the small-order ME price. Here, Huafeng purchased 100 percent of its actual lumber and veneer inputs from its ME sources. During the POR, however, it purchased no lumber and veneer inputs whatsoever, rendering the application of this practice meaningless as no percentage can be calculated with a denominator of zero (the total input purchases during the POR).

domestic inputs was the actual purchase price of imported ME inputs). The court, however, has sustained Commerce's practice of favoring surrogate values that are contemporaneous with the POR, all other things being equal.[7] *See Shakeproof Assembly Components Div. of Ill. Tool Works, Inc. v. United States*, 30 CIT 1173, 1177, 1179 (2006) ("*Shakeproof III*").

HMI argues that the text of 19 U.S.C. § 1677b(c)(1) unambiguously prohibits the application of Commerce's methodology in this case. The statute requires Commerce to base normal value on "the factors of production *utilized in producing the merchandise*." § 1677b(c)(1) (emphasis added). HMI contends that this compels Commerce to use actual price data to the exclusion of any surrogate values when pre-POR inputs are "utilized" in production. *See* HMI Cmts. 4. Although "utilized" could be interpreted to require Commerce to rely on actual costs of the specific inputs used in production by the particular producer, this portion of the statute is ambiguous. Furthermore, HMI's reading seems inconsistent with the rest of the subsection. For example, § 1677b(c)(3) defines "the factors of production utilized in producing merchandise" in general terms such as labor, raw materials, energy costs, and capital costs. This supports the conclusion that the clause relied upon by HMI simply is directing Commerce to value the *types* of inputs actually used by the particular producer, without specifically addressing any temporal aspects with regard to cost. Even if this were not the case, Commerce's interpretation of the ambiguous provision is reasonable, and therefore the court defers to that interpretation. Similarly, HMI's argument based on Commerce's regulation requiring it to "normally" use ME data is without merit. "Normally" is clearly an ambiguous term designed to allow Commerce discretion in uncontemplated abnormal situations. Commerce as the promulgating agency may reasonably interpret its meaning. *See Decker v. Nw. Envtl. Def. Ctr.*, 133 S. Ct. 1326, 1337 (2013). *But see id.* at 1338 (Roberts, C.J., concurring); *id.* at 1339 (Scalia, J., concurring in part and dissenting in part) (questioning the continued application

[7] Under the market economy methodology, the statute requires that the "normal value of the subject merchandise shall be the price described in subparagraph (B), at a time reasonably corresponding to the time of the sale used to determine the export price or constructed export price." 19 U.S.C. § 1677b(a)(1)(A). Although this clause is not applicable in NME cases, which are analyzed under subsection (c), Commerce of course must make some reasonable connection between the normal value and the export price. It typically does so by using values for both that are contemporaneous with the POR. *See Remand Results* at 6. Commerce departs from the strict application of its preference for POR prices in other circumstances, such as through application of the 90/60 day contemporaneity rule whereby in ME cases Commerce may consider home market sales from 90 days prior to and 60 days after the POR. *See* 19 C.F.R. § 351.414(f)(2)–(3).

of *Auer* deference). This is not to say, however, that the general thrust of HMI's argument is inaccurate, as Commerce must still calculate dumping margins as accurately as possible and in line with the producer's actual experience, employing the best available information on the record.[8] *See Remand Results* at 7 (acknowledging that the aim of using ME prices, where possible, in the NME context is "to capture the company's actual POR experience with market prices").

B. Substantial Evidence

Even though HMI unsuccessfully argues that the applicable statute and regulation unambiguously require Commerce to use ME purchase prices in all cases to value FOPs, HMI correctly asserts that Commerce must support the application of its methodology in this particular case with substantial evidence. Commerce has failed to do so here. "[W]hile various methodologies are permitted by the statute, it is possible for the application of a particular methodology to be unreasonable in a given case. Form should be disregarded for substance and the emphasis should be on economic reality." *Yangzhou Bestpak Gifts & Crafts Co. v. United States*, 2013 U.S. App. LEXIS 10008, at *19 (Fed. Cir. May 20, 2013) (internal quotation marks, citations, and brackets omitted). For example, the court has rejected Commerce's selection of surrogate values based solely on the fact that they are more contemporaneous and non-aberrational where Commerce has failed to consider whether the less contemporaneous data "[was] an accurate reflection of the price paid" for the input by the producer. *See Yantai Oriental Juice Co. v. United States*, 26 CIT 605, 617–18 (2002) (remanding to Commerce for an explanation of why domestic data, adjusted for inflation or deflation, "would not more accurately approximate the experiences of" producers during the POR); *see also Olympia Indus. v. United States*, 7 F. Supp. 2d 997, 1001 (CIT 1998) (rejecting Commerce's blanket policy as a justification for not considering NME trading company data instead of comparing it to alternative surrogate value data).

In its previous opinion, the court explained that based on the record, "[i]f the only wood inputs into the subject merchandise were market economy inputs, contemporaneity would not outweigh all other factors," especially in light of flaws in the selected surrogate

[8] The court notes some tension between Commerce's asserted blanket methodologies. Commerce focuses on contemporaneous purchases based on a presumption that those inputs will be used in production and excludes inputs not actually used in production. Despite this policy's focus on production, Commerce purports to employ a methodology in this case that disregards production concerns, focusing instead exclusively on the time of purchase. Commerce has not based this shift in focus on evidence of record here.

values. *Home Meridian*, 865 F. Supp. 2d at 1318–19. The court noted that "[u]sing the actual [purchase prices of the] inputs, if available and where they yield reliable values, would seem to promote accuracy more than does using flawed surrogate values." *Id.* at 1319. The court also explained that "Commerce cannot create a blanket rule that prevents it from comparing the merits of contemporaneous and non-contemporaneous data, and thereby prevents Commerce from determining the best available information." *Id.* Finally, the court required Commerce to consider the factual allegation by AFMC that Huafeng had not used the ME-sourced inputs that it claimed to have used, an allegation that Commerce did not previously address. *Id.* Because this factual question is a threshold issue, the court turns to it first.

1. *Factual Dispute as to Inputs Used*

The parties continue to dispute HMI's claim that 100 percent of the wood inputs used by Huafeng during the POR were purchased from an ME supplier. *See* HMI Cmts. 9–15; Def.'s Resp. 8–10. On remand, Commerce purportedly weighed the record evidence and determined that Huafeng had purchased its wood inputs from both ME and NME suppliers in the thirteen months prior to the POR, with the exception of two inputs that were purchased entirely from ME suppliers. *Remand Results* at 8. For all inputs, Commerce found that sufficient inventories of unknown origin existed, such that NME-supplied inputs could have been used by Huafeng to make all of the subject merchandise during the POR. *Id.* HMI continues to argue that it and Huafeng always have claimed that all of Huafeng's wood inputs that were used during the POR were supplied by ME producers. HMI Cmts. 10–11. HMI also submits that these assertions were supported by Huafeng's original and supplemental Section D questionnaire responses. *Id.* (citing Section D questionnaire responses). HMI claims that Commerce's determination is, at best, speculation and, at worst, the application of an impermissible adverse inference. *Id.* at 10–15. Defendant contends that Commerce based its decision on substantial evidence because HMI has failed to present sufficient evidence to prove its allegation. Def.'s Resp. 8–10.

Commerce asserted in response to HMI's challenges that "[r]ather than identifying evidence that definitively shows that Huafeng's consumption of lumber consisted entirely of ME-purchased lumber, Home Meridian relies on circumstantial evidence to support its claims." *Remand Results* at 41 (citing Huafeng's Section D supplemental responses). Commerce reached this conclusion despite the fact that it verified that Huafeng separated its inputs based on country of origin at the manufacturing site and segregated its workshops based

on shipping destination; Commerce also did not find anything that contradicted Huafeng's assertions as to the price or quantity of its ME purchases. *Verification Report* (Jan. 31, 2011) Bus. Proprietary App. to Mem. of Points and Auth. in Supp. of R. 56.2 Mot. for J. on the Agency Record by Pls. HMI (Feb. 29, 2012) ("HMI App."), Tab 16, at 4–5, 26. Instead, Commerce merely noted that the handwritten material withdrawal slips did not specify the origin of the input when materials were withdrawn from supply and entered into production. *See Remand Results* at 41. This appears to be the piece of direct evidence Commerce required. *See id.* ("[T]here is no evidence on the record that ties either ME purchases or NME purchases of lumber to consumption during the POR.")

Although Commerce certainly has the authority to discredit Huafeng and HMI's claims that a certain percentage of the wood inputs used were sourced from an ME supplier, such a decision must rest upon substantial evidence. Here, Commerce was presented with evidence of ME purchases, which it had an opportunity to verify, along with sworn statements by Huafeng that 100 percent of the inputs it used were purchased from an ME supplier. Commerce opted not to conduct an in-depth verification of these ME purchases because it considered the evidence irrelevant, but its failure to do so does not discredit Huafeng's claim.[9] Indeed, as HMI has argued, some of Commerce's verification report corroborates Huafeng's assertions, such as the separation of ME and NME inputs at the work site, the division of workshops based on product destination, and the use of separate control numbers ("CONNUMS") for products bound for the United States. *See Verification Report* (Jan. 31, 2011) HMI App., Tab 16, at 4–5, 15, 26.

When presented with conflicting evidence that provides substantial evidence to support opposite conclusions, the court will defer to Commerce's reasoned choice between the two. Where, however, as here, Commerce is presented with non-definitive but still substantial evidence to support one factual conclusion and zero evidence to the contrary, beyond mere speculation, the only reasonable choice for Commerce is the one for which evidence exists.[10] Accordingly, the court finds that Commerce lacked substantial evidence to discredit

[9] Commerce declined to conduct further verification of the ME purchases because it decided to apply a blanket policy of excluding pre-POR ME purchase data, even at the verification stage before surrogate values were calculated.

[10] Where there is a gap in the record, Commerce may employ facts otherwise available and draw an adverse inference against a non-cooperating respondent under some circumstances. *See* 19 U.S.C. § 1677e. Commerce did not state that it was using such a tool here, and its application of such an inference likely would not be permissible. *See Remand Results* at 42 (recognizing that few, if any, companies keep the type of direct evidence Commerce appears to be demanding).

Huafeng and HMI's claims that 100 percent of the inputs used in production during the POR were purchased from an ME supplier.[11]

2. Best Available Information

In light of this conclusion, the court turns to Commerce's decision as to what data set constituted the best available information. Although somewhat unclear, Commerce decided on remand that even if HMI's factual allegations regarding the source of its inputs were true, Huafeng's pre-POR purchase data still would not constitute the best available information on the record for valuing those inputs because the purchases were made during the year prior to the POR. *Remand Results* at 5–7. Commerce supported this determination by relying on its policy that it "normally calculates normal value by valuing the NME producers' FOPs using prices from an ME that is at a comparable level of economic development and that is also a significant producer of comparable merchandise." *Id.* at 5. Commerce then contended that it has created a narrow exception to the rule by permitting actual market economy purchase prices to be used rather than surrogate values when they are contemporaneous with the POR and the inputs are used within the POR.[12] *Id.* at 5.

As set out above and in *Home Meridian*, selection of the best available information is, except in the rarest of cases, a balancing of competing options, not a binary decision made with respect to one data source in isolation. The selection cannot be made without consideration of the specific options available to Commerce based upon the particular facts on the record. Here, Commerce was presented with two potential sources for valuing Huafeng's inputs, Huafeng's

[11] Of course, under Commerce's own practice, a small percentage of ME inputs is normally sufficient to value the entire set of inputs. If Commerce has good reason to reopen the record at this late stage to address the factual issue of Huafeng's use of ME wood inputs, it may move for permission to do so. Otherwise, the conclusion that Huafeng used 100 percent ME wood inputs for its POR production will control the proceedings.

[12] In its *Remand Results*, Commerce also compared actual ME price data to surrogate value data under the criteria for deciding between competing surrogate values, although Commerce recognized that actual price data is not a surrogate value. *Remand Results* at 5–6. It does not appear that Commerce relied on this comparison in arriving at its decision, and at any rate, it seems to make little analytical sense. It is unsurprising that actual ME purchases by a producer may be from an economically different country, fail to represent broad market averages, and may be inclusive of taxes. *See id.* This does not make such purchases somehow less accurate as a data source for valuing the inputs, and in fact, the court and Commerce have noted repeatedly that actual purchase data are generally preferable to surrogate estimates, all other considerations equal. *See Lasko I*, 810 F. Supp. at 317–18; *Oscillating Fans*, 56 Fed. Reg. at 55,275 ("[U]sing surrogate values when market-based values are available would, in fact, be contrary to the intent of the law.").

nearly contemporaneous[13] but pre-POR ME purchases and contemporaneous surrogate values based on import data under three Philippine tariff subheadings.[14]

Instead of comparing the substance and merits of these two options, Commerce again undertook a cursory, binary consideration. Commerce has not pointed to substantial evidence on the record to demonstrate that Huafeng's input purchases are unreliable or aberrant, and it has not argued as much. At most, Commerce noted that a single supplier from the 2008 review paid higher input prices to a different supplier. *Remand Results* at 9. Commerce also failed to respond to any of HMI's explanations differentiating its purchases from those of the other producer. HMI Cmts. 20–23. Commerce merely acknowledged that different suppliers may have different prices at different times. *See Remand Results* at 8–9. Even if the prices are pre-POR, Commerce has established a relatively simple way to adjust for the lack of contemporaneity of valuation data. It is able to add or subtract from the pre-POR prices an inflation or deflation adjustment to reflect changes in relative prices at the macroeconomic level.[15] Because this simple adjustment exists, if even needed here, Huafeng's ME purchase prices are specific and easily convertible to reflect POR prices.

In contrast, the court noted in *Home Meridian* its concerns with the surrogate values chosen by Commerce, especially with the basket tariff line used to value some inputs, as it is a basket subheading that includes many types of woods not used by Huafeng in its products.

[13] [[ ]] of Huafeng's ME purchases occurred during the [[ ]] of 2008, just prior to the POR. For example, [[ ]] of its pine lumber purchases, [[ ]] of its poplar lumber purchases, and [[ ]] of its oak lumber purchases were made between [[ ]]. *Market Economy Inputs During 2008 or Before* (Oct. 12, 2010) HMI App., Tab 15, Ex. S-39, at 3.

[14] Philippine harmonized tariff schedule subheading 4407.10 covers "wood sawn or chipped lengthwise, sliced or peeled, whether or not planed, sanded or end-jointed, of a thickness exceeding 6mm, coniferous;" 4407.99 covers "wood sawn or chipped lengthwise, sliced or peeled, whether or not planed, sanded or end-jointed, of a thickness exceeding 6mm, other;" and 4408.90 covers "sheets for veneering (including those obtained by slicing laminated wood), for plywood or for similar laminated wood and other wood, sawn lengthwise, sliced or peeled, whether or not planed, sanded, spliced or end-jointed, of a thickness not exceeding 6 mm, other." *Letter from King & Spalding to Commerce re: Submission of Publicly Available Information to Value Factors of Production* (Nov. 15, 2010), P.R. 435, Ex. 3, at 234–37.

[15] Commerce contends that inflating ME prices is not appropriate because they are not based on broad market averages and inflation does not account for product-specific changes in price over time. *See Remand Results* at 7. Commerce, however, consistently inflates pre-POR surrogate and actual values when needed, and it does not seem that an adjustment to non-contemporaneous surrogate values via an inflator accounts for price fluctuations any better than one applied to actual prices.

See 865 F. Supp. 2d at 1319. On remand, Commerce partially corroborated the surrogate prices, which are largely based on imports from North American and Europe, with reference to a single respondent in 2008 in order to address the court's concern regarding the large year-over-year increase in prices.[16] *Remand Results* at 9; *see Surrogate Value Submission* (Nov. 15, 2010), HMI App., Tab 19, Ex. 2 (listing the source countries underlying the Philippine import data). A partial corroboration of the surrogate values does not, however, trump Commerce's stated preference for ME values as furthering statutory intent. Further, such corroboration does not address the concerns about the specificity of the basket tariff heading, 4407.99.[17]

Although Commerce continues to cite to its general preference for contemporaneity among equally useful values, its continued reliance on the court's affirmation of that preference in *Shakeproof III* fails to recognize that such a preference may not be absolute; the preference is permissible only when there is "no dispute about the representativeness of Commerce's chosen surrogate value." *Shakeproof III*, 30 CIT at 1180 n.7 (distinguishing *Yantai*, 26 CIT at 617). At any rate, the limited approval of such a policy in *Shakeproof III* is distinguishable from the unique facts of the present case where 100 percent of the inputs used were from pre-POR purchases. *See id.* Under the unique facts of this case, Commerce's conclusion that its fictional surrogate values better reflect the actual experience of the producer, especially in light of the imprecision of surrogate values generally, is unsustainable. The court is unable to square Commerce's asserted blanket policy of ignoring actual ME data unless the inputs are both purchased and used within the POR with Commerce's statutory obligation to use the best available information on the record, and its previous statements about what kind of value data are the best available data. As noted *supra*, although Commerce reasonably may prefer both conditions be met in the abstract, such reasoning breaks down under the circumstances of the present case where no input purchases at all were made during the POR. Commerce's stated preference for contemporaneous purchases is in part based on its presumption that those purchases will be used during the POR.

[16] It remains particularly alarming that most of the surrogate values are [[ ]] Huafeng's ME purchase prices, even if a single producer paid prices to [[ ]] that were somewhat similar to those of the non-specific wood imports into the Philippines utilized by Commerce. *See* HMI Cmts. 27–29.

[17] Commerce notes that no party challenged the particular tariff classifications used to calculate surrogate values, including this basket subheading. *Remand Results* at 9. The lack of objection, however, merely indicates that neither party argued for a more specific tariff subheading, possibly because one might not exist. It does not mean that the parties acknowledged that a general basket subheading is more specific than the actual ME purchase data submitted by Huafeng.

Commerce has failed to explain its departure from this practice of focusing on when the inputs were used in production, especially where here 100 percent of the inputs were purchased from an ME supplier in contrast to the 33 percent threshold Commerce uses when considering whether to use contemporaneous ME purchases to value even the other 67 percent.[18]

Additionally, statements by Commerce such as "[t]he true experience of the company during the POR is that it chose not to make ME purchases during that time frame" are unhelpful to the court.[19] *Remand Results* at 7. HMI's proposed methodology does not seek to pretend that Huafeng made ME input purchases during the POR. Rather, it simply advocates that Commerce give consideration to the prices Huafeng actually paid. This advances Commerce's own stated policies of using data that advances fairness, predictability, and accuracy. *See Oscilating Fans*, 56 Fed. Reg. at 55,275 ("Where we can determine that a NME producer's input prices are market determined, accuracy, fairness, and predictability are enhanced by using those prices. Therefore, using surrogate values when market-based values are available would, in fact, be contrary to the intent of the law."). Commerce fails to recognize that its proposed valuation methodology, applied to the facts of this case, is far less reflective of Huafeng's actual experience because it pretends that Huafeng purchased all of its inputs during the POR at the estimated surrogate values. This fails to gauge accurately whether Huafeng sold its products at dumped prices into the U.S. market.[20] Given the clear disparity between these two potential valuation methods and Commerce's failure to provide any reasonable explanation of its preference for surrogate values on these facts, unless Commerce adequately sup-

[18] The court has recently held that in applying the 33 percent rule, Commerce may not blindly reject the use of actual ME purchase data where it amounts to 32.9 percent of total input purchases. *See Gold East Paper (Jiangsu) Co., Ltd. v. United States*, Slip Op. 13–74, Ct. No. 1000371, at 6 (CIT June 17, 2013) (finding application of this rigid policy to be "unreasonable, arbitrary and capricious under the circumstances" where Commerce failed to explain why the actual purchase data were not the best available information, notwithstanding Commerce's preferred input threshold).

[19] Commerce also explains that the use of pre-POR ME prices "would suggest that pre-POR ME prices are preferable to POR surrogate values because they reflect the respondent's POR purchasing experience — which is not necessarily the case." *Remand Results* at 9. It is unclear in what circumstances actual purchases, under market conditions, would not accurately reflect a producer's purchasing experience. These prices reflect the reality of what the producer actually paid as compared to the fiction Commerce proposes. In any case, such unusual circumstances do not exist here.

[20] NME dumping methodology is essentially an adjusted below-cost methodology. Certainly if this were an analogous ME AD case based on the cost of production methodology, Commerce would be hard pressed to argue that a producer making well-timed purchases of inputs has sold its goods below cost simply because input prices rose between the time of purchase and the time of sale.

ports a request to reopen this record to further examine Huafeng's wood purchases, Commerce must use Huafeng's ME purchase prices to value wood FOPs in this case. Commerce may adjust the values for inflation or deflation, if needed, based on the time of purchase.[21]

II. Insular Rattan Financial Statement

AFMC argues that Commerce again erred in using the 2009 financial statement of Insular Rattan in calculating surrogate financial ratios. AFMC Cmts. 2–7. It argues first that Commerce's finding that the statement is reliable and unaffected by subsidies is unsupported by substantial evidence. *Id.* at 2–5. It further argues that Commerce acted contrary to its prior practice by continuing to include the "questionable" financial statement in its calculations, despite the existence of eleven other reliable financial statements on the record. *Id.* at 5–6. Defendant acknowledges that the court remanded this same issue back to Commerce in another case, but nonetheless makes the same previously rejected arguments. Def.'s Resp. 3 n.1; *see Dongguan Sunrise Furniture Co. v. United States*, Slip Op 13–46, Ct. No. 10–00254, at 15 (CIT Apr. 5, 2013). Defendant contends that Commerce did not blindly rely upon the "unqualified" statement by Insular Rattan's auditor, but instead relied on the completeness of all aspects of the statement, other than the missing tax line. Def.'s Resp. 14. Defendant also claims that because Philippine generally accepted accounting principles require disclosures of subsidies, the lack of any such disclosure provides evidence that no countervailable subsidy was received by Insular Rattan.[22] *Id.* at 13–14.

Commerce selected financial statements in this review based on whether the companies were: "producers of merchandise identical to subject merchandise which received no countervailable subsidies, and earned a before tax profit in 2009 for which [Commerce has] financial information." *Wooden Bedroom Furniture From the People's Republic of China: Preliminary Results of Antidumping Duty Administrative Review and Intent To Rescind Review in Part*, 76 Fed. Reg. 7534, 7544 (Dep't Commerce Feb. 10, 2011). Commerce also requires

[21] Because the court remands to Commerce to revalue Huafeng's wood inputs, it need not address HMI's ministerial error claim. *See* HMI Cmts. 30.

[22] Defendant also contends that arguments involving the effective date of the relevant accounting principle, IAS 20, were not made before the agency and therefore have not been exhausted by HMI. Def.'s Resp. 15–16. Because the court remands Commerce's determination on other grounds, it need not consider the exhaustion question. The court notes, however, that HMI generally challenged Commerce's reliance on the non-disclosure of subsidies to support its finding, although HMI did not directly refer to IAS 20. *See Petitioners' Cmts. Concerning Draft Results of Redetermination* (Jan. 10, 2013) Dkt. No. 113–2, Attach. 2, at 8.

complete financial statements to ensure reliability.[23] *See Dongguan Sunrise Furniture Co. v. United States*, 865 F. Supp. 2d 1216, 1243 (CIT 2012).

On remand, Commerce continued to speculate as to how Insular Rattan's financial statement, which facially conflicts with the applicable accounting standard, remains complete and reliable for use in surrogate financial ratio calculations. *See Remand Results* at 17–19; *Resolution No. 24–00* (July 31, 2000) App. to AFMC's Cmts. Concerning Commerce's Final Results of Redetermination Pursuant to Ct. Remand, Tab. 2, at 21 (requiring financial statements to contain a separate tax line). The court already has held that the financial statement in question is "dubious" without some further basis to support Commerce's reliance. *See Home Meridian*, 865 F. Supp. 2d at 1326–27. Merely stating that the rest of the financial statement facially complies with the applicable accounting standards and that the statement is "unqualified" is insufficient to provide substantial evidence to negate the obvious lack of a required tax line. For the same reason, Commerce's assumption that Insular Rattan would have disclosed any subsidies under applicable accounting principles, whether they existed at the time or not, is unreasonable in light of the tax line omission.

Additionally, although Defendant argues that the tax line is not a critical component of the financial statement because it is not directly used in surrogate financial ratio calculations, it is directly related to another important tax line, profit, which is used in calculating financial ratios. *See Dongguan*, Slip Op 13–46, at 12. Commerce acknowledges that without proper disclosures, it is unable to reconstruct financial statements to conform the statement to proper accounting standards, eliminating any possible remedy for this defect. *See Remand Results* at 18 ("The Department does not have the ability to look behind financial statements used as surrogates by questioning the surrogate company."). The lack of a tax line also limits Commerce and the parties' ability to determine whether an undisclosed tax subsidy was received.[24]

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[23] Commerce previously rejected Insular Rattan's financial statement due to different defects than the ones at issue here. *See Issues and Decision Memorandum for the Final Results of the 2007 Antidumping Duty Administrative and New Shipper Reviews, A-570–890, POR: 1/1/07–12/31/07, at 35 (Aug. 10, 2009), available at http://ia.ita.doc.gov/frn/summary/PRC/E9–19666–1.pdf (last visited June 25, 2013), aff'd Lifestyle Enter., Inc. v. United States, 768 F. Supp. 2d 1286, 1310–11 (CIT 2011).*

[24] The court notes that Insular Rattan's overhead expenses; selling, general and administrative ("SG&A") expenses; and profits were significantly lower than those of the other companies used to calculate financial ratios, possibly indicating other issues with Insular

Finally, Commerce's attempt to distinguish its decision to include Insular Rattan's statement in this review, despite refusing to do so in the third administrative review, is unreasonable. Although an agency is permitted to depart from its prior practice, it must provide a reasonable explanation for doing so. *See NMB Singapore Ltd. v. United States*, 557 F.3d 1316, 1328 (Fed. Cir. 2009). Commerce's only explanation for its shift in practice is that the financial statement in the third review lacked auditor notes while the statement here lacked a tax line. *Remand Results* at 17–19. Commerce does not assert necessity, as other statements are available for use in financial ratio calculations. Although notes are certainly different from a tax line, Commerce has not provided a reasoned basis for concluding that the omission of notes renders the statement incomplete and unreliable while the omission of a tax line does not, especially in light of the requirement under applicable accounting principles that both be disclosed.

Accordingly, Commerce's finding that the statement was reliable was not based on substantial evidence but rather speculation as to why the apparent deficiency is neither real nor important, and its selection was contrary to Commerce's practice. The court remands this issue so that Commerce may remove Insular Rattan's facially defective financial statement from the pool for calculation of financial ratios.

CONCLUSION

For the foregoing reasons, Commerce has until July 15, 2013, to seek to reopen the record. Otherwise, the court remands the matter to Commerce to: 1) use Huafeng's actual ME wood input purchases to calculate normal value, adjusted as needed, and 2) omit Insular Rattan's financial statement in its financial ratio calculations. Commerce shall file its remand determination by August 26, 2013. The parties shall have until September 23, 2013, to file objections, and Defendant shall have until October 8, 2013, to file its response.

Dated: June 25, 2013
New York, New York

/s/ Jane A. Restani
JANE A. RESTANI
JUDGE

Rattan's financial statement. *See Final Results Surrogate Value Memorandum* (Aug. 5, 2011) App. to AFMC's Resp. Br. in Opp'n to Pls.' Mots. for J. on the Agency Record, Tab 15, at 3.

Slip Op. 13–82

CATFISH FARMERS OF AMERICA, et al., Plaintiffs, v. United States, Defendant, and VINH HOAN CORPORATION, QVD FOOD CORPORATION, VIETNAM ASSOCIATION OF SEAFOOD EXPORTERS AND PRODUCERS, ANVIFISH JOINT STOCK COMPANY, BIEN DONG SEAFOOD COMPANY LTD., and VINH QUANG FISHERIES CORPORATION, Defendant-Intervenors.

Before: R. Kenton Musgrave, Senior Judge
Consol. Court No. 12–00087

[Denying the defendant's motion to strike.]

Dated: June 27, 2013

Valerie A. Slater, *Jarrod M. Goldfeder*, and *Nazak Nikakhtar*, Akin, Gump, Strauss, Hauer & Feld, LLP, of Washington DC, for the plaintiffs.

Ryan Majerus, Attorney, Commercial Litigation Branch, Civil Division, U.S. Department of Justice, of Washington DC, argued for the defendant. On the brief were *Stuart F. Delery*, Acting Assistant Attorney General, *Jeanne E. Davidson*, Director, *Franklin E. White*, *Jr.*, Assistant Director. Of Counsel was *Elika Eftekhari*, Office of the Chief Counsel for Import Administration, U.S. Department of Commerce.

OPINION AND ORDER

Musgrave, Senior Judge:

Subsequent to the filing of Rule 56.2 motions for judgment on this consolidation of actions contesting the seventh final administrative review results *Certain Frozen Fish Fillets from the Socialist Republic of Vietnam*, 77 Fed. Reg. 15039 (Mar. 14, 2012), on April 17, 2013, the plaintiffs docketed papers styled "Notice of Supplemental Authority" ("NSA"), ECF No. 60, calling attention to the final results of the eighth administrative review and aligned ninth new shipper reviews for the 2010–2011 period published by the defendant's same agent International Trade Administration, U.S. Department of Commerce. Counsel for the defendant moves to strike that document, arguing that the plaintiffs are attempting to introduce new evidence, or supplement the administrative record, without an appropriate motion in this proceeding. *See* Def's Mot. at 2, referencing *Essar Steel Ltd. v. United States*, 678 F.3d 1268, 1277–78 (Fed. Cir. 2012), for the proposition that the exceptions for supplementing the administrative record are limited, & 3, referencing *Peer Bearing Co. v. United States*, 32 CIT 1307, 1310, 587 F. Supp. 2d 1319, 1325 (2008), for the proposition that it is axiomatic that Commerce's determinations and factual findings are based on the particular record of each review.

It is true, as the defendant points out, that the agency's determinations in subsequent reviews were obviously not "before" the agency

at the time it made its determinations, *id*. at 3, but it is also true, as the plaintiffs point out, that their NSA does not seek to supplement the administrative record with additional evidence as such, and, indeed, only attempts to alert the court to subsequent administrative authority, not in the form of a "pleading" (supplemental or otherwise) as contemplated by Rules 7(a) or 15(d). Were the plaintiffs to request that judicial notice be taken of such authority, the court would still be bound to consider, at the very least, such request. *See*, *e.g.*, *Catfish Farmers of America v. United States*, 37 CIT __, Slip Op. 13–63 (May 23, 2013) at n.9.

The lawfulness of any determination, finding or conclusion is based on the administrative record before the agency at the time it made its determinations. 19 U.S.C. § 1516a(b)(1)(B)(i). That is a "reasonableness" standard of review. *Consolidated Edison Co. v. NLRB*, 305 U.S. 197, 229 (1938). Whatever "reasonableness" is, it is not, of necessity, restricted to the four corners of the administrative record (nor, presumably, is it discerned by reference to the "anything goes" mentality and irresponsibility of this particular day and age). Which is to say that the relevance, if any, of the plaintiffs' proffered NSA to that question remains to be seen, but it is unnecessary that the defendant's motion to strike be granted in order to ensure adherence to the proper standard of judicial review.

That being the case, the motion to strike may be, and hereby is, denied.

So ordered.

Dated: June 27, 2013
New York, New York

/s/ R. Kenton Musgrave
R. KENTON MUSGRAVE, SENIOR JUDGE

Slip Op. 13–84

HARTFORD FIRE INSURANCE COMPANY, Plaintiffs, v. UNITED STATES Defendant.

Before: Donald C. Pogue,
Chief Judge
Court No. 07–00067

[Defendant's motion to dismiss for failure to state a claim is GRANTED]

Dated: June 27, 2013

Frederic D. Van Arnam, Jr., *Eric W. Lander*, and *Helena D. Sullivan*, Barnes, Richardson & Colburn, of New York, NY for the Plaintiff.

Justin R. Miller, Trial Attorney, International Trade Field Office, Commercial Litigation Branch, Civil Division, U.S. Department of Justice, of New York, NY, for the Defendant. With him on the briefs were *Stuart F. Delery*, Acting Assistant Attorney General, and Barbara S. Williams, Attorney-in-Charge, International Trade Field Office. Of counsel on the briefs was *Beth C. Brotman*, Office of the Assistant Chief Counsel, International Trade Litigation, U.S. Customs and Border Protection.

OPINION

Pogue, Chief Judge:

In this action, Plaintiff Hartford Fire Insurance Company ("Hartford") seeks to void certain bonds securing entries of frozen cooked crawfish tailmeat from the People's Republic of China ("China"). In its Second Amended Complaint, ECF No. 88, Hartford alleges as its single cause of action that the Defendant, United States Customs and Border Protection ("Customs"), abused its discretion by either failing to require a cash deposit in lieu of a bond for the entries in question or rejecting the entries altogether. Customs moves, pursuant to USCIT Rule 12(b)(5), to dismiss the Second Amended Complaint for failure to state a claim. For the reasons explained below, Customs' motion to dismiss is GRANTED.

BACKGROUND[1]

This action arises from Sunline Business Solution Corporation's ("Sunline") importation into the United States of eight entries of freshwater crawfish tailmeat, between July 30, 2003, and August 31, 2003 (the "Hubei entries"). Second Am. Compl., ECF No. 88 at ¶¶ 2–3. The entries were from Chinese producer Hubei Qianjiang Houho Frozen. The Hubei entries were subject to an antidumping ("AD") duty order covering freshwater crawfish tailmeat from China, Second Am. Compl. ¶ 4, and were entered following Customs' approval of eight single entry bonds designating Hartford as the surety. Second Am. Compl. ¶¶ 7–9. Customs liquidated the Hubei entries at the 223% country-wide AD rate for China, and, following Sunline's failure to pay the duties owed, Customs made a demand for payment on Hartford. Second Am. Compl. ¶¶ 12–13.

Hartford did not pay the demand and, instead, filed its orginal complaint in this action alleging that the bonds were voidable. According to Hartford, the bonds were voidable because Customs was investigating Sunline for possible violation of the import laws during the period in which the bonds were secured and the Hubei entries

[1] The facts of this case were summarized in the court's prior opinion, Hartford Fire Ins. Co. v. United States, __ CIT__, 857 F. Supp. 2d 1356 (2012) ("Hartford I"). Familiarity with that opinion is presumed, and only those facts necessary to the disposition are reiterated here.

were entered, and Customs did not, at any time, inform Hartford about its investigation of Sunline. Second Am. Compl. ¶¶ 20–24.

Hartford's First Amended Complaint, ECF No. 29, alleged four causes of action: (1) material misrepresentation by Customs; (2) material misrepresentation by the importer; (3) impairment of suretyship; and (4) equitable subrogation or setoff. Customs moved to dismiss the First Amended Complaint in its entirety. Def.'s Mot. to Dismiss for Failure to State a Claim Upon Which Relief Can Be Granted, ECF No. 63.

The court granted Customs' Motion to Dismiss in Hartford I, holding that (1) the claim of material misrepresentation by Customs, premised on Customs failure to inform Hartford of a confidential investigation pending at the time the bonds in question were issued, was pre-empted by the Freedom of Information Act; (2) the claim of material misrepresentation by the importer did not contain sufficient facts to make the claim plausible; (3) the impairment of suretyship claim was barred on sovereign immunity grounds; and (4) the equitable subrogation or setoff claim failed because Customs possessed no funds to which Hartford could stake an equitable claim. *See* generally Hartford Fire I, __ CIT __, 857 F. Supp. 2d 1356. The court dismissed the third and fourth causes of action with prejudice but permitted Hartford to amend its complaint to plead an alternative theory that Customs abused its discretion when it did not require the importer to post a cash deposit in lieu of a bond or reject the entries and to plead sufficient facts to make this claim of material misrepresentation plausible. *Id.*

In its Second Amended Complaint, Hartford alleges only this latter, remaining theory. It claims that given the existence of the Sunline investigation, Customs abused its discretion by accepting the bonds on the Hubei entries. Hartford alleges that due to the ongoing status of the investigation into Sunline, Customs had the discretion to and should have insisted on cash deposits in lieu of bonds, required additional security, or rejected the Hubei entries altogether. Hartford further alleges that because of the confidential nature of Customs' investigation, Customs should have known that Hartford was not aware of the existence of an investigation and therefore unreasonably increased Hartford's risk when it approved the Hubei bonds. Second Am. Compl. ¶¶ 50–52.

The court has jurisdiction pursuant to 28 U.S.C. § 1581(i).

STANDARD OF REVIEW

When reviewing an agency decision for abuse of discretion, the court examines whether the decision "1) is clearly unreasonable,

arbitrary, or fanciful; 2) is based on an erroneous conclusion of law; 3) rests on clearly erroneous fact findings; or 4) follows from a record that contains no evidence on which the [agency] could rationally base its decision." Sterling Fed. Sys., Inc. v. Goldin, 16 F.3d 1177, 1182 (Fed. Cir. 1994) (quoting Gerritsen v. Shirai, 979 F.2d 1524, 1529 (Fed. Cir. 1992)); *see also* Robert Bosch LLC v. Pylon Mfg. Corp., 659 F.3d 1142, 1147–48 (Fed. Cir. 2011) (noting that a clear error of judgment occurs when an action is "arbitrary, fanciful, or clearly unreasonable").

When deciding a motion to dismiss for failure to state a claim, the court "must accept as true the complaint's undisputed factual allegations and should construe them in a light most favorable to the plaintiff." Bank of Guam v. United States, 578 F.3d 1318, 1326 (Fed. Cir. 2009) (quoting Cambridge *v. United States*, 558 F.3d 1331, 1335 (Fed. Cir. 2009)).

"To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" Ashcroft v. Iqbal, 556 U.S. 662, 678 (2009) (quoting Bell Atl. Corp. v. Twombly, 550 U.S. 544, 570 (2007)). To be plausible, the complaint need not show a probability of plaintiff's success, but it must evidence more than a mere possibility of a right to relief. *Id.* at 678. "Threadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice." *Id.*

DISCUSSION

Customs contends that under the prevailing scheme, it could not abuse its discretion because it had none. Citing the statute that was in effect when Hartford issued the Hubei bonds, 19 U.S.C. § 1675(a)(2)(B)(iii), Customs asserts that it had no authority to override a new shipper's decision to submit bonds rather than cash deposits, and therefore there was no discretion to abuse.

According to 19 U.S.C. § 1675(a)(2)(B)(iii), when a new shipper such as Hubei[2] was being reviewed,

> The administering authority shall . . . direct the Customs Service to allow, at the option of the importer, the posting . . . of a bond or security in lieu of a cash deposit for each entry of the subject merchandise.

[2] Hartford does not contest that Hubei was a new shipper. Mem. Of Law in Supp. Of Def.'s Mot. to Dismiss for Failure to State a Claim Upon Which Relief Can Be Granted, ECF No. 93 at 7("Def.'s Mot.").

19 U.S.C. § 1675(a)(2)(B)(iii).[3] Customs correctly argues that given the statutory framework in effect at the time of Hubei's entries, it had no option to demand a cash deposit in lieu of the bonds issued by Hartford. Therefore, because Customs had no discretion, there is no abuse of discretion in Customs failure to have insisted on cash deposits rather than bonds.

Plaintiff concedes that the new shipper bonding privilege is an option that the shipper may elect. *See* Pl.'s Resp. to Def.'s Mot. Dismiss for Failure to State a Claim Upon Which Relief Can be Granted, ECF No. 101 at 7 ("Pl.'s Br."). However, it contends that 19 U.S.C. § 1623(a) empowers Customs to require additional security when circumstances establish that a bond is insufficient. 19 U.S.C. § 1623(a) states that when

> [a] bond or other security is not specifically required by law, the Secretary of the Treasury may by regulation or specific instruction require, or authorize customs officers to require, such bonds orother security as he, or they, may deem necessary for the protection of the revenue or to assure compliance with any provision of law, regulation, or instruction,

19 U.S.C. § 1623(a). Hartford relies extensively on National *Fisheries Institute, Inc. v. United States*, __ CIT __, 637 F. Supp. 2d 1270 (2009), for the proposition that Customs had the discretion to require additional bonding in addition to the new shipper bonding rate.[4] The *National Fisheries* court discussed 19 U.S.C. § 1623(a) when determining that Customs acted unreasonably in applying an enhanced bonding requirement for shrimp importers and noted that § 1623(a) might be read to grant Customs discretion to collect additional antidumping duties. *National Fisheries*, __ CIT __, 637 F. Supp. 2d at 1287–91. However, because the statute is ambiguous, 19 U.S.C. § 1623(a) could easily be interpreted as merely granting Customs broad authority to require some form of security from an importer – security which had been provided here --rather than contemplating additional security. Here Customs appears to have adopted the more restrictive interpretation. See, e.g., Sioux Honey Ass'n v. Hartford Fire Ins. Co., __ CIT __, 700 F. Supp. 2d 1330, 1347 (2010) (discussing how 19 U.S.C. § 1623(a) should be read in conjunction with 19 U.S.C. § 1675(a)(2)(B)(iii)) (aff'd in part, vacated in part on other grounds 672

[3] Congress suspended the option of bonds for new shippers and required cash deposits between April 1, 2006 and June 30, 2009.

[4] Additionally, Hartford argues that § 1623 grants Customs the authority to override a new shipper's bond option under 19 U.S.C. § 1675(a)(2)(B)(iii). Given that the statutory scheme in force when the Hubei bonds were issued clearly granted the bond option to a new shipper, this argument fails.

F.3d 1041, cert. denied, 133 S.Ct. 126 (2012)); *see also Chevron USA v. Nat'l Res. Def. Council*, 467 U.S. 837 (1984) (holding that an agency's reasonable reading of an ambiguous statute must be affirmed). The National Fisheries court ultimately concluded – and this court agrees - that the real issue is not how to interpret 19 U.S.C. § 1623(a), but whether Customs "acted in accordance with law" when making its determination. *Id.* at 1291. Here Customs interpretation cannot constitute an erroneous conclusion of law and therefore cannot be the basis for an allegation of abuse of discretion.

Rather, Customs correctly notes that it was in full compliance with the governing statues and regulations when it accepted the bonds. It argues that its acceptance of the Sunline bonds was in accordance with the requirements laid out in 19 U.S.C. § 1675(a)(2)(B)(iii), 19 U.S.C. § 1623(e), and 19 C.F.R. § 113.40(a). Plaintiff, on the other hand, asserts that Customs' actions were unlawful because they were contrary to Customs' statutory mandate to "protect the revenue of the U.S." because they deprived the sureties of the opportunity to cancel what would prove to be risky bonds. However, this argument fails because Customs is directed to protect, among other things, the revenues of the United States, but not the revenues of the sureties. 19 U.S.C. § 1484(a)(2)(C). *See Cam-Ful* Indus., Inc. v. Fid. & Deposit Co., 922 F.2d 156, 162 (2d Cir. 1991) ("[t]he policy behind surety bonds is not to protect a surety from its own laziness or poorly considered decision."). While the sureties' revenues are arguably a part of the revenues of the United States, in the same sense that every domestic industry's revenues must be, Plaintiff's reading of Customs' mandate is simply too broad.

Hartford further alleges that Customs abused its discretion when it approved the Hubei bonds because it was aware that Sunline was being investigated at the time. Hartford claims that Customs had begun its investigation into Sunline by August 15, 2003 and therefore was the sole party that knew of and was in a position to take preventative measures against Sunline's criminal activities "based on its knowledge of Sunline's contemporaneous bad acts involving the same class of merchandise from the same country of origin." Second Am. Compl. ¶¶ 16, 62. But Plaintiff fails to provide any basis for the court to plausibly infer abuse of discretion in Customs failure to take broader action in response to its investigation. *See* Iqbal, 556 U.S. at 678. Even construed in the light most favorable to the Plaintiff, there is nothing in the pleadings here to plausibly suggest that Customs' investigation had proceeded to the stage where Customs had reason to believe the Hubei entries were problematic or that new shipper bonds would be insufficient security. Hartford merely pleads that the

investigation into Sunline had begun two weeks before the last Hubei bond was issued. But the investigation did not involve the Hubei entries, but rather involved the entries of an entirely different supplier. Def.'s Mot. at 13. Without any connection to the Hubei entries, a bare allegation that Customs was investigating Sunline is insufficient to plausibly suggest abuse of discretion because it does not indicate any basis to infer that Customs' failure to require extra security or reject the bonds was clearly unreasonable, arbitrary, fanciful or in bad faith. *See* Iqbal, 556 U.S. at 678; Twombly, 550 U.S. at 570; Sterling, 16 F.3d at 1182.

Finally, Hartford argues at length that Customs abused its discretion when it did not reject the Hubei entries altogether because Customs had investigated and ultimately rejected another set of Sunline entries that preceded the Hubei entries without violating the confidential nature of the Sunline investigation. *See* Pl.'s Br. at 14; Second Am. Compl. ¶¶ 19–21. These entries are referred to as the "World Commerce" entries and were rejected when Customs concluded that Sunline had, with regard to those entries, falsified documents to reflect a different manufacturer. *Id.* This claim fails because the World Commerce entries suffered from a different flaw that was independent of, and not logically connected to, Sunline's default on the Hubei entries. Plaintiff's pleadings indicate no rational connection between the Hubei entries, Sunline, and the World Commerce entries other than conclusory allegations of the potential for violations. Plaintiff's pleadings do not even suggest how Customs' investigation of false documentation in one set of entries can plausibly lead to the conclusion that Sunline would default on the Hubei entries. Accordingly, Plaintiff has failed to plead facts that plausibly suggest a rational connection between the Sunline investigation, the false documentation in the World Commerce entries, and the eventual default on the Hubei entries. Therefore, there is no basis for the court to plausibly infer an abuse of discretion.

CONCLUSION

For the reasons stated above, Customs' motion to dismiss for failure to state a claim is GRANTED. Judgment will be entered accordingly.

Dated: June 27, 2013
New York, NY

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

Slip Op. 13–86

FOSHAN NANHAI JIUJIANG QUAN LI SPRING HARDWARE FACTORY and Foshan Yongnuo Import & Export Co., Ltd., Plaintiffs, v. UNITED STATES, Defendant, and LEGGETT & PLATT, INC., Defendant-Intervenor.

Before: Gregory W. Carman, Judge
Court No. 12–00025

[Affirming determination to rescind new shipper review.]

Dated: July 1, 2013

Michael Scott Holton, *Jeffrey S. Neeley*, and *Stephen William Brophy*, Barnes, Richardson & Colburn, of Washington, DC, for Plaintiffs.

Douglas G. Edelschick, Trial Attorney, Commercial Litigation Branch, Civil Division, United States Department of Justice, of Washington, DC, for Defendant. With him on the brief were *Stuart F. Delery*, Principal Deputy Assistant Attorney General, *Jeanne E. Davidson*, Director, and *Franklin E. White, Jr.*, Assistant Director. Of counsel on the brief was *Devin S. Sikes*, Attorney, Office of the Chief Counsel for Import Administration, United States Department of Commerce.

Yohai Baisburd and *Forrest R. Hansen*, White & Case LLP, of Washington, DC, for Defendant-Intervenor.

OPINION AND ORDER

Carman, Judge:

Plaintiffs Foshan Nanhai Jiujiang Quan Li Spring Hardware Factory and Foshan Yongnuo Import & Export Co., Ltd. (collectively, "Plaintiffs" or "the Foshan companies") are producers of uncovered innerspring units from the People's Republic of China which are subject to antidumping duties. Plaintiffs requested that the Department of Commerce ("Commerce" or "the government") conduct a new shipper review under section 751(a)(2)(B) of the Tariff Act of 1930, as amended, 19 U.S.C. § 1675(a), and under 19 C.F.R. § 351.214(c). New Shipper Review Request, Pls.' App'x Tab 1, CR 275, PR 276.[1] At the conclusion of the administrative proceedings, Commerce determined that Plaintiffs' relevant sale of goods was not a *bona fide* commercial transaction and rescinded the new shipper review. *Uncovered Innerspring Units From the People's Republic of China: Rescission of Antidumping Duty New Shipper Review*, 76 Fed. Reg. 80,337 (Dec. 23, 2011) ("Final Results") and accompanying Issues and Decision Memorandum (Pls.' App'x Tab 15, PR INT_046327 ("I&D Memo")). Plaintiffs bring this suit under 28 U.S.C. § 1581(c) to challenge the Final Results, and have moved for judgment on the agency record pursuant

[1] "CR" refers to the confidential administration record, and "PR" to the public administrative record.

to USCIT Rule 56.2. After considering the administrative record and the arguments of the parties, the Court concludes that Commerce based its determination on substantial evidence in the record and did not act contrary to law or in an arbitrary and capricious manner. The Final Results will therefore be upheld and Plaintiffs' motion will be denied. Judgement will issue for Defendant.

BACKGROUND

Under certain circumstances, Commerce imposes antidumping duty orders ("ADD orders") on goods found to be imported into the United States at less than fair value. The duty imposed is designed to remedy unfair trade and level the economic playing field, rather than punish the dumping exporter. In setting the rate of the duties, Commerce generally establishes company-specific rates for exporters Commerce has been able to individually investigate, and establishes an estimated "all-others" rate which is applied to shipments originating with other exporters. The "all-others" rate is typically much higher than the rates imposed on individually-investigated companies. If a producer or exporter of subject merchandise did not export its goods to the United States during the period of investigation leading to the ADD order, and is not affiliated with a company that did so, the company that now exports subject merchandise to the United States may request that Commerce conduct a "new shipper review" to establish a company-specific individual ADD rate for its exports. Pursuant to statute and regulation, Commerce will investigate the details of the company's shipments to the United States. If Commerce determines from its investigation that the company's United States sales are not *bona fide* market transactions, Commerce will rescind the new shipper review and the "all-others" ADD rate will apply to the company's shipments to the U.S.

I. Plaintiffs Request and Receive a New Shipper Review

The ADD order was published in 2009. *Uncovered Innerspring Units from the People's Republic of China: Notice of Antidumping Duty Order*, 74 Fed. Reg. 7,661 (Feb. 19, 2009). Approximately one year later, the Foshan companies sold a shipment of subject merchandise to an unaffiliated U.S. importer. Pls.' App'x Tab 8, CR 395 at 3 ("Preliminary Bona Fides Memo"). On August 20, 2010, Plaintiffs requested, and Commerce initiated, this new shipper review based on the sale. *See Uncovered Innerspring Units From the People's Republic of China: Initiation of Antidumping Duty New Shipper Review*, 75 Fed. Reg. 62,107 (Oct. 7, 2010) ("Initiation Notice").

After initiation, the Foshan companies timely responded to several questionnaires from Commerce. Mem. of Law in Supp. of Pls.' Mot. for

J. on the Agency R. under USCIT R. 56.2 ("Pls.' Mem.") at 3. The deadline imposed by 19 C.F.R. § 351.301(b)(4) for submitting new factual information into the record passed on January 18, 2011. *Id.* Thereafter, Commerce issued several supplemental questionnaires, and the Foshan companies responded without Commerce indicating any deficiencies in those responses. *Id.* Plaintiffs provided information in these responses about the U.S. importer that purchased the sale forming the basis of the new shipper review, and Commerce used this information to examine the characteristics of the sale to determine whether it was a commercially reasonable transaction likely to be representative of Plaintiffs' future exports to the U.S. Def.'s Resp. to Pls.' Mot. for J. upon the Agency R. ("Def.'s Opp.") at 3.

II. Commerce Rescinds the New Shipper Review

On August 4, 2011, the Department of Commerce published its preliminary determination to rescind the new shipper review because it found that the Foshan companies' U.S. sale was not a *bona fide* transaction. *Uncovered Innerspring Units From the People's Republic of China: Preliminary Intent To Rescind New Shipper Review*, 76 Fed. Reg. 47,151 (Aug. 4, 2011) ("Preliminary Results"). In determining whether a company's sales are *bona fide*, Commerce weighs "the totality of circumstances," including "such factors as (a) [t]he timing of the sale, (b) the price and quantity, (c) the expenses arising from the transaction, (d) whether the goods were resold at a profit, and (e) whether the transaction was made on an arm's length basis." *Id.* at 47,152.

A. *Preliminary Results*

Commerce obtained data about sale of subject merchandise from U.S. Customs and Border Protection ("CBP data") for comparison when analyzing the commercial reasonableness of the Foshan companies' sale. Preliminary Bona Fides Memo at 4. Examining that data, Commerce determined that the quantity and price of U.S. sales during the period of review ("POR") were not normal and therefore "would not provide an adequate basis for comparison." *Id.* Consequently, Commerce chose to base its *bona fides* analysis on a comparison of Plaintiffs' "third-country sales data, as well as post-POR CBP data." *Id.* at 5.

Commerce's comparison showed that Plaintiffs' sale was of a quantity "88% smaller than [Plaintiffs'] average third-country sale" and smaller than any other single sale. *Id.* at 6. Plaintiffs' sale quantity was also "147% smaller than the average post-POR sale" in the CBP data. *Id.*

Commerce examined whether Plaintiffs' sale was typical of its business practices in part by considering whether innerspring importation represented an ongoing concern for the importer who purchased Plaintiffs' sale. *Id.* The importer indicated that it was an innersprings trading company that bought imported products from multiple suppliers and sold to many customers, with its purchase from Plaintiffs' being "normal." *Id.* at 7. However, when later asked to provide details, the importer eventually admitted that it had *no* other imports of innersprings during or after the POR—which CBP data confirmed. *Id.* (emphasis added). Commerce also sought to learn whether the importer actually sold the goods it bought from Plaintiff. The importer provided contradictory responses; initially, it stated that the innersprings were "resold or used by mattress production companies," but later said they were used in its own production. *Id.* at 8. Finally, the importer stated that the innersprings were used by another company, but refused to provide corroborating records, citing confidentiality concerns despite Commerce having provided a copy of its regulations on keeping such materials private. *Id.*

Commerce also examined the price of the Foshan companies' sale. *Id.* at 9–10. The average unit value ("AUV") of Plaintiffs' sale was "30% larger than the average third-country similar model." *Id.* at 10. The sale also had a higher AUV than "all other similar model third-country sales." *Id.* Commerce noted similar results when looking at the post-POR CBP data: Plaintiffs' sale price was "134% higher" than the post-POR average and also higher than all post-POR sales. *Id.*

Noting that Plaintiffs' "single new shipper sale is the sole basis for calculating a separate antidumping margin," Commerce emphasized that it is essential to ensure that the transaction was an authentic sale. *Id.* Commerce, however, concluded that the sale was neither "reflective of normal business practices," nor "indicative of future selling practices," due to the atypical quantity and price of the sale, as well as the inconsistencies and deficiencies about what the importer did with the sale. *Id.* at 10–11.

The Foshan companies filed a case brief challenging the Preliminary Results on September 13, 2011. Pls.' App'x Tab 12, CR EXT_027114, PR EXT_027115 ("Pls.' Initial Case Brief"). Included in the case brief was new factual information the Foshan companies had obtained from the unaffiliated importer, which Plaintiffs believed could be submitted after the deadline because there was good cause and the information supplemented prior submissions by the importer. Pls.' Mem. at 7. Commerce, however, rejected the new information as untimely, and asked Plaintiffs' to resubmit the case brief with the new

information redacted (which Plaintiffs did). *Id.* (*see* Pls.' App'x Tab 14, CR EXT_028873, PR EXT_028875 ("Pls.' Redacted Case Brief")).

B. Final Results

Commerce issued its rescission of the new shipper review on December 23, 2011. Final Results, 76 Fed. Reg. at 80,337.

1. *Commerce's Analysis of Quantity of U.S. Sale*

As to the issue of the quantity of Plaintiffs' U.S. sale, Commerce addressed the arguments which Plaintiffs raised in their case brief. First, Commerce addressed Plaintiffs' argument that the CBP data from the POR contains quantities comparable to Plaintiffs' sale. Second, Commerce addressed Plaintiffs' argument that Commerce arbitrarily decided the higher quantities in the post-POR CBP data were normal, instead of deciding that those quantities were too high and the POR quantities were the normal ones. Third, Commerce addressed Plaintiffs' argument that Commerce should not use the post-POR data for its *bona fide* analysis because the Department did not obtain the associated entry packets, did not explain why it selected the particular post-POR period used, and did not place all of the data fields in the post-POR CBP data onto the record. Finally, Commerce address Plaintiffs' argument that Plaintiffs' third-country sales, analyzed on the basis of cost per unit rather than cost averaged over product weight, show the U.S. sale to be *bona fide*. I&D Memo at 2; *see generally* Pls.' Redacted Case Brief.

Commerce reiterated that the POR CBP data was unreliable, basing this conclusion on the low number of entries, wide variations in the AUVs and values in the POR data, and on the mixture of reporting on a unit value and a by-weight basis in the POR entries. I&D Memo at 3. Commerce stated that it chose to use post-POR data because that data tracked with Plaintiffs' POR third-country sales, convincing Commerce that the POR CBP data (rather than the post-POR CBP data) was aberrational. *Id.* at 4. Commerce rejected Plaintiffs' contention that entry packets showed the sale under review to be of similar volume to the POR CBP data, noting that Plaintiff was relying on gross weights that included non-subject merchandise in them. *Id.* As to its use of post-POR data, Commerce rejected the argument that it should have obtained full entry packets, noting that its normal practice is not to do so and that it only departed from this normal practice in this case in a limited manner in order to determine if there were errors in the POR CBP data and whether the POR entries could be converted into a per-unit basis. *Id.* at 5. Commerce also stated that it placed all of the relevant POR CBP fields of data

used in its analysis on the record, and used a non-arbitrary period of the year following the POR in choosing the post-POR data (admitting there were only entries in certain months but defending as appropriate use of this time period.) *Id.* Commerce also indicated that it compared Plaintiffs' U.S. sale to the average total quantity of third-country sales because it could not conduct an analysis based on matching Harmonized Tariff Schedule of the United States ("HTSUS") numbers, as no record evidence indicated which HTSUS numbers would apply to the third-country sales. *Id.* at 6.

2. *Commerce's Analysis of Price of U.S. Sale*

As to the issue of price, Commerce addressed Plaintiffs' arguments (a) that the U.S. sale was in range with the third-country sales on a per-unit basis; (b) that Commerce's use of per-weigh valuation rather than per-unit valuation was arbitrary and contrary to the record; and (c) that even on a per-weight basis, its U.S. sale model was most similar to a comparably-priced third-country model, and steel prices spiked during the POR, making Plaintiffs' price *bona fide*. *Id.* at 7.

Commerce indicated that it agreed that a unit-based cost analysis would be most appropriate where possible, but Commerce stated that "we note that regardless of the comparison data set, [Plaintiffs'] third-country sales or post-POR data, the results of the *bona fides* analysis are identical, *i.e.*, the price of the sale under review is high relative to other sales." *Id.* at 8. Commerce thus found the U.S. sale price to be high even when relying on a per unit price comparison to Plaintiffs' third-country sales. *Id.* Commerce rejected Plaintiffs' suggestion that Commerce should compare its U.S. sale to a single sale by Defendant-Intervenor, since there was a dearth of data about it on the record. *Id.* at 8–9. Commerce also rejected Plaintiffs' argument that it should compare the U.S. sale to sales of all models in third-countries, rather than only to third-country sales of the most similar model. *Id.* at 9. Commerce found that this would not provide an apples-to-apples comparison because it would not be based on similar merchandise. *Id.*

3. *Commerce's Analysis of Disposition of U.S. Sale*

As to the disposition of the U.S. sale, Commerce rejected Plaintiffs' arguments (a) that the importer stated clearly that the merchandise was sold to its affiliate, which manufactured it into mattresses; (b) that Commerce should have requested an explanation if it needed clarification of the importer's conflicting or inconsistent responses; (c) that the importer only said it had consumed the merchandise because it was referring to itself and its affiliated company together, and the

affiliate had consumed the merchandise; and (d) that Commerce falsely assumed the importer and its affiliate generated internal documentation that would corroborate their statements to Commerce. *Id.* at 9–10.

Commerce noted again the inconsistencies in the multiple responses of the importer as to what it does with purchased innersprings, and rejected Plaintiffs' "improbable *post-hoc* explanation that its importer transfers innersprings between affiliated companies, further manufactures innersprings into mattresses, and sells the resulting mattresses, all without keeping any form of written record of these activities." *Id.* at 10. Commerce continued to find that there was "no clear evidence that the merchandise under review was consumed or sold," and thus no evidence that the sale was *bona fide*. *Id.* at 11. Commerce also noted that it was Plaintiffs' obligation to complete the administrative record, and not Commerce's obligation to request an explanation for conflicting responses by the importer. *Id.* at 11.

4. *Commerce's Analysis of Importer's Ongoing Business Interest*

As to whether innersprings were an ongoing concern for the importer, Commerce considered Plaintiffs' arguments (a) that Commerce incorrectly conflated the importer's lack of "imports" of innersprings with a lack of "purchases" of innersprings; and (b) that Commerce failed to develop a record of the importer, which would have shown it and its affiliates to be a well-established group of companies engaged in the consumption of innersprings and the manufacturing of mattresses. *Id.*

Commerce, however, noted that it had requested detailed information on the importer's "purchases" and ongoing commercial operations, but that the importer had not provided any timely information about other innerspring purchases. *Id.* at 12.[2]

5. Conclusion of Final Results

Based on all of these considerations, Commerce continued to find in the Final Results that the administrative record did not show that Plaintiffs' U.S. sale was a *bona fide* commercial transaction and determined that the new shipper review would be rescinded. *Id.* at 13; *see also* Final Results.

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[2] Commerce noted that the importer finally provided information about other purchases of innersprings with Plaintiffs' case brief, but the information was properly rejected by Commerce as untimely. I&D Memo at 12 n.55.

STANDARD OF REVIEW

In hearing a challenge to a decision by Commerce to rescind a new shipper review, "[t]he court shall hold unlawful any determination, finding, or conclusion found . . . to be unsupported by substantial evidence on the record, or otherwise not in accordance with law." 19 U.S.C. § 1516a(b)(1)(B)(i).

DISCUSSION

I. Legal Framework of Commerce's Determination

In a new shipper review, Commerce examines the U.S. sales of a new exporter to determine whether that company is entitled to its own antidumping duty margin under an antidumping order, and if the company is entitled to a separate rate, to determine what the rate should be. *See* 19 C.F.R. § 351.214(b)(2); *Hebei New Donghua Amino Acid Co., Ltd. v. United States*, 29 CIT 603, 604, 374 F. Supp. 2d 1333, 1335 (2005) ("*Hebei*"). To determine entitlement to an individualized rate, Commerce's practice is to determine whether the proposed new shippers have conducted *bona fide*, commercially reasonable transactions that are indicative of how the company can be expected to act in the future. *Hebei*, 374 F. Supp. 2d at 1338; *Tianjin Tiancheng Pharm. Co. Ltd. v. United States*, 29 CIT 256, 259, 366 F. Supp. 2d 1246, 1249–50 (2005) ("*Tianjin*"). "In evaluating whether or not a sale is 'commercially reasonable,' Commerce has considered the following factors, among others: (1) the timing of the sale, (2) the price and quantity[,] (3) the expenses arising from the transaction, (4) whether the goods were resold at a profit, (5) and whether the transaction was at an arm's length basis." *Hebei*, 374 F. Supp. 2d at 1339 (citations omitted). This Court "has, on a number of occasions, upheld Commerce's use of this analysis." *Shandong Chenhe Int'l Trading Co., Ltd. v. United States*, 34 CIT ___, 2010 WL 4924016 at *2 (2010) (*citing Hebei*, *Tianjin*, and *Windmill Int'l Pte., Ltd. v. United States*, 26 CIT 221, 193 F. Supp. 2d 1303 (2002)).

II. Plaintiffs' Challenges to the Final Results

Plaintiffs challenge the Final Results on several grounds. First, Plaintiffs contend that the Commerce "concealed its adverse facts available [("AFA")] decision and failed to meet its statutory obligations by not disclosing to parties their failure to respond or otherwise cooperate." Pls.' Mem. at 10. Plaintiffs contend such a result is "troubling" because Plaintiffs were never notified of any failure to cooperate, as required by statute before AFA can be applied, and because any such finding "would have to be based on the unaffiliated import-

er's responses" rather than a failure by Plaintiffs. *Id.* at 10–11. Next, Plaintiffs claim that the evidence on the record fails to support Commerce's decision that the quantity and selling price of Plaintiffs' sale were not commercially reasonable since many *bona fide* sales on the record were similar to the U.S. sale under review. *Id.* at 11. Plaintiffs also challenge Commerce's conclusion that the importer provided conflicting information, claiming it to be unsupported in the record. *Id.* Finally, Plaintiffs contend that Commerce's rejection of the new factual information submitted by the importer along with Plaintiffs' case brief was an abuse of discretion since the information that corrected and clarified the record that had already been established. *Id.*

III. The Final Results Are Supported by Substantial Evidence and Otherwise in Accordance with Law

A. *Plaintiffs Failed to Administratively Exhaust Their AFA Claim*

The Court "shall, where appropriate, require the exhaustion of administrative remedies." 28 U.S.C. § 2637(d). The Court construes this requirement strictly in order to avoid intruding on the authority of Commerce by making decisions that are properly for the agency to carry out. *See Corus Staal BV v. United States*, 502 F.3d 1370, 1379 (Fed. Cir. 2007); *Rhone Poulenc, Inc. v. United States*, 13 CIT 218, 226, 710 F. Supp. 341, 348 (1989). After examining the record and the briefs before the Court, it is clear that Plaintiffs failed to raise a claim in the administrative proceeding that Commerce's *bona fide* analysis of the importer was tantamount to making an AFA finding without complying with the requirements of 19 U.S.C. § 1677e. The first determination as to whether this argument has merit, or is merely argle-bargle, is a determination entrusted by Congress to the Department of Commerce, and the Court will refrain from considering it.[3]

B. *Substantial Evidence Supports Commerce's Bona Fide Determination*

Commerce properly determined that the totality of the circumstances evidenced in the administrative record supported a finding that the Foshan companies' U.S. sale was not *bona fide*. The Court therefore affirms that finding.

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[3] For this reason the Court also does not address the merits of Commerce's counterargument, which is that Commerce made no AFA determination because, in the absence of even a single *bona fide* sale, it was unable to advance to that stage of the new shipper review. *See* Def.'s Opp. at 12.

1. *Quantity*

Plaintiffs challenge Commerce's finding that the quantity of the U.S. sale under review deviated below the quantity of other sales of the subject merchandise. Plaintiffs' issue is really that Commerce based "its *bona fides* analysis on the average quantities rather than the actual quantities of other commercial sales reported on the record." Pls.' Mem. at 19. But as Defendant points out, this Court has upheld Commerce's use of averages in situations calling for them. Def.'s Opp. at 18. Here, Commerce chose to average because, as it explained in its *bona fides* memo, its past practice was to do so when it could not disaggregate data, and also because the record here did not indicate which HTSUS number would apply to the third-country sales under consideration and therefore a comparison on an individual basis could not be relied upon. *Id.* at 18–19 (citing Preliminary Bona Fides Memo at 4). Because the Court finds that Commerce's approach to quantity was explained on the basis of the particular administrative record before the agency and was a reasonable exercise of Commerce's discretion in conducting a new shipper review, the Court affirms the quantity portion of the Final Results.

2. *Price*

Plaintiffs contend that Commerce acted outside the record evidence when it chose to compare post-POR CBP entries of subject merchandise with the average unit value by weight of Plaintiffs' sales of a similar unit in third countries. Pls.' Mem. at 21. Plaintiffs also argue that Commerce failed to take account of evidence of the effect on price of "changes in raw material costs and other unique production issues," *id.* at 21, and ignored certain pricing data submitted by Defendant-Intervenor, *id.* at 23–24. The problem with these arguments is that they are belied by the record. Commerce, in fact, explained that the post-POR CBP data was reported only on the basis of weight, and explained that Commerce consequently had to convert all of the data to a weight basis in order to make comparisons with the post-POR CBP data. Def.'s Mem. at 21. Also, Commerce explained that this was a secondary price comparison that supplemented its primary third-country unit-based price analysis. *Id.* Both comparisons, Commerce determined, show that the price of the U.S. sale under review was high. Commerce also addressed Plaintiffs' concerns about the way Commerce used third-country pricing data, noting that it was unable to conduct the ideal analysis it would have like to conduct because the record lacked evidence about the HTSUS number of third-country sales. *Id.* at 21–22. Finally, Commerce found in the Final Results that Defendant Intervenor's sale lacked sufficient

information to be reliable as a comparison. *Id.* at 22. The Court finds that Commerce adequately responded to all of Plaintiffs' arguments in reasonable ways and based its determination as to price on a reasonable handling of the record evidence before the agency. The Court therefore affirms the price portion of the Final Results.

3. *The Importer's Disposition of the U.S. Sale Merchandise*

Plaintiffs' challenge to Commerce's finding that the importer gave inconsistent and conflicting information boils down to contending that if Commerce found the information "incomplete," Commerce should have tried to clarify the information on its own initiative. Pls.' Mem. at 25–26. This argument is unavailing and rests on Plaintiffs' desire for Commerce to, in essence, give the importer the benefit of the doubt.

But doubt is exactly what the importer's responses raise. Commerce asked the importer to identify the customer that bought the merchandise in the U.S. sale under review, and the importer replied, vaguely, that the innersprings at issue "were resold or used in mattress companies," including one named company (which is affiliated with the importer). Def.'s Opp. at 23. That response did not provide a clear answer to Commerce's question. Commerce then asked for documents demonstrating that each innerspring unit in the U.S. shipment was sold, and included instructions on how the importer could submit those records under an APO. *Id.* But the importer did not document the resale of the merchandise, instead telling Commerce that it was "used for our own production." *Id.* at 23–24. So Commerce then asked the importer to document the consumption of the goods, but, again, the importer declined to do so, now stating that a different entity, not the importer, had consumed the goods in production (a statement it also did not support with any documents). *Id.* at 24. Faced with such varied responses, and the importer's failure to provide supporting documents, the Court finds that Commerce acted reasonably in concluding that the U.S. sale under review was not typical for the importer. That conclusion is certainly supported by the record evidence, and so the Court affirms Commerce on this question.

4. *The Importer's Ongoing Interest in Innersprings*

In its initial response to Commerce, the importer claimed that it was a regular purchaser of innersprings with many suppliers, and that it regularly found new suppliers such as Plaintiffs to supply it with large numbers of various sizes of innersprings of high quality.

However, the importer refused to identify its suppliers, and indicated that it did not buy any other imports of innersprings after the beginning of the POR. *Id.* at 25–26. The importer also declined to document its other purchases. *Id.* at 26. Faced with responses of this variety, Commerce reasonably determined that it could not tell whether the importer had an ongoing interest in innersprings and therefore found the importer's purchase of the subject sale not to be an ordinary commercial transaction for the importer. Regardless of Plaintiffs' disagreement, Commerce made a permissible, reasonable determination based on the evidence before it when it determined that the importer had no ongoing interest in the subject merchandise. The Court therefore affirms that aspect of the Final Results.

5. *Commerce Acted Properly in Rejecting New Factual Information*

The Courts have held that Commerce abuses its discretion if it rejects newly submitted factual information under certain circumstances. Plaintiffs contend such circumstances were present here because the new information submitted with its Non-redacted Case Brief merely clarified or supplemented information already on the record. Defendant correctly notes, however, that the new factual material submitted by the importer with Plaintiffs' case brief attempted to introduce information that the importer had previously declined to supply despite having an opportunity to do so. Def.'s Opp. at 34–35. Additionally, Commerce retains the discretion to extend its regulatory new factual information deadline for good cause. But as Defendant points out, no good cause was shown here and no request for an extension of time was filed. In such circumstances, the Court finds that Commerce did not abuse its discretion in enforcing its deadline and rejecting the new factual information in Plaintiffs' Non-redacted Case Brief.

CONCLUSION

The Court has considered Plaintiffs' remaining arguments and found them to be without merit. As a result of the considerations detailed above, the Court holds that Commerce based the Final Results on substantial evidence on the administrative record and acted in accordance with law. Consequently, it is hereby

ORDERED that *Uncovered Innerspring Units From the People's Republic of China: Rescission of Antidumping Duty New Shipper Review*, 76 Fed. Reg. 80,337 (Dec. 23, 2011) is sustained; and it is

ORDERED that Plaintiffs' motion for judgment on the agency record is denied; and it is furthermore

ORDERED that judgment shall issue for the United States.

Dated: July 1, 2013
New York, New York

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