U.S. Customs and Border Protection

Slip Op. 13–77

JINXIANG YUANXIN IMPORT & EXPORT 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. 11–00145
Public Version

[Plaintiff's motion for judgment on the agency record is granted, in part, and the Department of Commerce's final determination rescinding plaintiff's new shipper review is remanded.]

Dated: June 18, 2013

John J. Kenkel, deKieffer & Horgan, of Washington, D.C., argued for plaintiff. With him on the brief were *Gregory S. Menegaz* and *J. Kevin Horgan*.

Melissa M. Devine, Trial Attorney, Commercial Litigation Branch, Civil Division, United States Department of Justice, of Washington, D.C., argued for defendant. With her 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.

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

OPINION AND ORDER

Eaton, Judge:

Before the court is the motion for judgment on the agency record, pursuant to USCIT Rule 56.2, of plaintiff Jinxiang Yuanxin Import & Export Co. ("plaintiff" or "Yuanxin"), an exporter of fresh, whole garlic from the People's Republic of China ("PRC"). By its motion, Yuanxin 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, after finding that Yuanxin's sole U.S. export was not a bona fide sale. *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") was November 1, 2008 through October 31, 2009.

Yuanxin claims that "Commerce unlawfully rescinded the new-shipper review . . . [and that the] Department's determination with respect to the issue of whether Yuanxin's sale was *bona fide* was not supported by substantial evidence on the record and was otherwise contrary to law." Pl.'s Mem. in Supp. of Mot. for J. on the Agency R. 1 (ECF Dkt. No. 34) ("Pl.'s Br"). Defendant United States ("defendant"), on behalf of Commerce, urges that the determination be sustained. Def.'s Mem. in Opp. to Pl.'s Mot. for J. on the Agency R. 1 (ECF Dkt. No. 49) ("Def.'s Mem."). 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, Inc.) ("defendant-intervenors"), argue that plaintiff's contentions are without merit, and that 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 granted, in part, and defendant's Rescission of Yuanxin's new shipper review is remanded.

BACKGROUND

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

Yuanxin is a processor and exporter of garlic from the PRC that made one sale of singleclove[1] whole garlic into the United States during the POR.[2] Bona Fides Mem. at 4. Yuanxin sold its merchan-

[1] Single-clove garlic (also known as solo garlic, monobulb garlic, single bulb garlic, or pearl garlic) has the same flavor as multi-clove garlic, but consists of a single clove per bulb, instead of multiple cloves. *See generally* MEREDITH, THE COMPLETE BOOK OF GARLIC: A GUIDE FOR GARDENERS, GROWERS, AND SERIOUS COOKS 294–95 (2008). It originates in Yunnan province in Southern China. *Id.*

[2] The sale consisted of [[ ]] kilograms of single-clove garlic from the PRC with a total value of [[ ]] or a weighted-average unit value ("AUV") of [[ ]] per kilogram. Bona Fides Mem. at 4.

dise through a U.S. reseller[3] ("the Reseller") that had not formerly purchased garlic. Def.'s Mem. 3. The Reseller did not purchase any other garlic during or subsequent to the POR. Def.'s Mem. 4. The Reseller immediately transferred the garlic to a U.S. wholesaler[4] ("the Wholesaler") that had previously purchased single-clove garlic from another exporter during the preceding period of review. Bona Fides Mem. at 8.

In November 2009, Commerce received a timely request for a new shipper review from Yuanxin. *See* Fresh Garlic from The PRC (Nov. 25, 2009) (request for new shipper review) (P.R. Doc. 2; C.R. Doc. 2). On January 5, 2010, the Department initiated new shipper reviews for three exporters of fresh garlic from the PRC, including Yuanxin. Fresh Garlic From the PRC, 75 Fed. Reg. 343–44 (Dep't of Commerce Jan. 5, 2010) (initiation of new shipper reviews).

On November 12, 2010, Commerce issued its Preliminary Results, finding that it did not have a basis to conclude that Yuanxin's sale was not bona fide, and setting the company's dumping margin at $0.75 per kilogram. 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. at 5. ("Prelim. Bona Fides Mem."). Also, in the Preliminary Results, however, "Commerce expressed its concern . . . that the [average unit value ("AUV")] of Yuanxin's sale was the [[ ]] AUV out of the [[ ]] Chinese entries," and that "Yuanxin's sale quantity was [[ ]] percent [[ ]] than the average quantity of all such entries." Def.'s Mem. 5. The Department "also expressed concern as to" the unusual nature of the Reseller's sale to the Wholesaler. Def.'s Mem. 5. Commerce therefore concluded that "given the concerns regarding the price, quantity, and atypicality of the product and transaction, we plan to continue to examine all factors relating to the *bona fide* nature of Yuanxin's sale throughout the remainder of this [new shipper review]." Prelim. Bona Fides Mem. at 6.

After the Preliminary Results were issued, the Department sent a supplemental questionnaire to Yuanxin to solicit additional information about its sale and about the nature of single-clove garlic. Rescission, 76 Fed. Reg. at 19,324. Yuanxin submitted a response to the questionnaire and provided supplementary evidence concerning the bona fides of its sale. Pl.'s Third Supp. Questionnaire Resp. (Feb. 14, 2011) (C.R. Doc. 46) ("Pl.'s 3d Resp."). Additionally, information about

[3] The U.S. reseller was [[ ]], a sporting and athletic goods manufacturer. Bona Fides Mem. at 8.

[4] The U.S. wholesaler was [[ ]]. Bona Fides Mem. at 8.

single-clove garlic was placed on the record by plaintiff and by the Department. Rescission, 76 Fed. Reg. at 19,324.

On April 7, 2011, after reviewing additional briefing from plaintiff and defendant-intervenors and the new record evidence, Commerce determined that Yuanxin's sale was not bona fide and rescinded the company's new shipper review. Rescission, 76 Fed. Reg. at 19,324. In the Rescission, Commerce concluded,

> [b]ased on the Department's complete analysis of all the information on the record of this review regarding the *bona fides* of Yuanxin's . . . sale, the Department finds Yuanxin's sale to be not *bona fide* because (1) Yuanxin's sale price is so high as to be commercially unreasonable and not indicative of future sales, (2) Yuanxin's sales quantity is not representative of the garlic industry, and (3) the structure of Yuanxin's U.S. sale is of an unusual nature.

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) (2006).

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 been previously 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 performing 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 (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 prac-

tices.'" *Id.* at __, Slip Op. 10–129, at 6 (quoting *Hebei New Donghua*, 29 CIT at 610, 374 F. Supp. 2d at 1339).

To determine whether a sale is atypical of normal business practices, the Department will look at all of the circumstances surrounding the sale. *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 commercially 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, 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; *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). In addition,

> [f]or 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.[5]

Zhengzhou Huachao Indus. Co. v. United States, 37 CIT __, __, Slip.

[5] 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. 12–39, at 5 n.3. (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.

Op. 13–61, at 6–7 (2013) (citing *Jinxiang Chengda Imp. & Exp. Co. v. United States*, 37 CIT __, __, Slip Op. 13–40, at 4–5 (2013)).

II. The Department's Use of the Customs Data in Its Price Analysis Was Not Supported by Substantial Evidence

Commerce began its analysis of Yuanxin's sale by examining the company's sales price to its Reseller. To this end, following the Preliminary Results, the Department placed on the record a copy of the U.S. Customs and Border Protection ("Customs") data run 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," a category that includes both single-clove and multi-clove fresh, whole garlic bulbs. Bona Fides Mem. at 4. The Customs data yielded an AUV of [[ ]] per kilogram for the [[ ]] entries under this HTSUS heading. Bona Fides Mem. at 6. Commerce then compared Yuanxin's sales price of [[ ]] to the Customs AUV of [[ ]] and found that Yuanxin's price was abnormally high because it was "more than [[ ]] times higher than the [Customs] AUV, making its entry [[ ]] under this HTSUS heading." Bona Fides Mem. at 6.

Plaintiff objects to the Department's comparison of the company's sales price for single-clove garlic to the prices in the Customs data because those prices were for multi-clove garlic. Yuanxin argues that this comparison departs from Commerce's "consistent policy" in other reviews of not conducting comparisons with the Customs AUV when products are determined to be unique. Pl.'s Br. 12, 20–21. In support of its position, plaintiff first cites to the review for Jinxiang Hejia Co., Ltd. ("Hejia"), the only other review conducted for a sale of single-clove garlic. *See* Fresh Garlic from the PRC, 74 Fed. Reg. 50,952 (Dep't of Commerce Oct. 2, 2009) (final results and final rescission, in part, of new shipper reviews), and accompanying Issues & Decision Mem. ("*Hejia* Issues & Dec. Mem."). In that review, Commerce determined that, "[a]lthough Hejia's sale of single-clove garlic entered at a significantly higher price than the AUV for [the other entries under the same tariff heading], this comparison may not be meaningful for purposes of this *bona fides* analysis because [the tariff heading] includes substantial entries of multi-clove garlic which, both parties concede, have prices significantly lower than Hejia's price for single clove garlic." *Hejia* Issues & Dec. Mem. at 4–5. Based on this finding, the Department disregarded its comparison of the sales price of Hejia's single-clove garlic to the AUV of garlic entered under HTSUS 0703.20.0010. Commerce relied instead on the parties' concession,

supported by record evidence of single-clove garlic prices, that prices for single-clove garlic should be higher than those for multi-clove garlic.

Plaintiff further claims that Commerce used a similar "unique products" analysis in three other administrative reviews—*Fish Fillets*, *Stainless Steel*, and *Wooden Bedroom Furniture*. Pl.'s Br. 28–29. In each of these reviews, the Department approved prices that were higher than the average for the products entered under the same HTSUS heading. The Department found that the higher prices were justified because each product under review was distinct from the remaining entries made under the same heading. Yuanxin claims similar treatment, arguing that "the AUV price in the Customs database is inappropriate [because] Yuanxin sold a product that is at a level far above that of normal multi-clove garlic." Pl.'s Br. 28.

In response, Commerce acknowledges that in the Preliminary Results it stated that the distinction between single-clove and multi-clove garlic "le[d] us to deviate from our typical procedure of relying on [Customs] data as a point of comparison for the new shipper's price." Bona Fides Mem. at 6, 4 ("In the *Preliminary Results*, although all entries were made under the same HTSUS number, the Department did not compare Yuanxin's sale to the POR AUV based on the understanding at the time that single-clove garlic is distinct from multi-clove garlic, with significantly different prices."). Thus, for the Preliminary Results, Commerce noted that,

> [a]lthough Yuanxin's sale of single-clove garlic entered at a significantly different price than the AUV for [other entries in the Customs data], this comparison may not be meaningful for purposes of this *bona fides* analysis because [the HTSUS heading] includes substantial entries of multi-clove garlic . . . [and] there are no other U.S. prices of single-clove garlic on the record to compare with the sale in question.

Prelim. Bona Fides Mem. at 4–5.

After the Preliminary Results, however, "the Department . . . reexamined whether Yuanxin's sale of single-clove garlic should be considered a sale sufficiently distinct from a sale of multi-clove garlic for purposes of [the] bona fides analysis." Bona Fides Mem. at 6. Accordingly, Commerce requested additional information and briefing from the parties about single-clove garlic, and placed new evidence about single-clove garlic on the record. Plaintiff was also asked to "describe the growing process of both single-clove garlic and multi-clove garlic . . . [and] . . . highlight the differences between the two

growing processes," and to address whether "single-clove garlic a differen[t] species than multi-clove garlic." Pl.'s 3d Resp. 3.

Plaintiff responded that "[s]ingle-clove garlic and multi-clove garlic are the same species" and "[t]he growing process of single-clove garlic is the same [as] multi-clove garlic except that the harvest timing of single-clove garlic is two months earlier than the multi-clove garlic." Pl.'s 3d Resp. 3. Based on this response, the Department found "that there is no reason on the record in this case to disregard its long-standing practice of examining [Customs]-derived AUVs [for fresh, whole garlic bulbs] as the most appropriate representation of the price of subject merchandise." Bona Fides Mem. at 6. In other words, in contrast to *Hejia* (where Commerce found that it was reasonable that the sales price for Hejia's single-clove garlic was much higher than the prices for entries of multi-clove garlic entered under the same HTSUS heading), here the Department believes it had enough evidence to support a comparison between Yuanxin's sales price and the Customs data for sales of other fresh, whole garlic bulbs, even though those bulbs were multi-clove rather than single-clove. Specifically, in this review, Commerce found that (1) single- and multi-clove garlic are the same species; (2) the growing process is the same except that single-clove garlic is harvested two months earlier; (3) the physical differences, i.e., number of cloves, "does not affect the garlic bulb's ultimate end-use"; and (4) "there is no evidence on the record that the 'market' for single-clove-garlic in the United States is distinct from the market for fresh whole garlic in general." Bona Fides Mem. 6. Therefore, the Department found it was reasonable to compare Yuanxin's U.S. sales price to the prices for other entries of whole garlic from the PRC during the POR.

As to its departure from the analysis it performed for Hejia, the other shipper of single-clove whole garlic during the previous POR, Commerce argues that "[i]n *Hejia*, Commerce found that a comparison using the AUV for whole garlic . . . was not meaningful for purposes of a *bona fides* analysis because both parties conceded that entries of multi-clove garlic had prices significantly lower than Hejia's price for single-clove garlic." Def.'s Mem. 30. In contrast, here, Commerce had record evidence that it claims demonstrates that single- and multi-clove garlic are similar enough to allow a comparison between the prices of the two. Therefore, unlike in *Hejia*, the Department "did not need to depart from its typical methodology and use a range of prices as it has done in cases when matching identical merchandise has been difficult." Def.'s Mem. 30.

As to plaintiff's claim that Commerce should have employed the analysis in *Fish Fillets*, *Stainless Steel*, and *Wooden Bedroom Furniture*, Commerce first counters that "to the extent that Yuanxin relies upon Commerce's analysis of proprietary information contained in these reviews, the Court should disregard Yuanxin's arguments [because t]hese memoranda and the proprietary information contained therein are not available to the public and were not placed upon the record of this case." Def.'s Mem. 29. Thus, Commerce urges the court to reject plaintiff's reliance on the three administrative reviews, information about which is not available to the public, and instead sustain Commerce's use of the Customs AUV. Def.'s Mem. 29–32.

In addition, contrary to plaintiff's position, the Department argues that the three reviews cited by plaintiff "demonstrate that Commerce's preference is to use the AUV derived from [Customs] data, but that, in truly exceptional circumstances, Commerce may depart from its longstanding practice." Def.'s Mem. 29. Here, the Department maintains that it "correctly determined that such exceptional circumstances did not apply." Def.'s Mem. 29. According to Commerce, this is because, unlike in *Hejia*, here there is no record evidence that indicates that single-clove garlic is a "niche product," like the specialized steel product in *Stainless Steel*, "or an import with multiple inputs or special 'physical characteristics.' Furthermore, the HTSUS category used by Commerce covers only fresh whole garlic, and not a myriad of different products as was the case in *Stainless Steel* and *Furniture*." Def.'s Mem. 31–32. Thus, the Department asserts that "Commerce reasonably determined that it was not faced with a complicated and unique product . . . that make[s] matching the new shipper's sales to the Customs data problematic." Def.'s Mem. 32 (citing Bona Fides Mem. at 7–9).

III. Commerce Must Explain Its Departure from the Practice It Established in *Hejia*

As has been seen, the Department concluded that, when compared to the Customs AUV of [[ ]], Yuanxin's sales price of [[ ]] was unusually high, and therefore indicative of a non-bona fide sale. In addition, Commerce found that Yuanxin's sales price was not only high when compared to the Customs AUV, but was actually the [[ ]] under either the whole or peeled garlic category. Bona Fides Mem. at 6.

The court finds, however, that the use of this comparison is at odds with the Department's practice established in *Hejia*,[6] and that the

[6] Commerce may establish a new practice in a single review, provided that the Department has adequately explained both why it is deviating from a former practice (if it had an

departure from this practice was not adequately explained. In *Hejia*, Commerce found that single-clove garlic was "unique" and therefore a comparison with entries of multi-clove garlic was not appropriate.

> Commerce . . . concluded in the *Final Results* that Hejia's one-time sale was a bona fide commercial transaction. In defending the relatively high price of its sale, Hejia argued that prices for single-clove garlic are significantly higher than those for multi-clove garlic. To support its argument, Plaintiff placed on the record sales offers of single-clove garlic to Germany, Great Britain, and Japan, all for single-clove garlic at prices significantly higher than the multi-clove variety. Thus, the Department rejected the contention by Defendant-Intervenors . . . that Hejia's sale was not reflective of future sales and determined that the agency "[did] not have a basis for concluding that [Hejia's] price is aberrationally high for single-clove garlic in the United States."

Jinxiang Hejia Co. v. United States, 35 CIT __, __, Slip Op. 11–112, at 6 (2011) (citations omitted). Although the Department insists that it made its finding in *Hejia* that single-clove garlic commands a higher price than multi-clove garlic based on the concession of the parties, it is apparent from the passage quoted above that it also based its finding on record evidence. Having done so, in order to depart from the practice established in *Hejia*, the burden is on Commerce to explain this departure. *See Mueller Comercial de Mexico, S. de R.L. de C.V. v. United States*, 35 CIT __, __, 807 F. Supp. 2d 1361, 1367–68 (2011) ("[I]f the Department chooses to depart from [its] practice it is required to provide a reasonable explanation for doing so." (citing *Allegheny Ludlum Corp. v. United States*, 24 CIT 452, 459, 112 F.

established practice), and why the new practice is appropriate. *See Huvis Corp. v. United States*, 570 F.3d 1347, 1353 (Fed. Cir. 2009) (upholding this Court's decision that sustained the Department's use of a new practice, stating "Commerce need only show that its methodology is permissible under the statute and that it had good reasons for the new methodology."); *Torrington Co. v. United States*, 68 F.3d 1347, 1356 (Fed. Cir. 1995) (upholding Commerce's "new practice" of deducting indirect home-market transportation expenses from foreign market value in cases in which United States price is calculated on the basis of exporter's sales price); *Dorbest Ltd. v. United States*, 35 CIT __, __, 789 F. Supp. 2d 1364, 1370 (2011) ("Where Commerce adopts a practice that substantially deviates from precedent, it must at least acknowledge the change and show that there are good reasons for the new policy. The new practice must also be within the scope of authority granted to Commerce by the relevant statute.") (citations omitted); *cf. AIMCOR v. United States*, 23 CIT 1000, 1012, 86 F. Supp. 2d 1248, 1259 (1999) ("Because these general policy statements do not set forth any reasons *why* Commerce believed it appropriate to depart from its former practice, its allegedly new 'practice' . . . , without more, cannot serve as a basis for refusing to [use the practice advocated by plaintiffs].").

Supp. 2d 1141, 1148 (2000))); *PSC VSMPO-AVISMA Corp. v. United States*, 35 CIT __, __, 755 F.Supp.2d 1330, 1339 (2011). The Department has not provided an adequate explanation here. In other words, the court finds that Commerce has failed to explain why it departed from its practice of treating single-clove garlic as a product commanding a higher price than multi-clove garlic.

While Yuanxin itself provided some evidence that demonstrates that the two types of whole garlic are similar, the Department did not address the question of whether single-clove garlic commands a higher price than other types of garlic, and whether the pricing is affected by the unique nature of the single-clove garlic. *See Hejia* Issues & Dec. Mem. at 5 ("[E]ntries of multi-clove garlic . . . , both parties concede, have prices significantly lower than Hejia's price for single clove garlic."). Although the Department cites its longstanding practice of comparing the price of a newly-shipped product to the AUV of products entered under the same HTSUS heading, it fails to acknowledge the practice it established in *Hejia*.

In its brief pricing discussion, the Department relies on its finding that there is no evidence of a distinct market for single-clove garlic. Bona Fides Mem. 6. Commerce, however, cannot rely on an absence of evidence of a niche market to overcome its obligation to follow its past practice in which it found that single-clove garlic commands a higher price. *See, e.g.*, Bona Fides Mem. at 6 ("[T]here is *no evidence on the record* that the 'market' for single-clove-garlic in the United States is distinct from the market for fresh whole garlic in general." (emphasis added)). This is particularly the case because the Department made no effort to determine whether there is a distinct market for single-clove garlic. Thus, although Commerce issued a supplemental questionnaire following publication of the Preliminary Remand Results, its questions did not seek information relating to a distinct market for the single-clove variety. Rather, Commerce's questions were confined to physical characteristics, growing processes, and Yuanxin's reasons for "decid[ing] to purchase single-clove garlic." Pl.'s 3d Resp. 2–3.

Because the Department asked no questions about a separate market for single-clove garlic, plaintiff was not alerted that it should place on the record information that would counter the Department's conclusion that there was "*no evidence on the record* that the market for single-clove garlic in the United States is distinct from the market for fresh whole garlic in general." Bona Fides Mem. at 6. Thus, the Department's statement that the record contained no niche market information is an inadequate explanation of its decision not to continue to use the practice it established in *Hejia*.

As to Commerce's claim that *Fish Fillets*, *Stainless Steel*, and *Wooden Bedroom Furniture* cannot form the basis for an argument before the court because the bona fides memoranda for these reviews were neither available to the public nor placed on the record in this review, the court finds this claim unconvincing. This Court has reviewed arguments based on these three reviews in the past, and the availability of the underlying confidential memoranda was not an impediment to its analysis. *See Jinxiang Chengda*, 37 CIT at __, Slip Op. 13–40, at 11 ("In those reviews, according to plaintiff, Commerce found that the Customs data did not provide a useful comparison because the products under review were unique, and thus not comparable to the products represented by the Customs data, even though the unique products fell under the same tariff heading as the other products in the data."). Moreover, the Department itself has fully described its reasons for the treatment accorded the products discussed in those reviews. Therefore, plaintiff's arguments relating to these three reviews are not barred.

Finally, here, plaintiff placed at least some evidence on the record indicating that a niche market existed for single-clove garlic. In particular, plaintiff provided Indian offer prices for single-clove garlic during the POR that reflected an average offer price of $1.28 per kilogram. Bona Fides Mem. at 5. While lower than the sales prices at the high end of the Customs data, the average of the Indian offer prices is certainly higher than the AUV from the Customs data of [[ ]] per kilogram. Thus, because it failed to make any effort to determine if there is indeed a distinct market for single-clove garlic, the Department has not adequately explained its departure from the practice it established in *Hejia*. Therefore, the question must be remanded.

IV. The Department's Comparison Between Yuanxin's U.S. Sales Price & Its Third-Country Sales Was Not Supported by Substantial Evidence

As part of its sales price analysis, Commerce also compared Yuanxin's U.S. sales price to the prices for the sales the company made to third countries (i.e., other than to the United States) both during and after the POR. In doing so, the Department found that, although "[t]he price of Yuanxin's U.S. sale mirrors the price of [its] third country sales of single-clove garlic during the POR . . . , after the POR, the prices of these third country sales dropped by [[ ]]." Bona Fides Mem. at 5. Based on these observations, Commerce found that, "[a]ssuming the price of Yuanxin's U.S. sales continued to mirror the price of its third country sales, Yuanxin's subsequent hypothetical post-POR U.S. single-clove garlic sales prices would then also de-

crease by [[ ]].” Bona Fides Mem. at 5. For this reason, Commerce concluded that “Yuanxin’s POR sales of single-clove garlic do not appear to be a good indicator of future sales.” Bona Fides Mem. at 5.

Plaintiff objects to this conclusion, stating that “while Commerce found an apples-to-apples comparison of Yuanxin’s sales to all markets in the [POR], it impermissibly made comparisons after the POR and then speculated that future Yuanxin prices to the U.S. would mirror the decline in price in third markets.” Pl.’s Br. 23. Under the “best available information” framework,[7] according to plaintiff, “Commerce [should] reject any analysis outside Yuanxin’s POR since it has third-country data within the POR.” Pl.’s Br. 23.

In response, defendant counters that “Commerce put the subject sale within the context of Yuanxin’s normal established business practice with this third-country customer.” Def.’s Mem. 23. Furthermore, Commerce’s goal in a new shipper review is to determine “whether the sale(s) under review are indicative of future commercial behavior.” *Hebei*, 29 CIT at 613, 374 F. Supp. 2d at 1342. Therefore, the Department argues that it was “entirely appropriate for Commerce to compare Yuanxin’s third-country sales price of [[ ]] during the [POR] with its sales price of [[ ]] to this same country after the [POR], and to determine that the drop in price for Yuanxin’s third-country sales demonstrated that Yuanxin’s sales during the [POR] were not reliable indicators of future prices.” Def.’s Mem. 23. In other words, because the prices for plaintiff’s sales to third countries dropped significantly after the POR, Commerce concluded that Yuanxin’s U.S. sales prices would not remain constant following the POR because future prices would “mirror” Yuanxin’s third-country sales and thus decline as well.

With respect to Commerce’s methodology, this Court has often affirmed the procedure of considering a plaintiff’s third-country sales as one part of its bona fide analysis. *See, e.g., Shandong Chenhe*, 34

[7] The “best available information” framework is part of Commerce’s surrogate valuation analysis conducted to determine whether merchandise is being, or is likely to be, sold at less-than-fair value. *See* 19 U.S.C. § 1677b(c)(1) (directing Commerce, when calculating normal value, to value the factors of production “based on the best available information regarding the values of such factors in a market economy country”). Thus, it is not part of the Department’s bona fides sales framework, which relies on a “totality of the circumstances” analysis. *See* Def.-Ints.’ Resp. 23 (“Yuanxin argues that Commerce is compelled to rely on the ‘best information available’ in reaching its determinations, and that Commerce should limit its analysis to information that is specific to the POR. Those arguments, however, are not consistent with Commerce’s well-established practice of considering the ‘totality of the circumstances’ of a transaction in evaluating its *bona fides*.” (citations omitted)). Therefore, it is unclear why plaintiff grounds its arguments in the “best available information” framework.

CIT at __, Slip Op. 10–129, at 17–18; *Hebei New Donghua*, 29 CIT at 615, 374 F. Supp. 2d at 1343; *Tianjin Tiancheng*, 29 CIT at 269, 366 F. Supp. 2d at 1258 ("[T]hird-country sales were relevant to the determination and demonstrated that Plaintiff had priced the product in a manner more reflective of the AUV data during the POR.").

As to the facts presented here, Commerce compared the third-country sales prices to Yuanxin's U.S. sales price and found that they were comparable during the POR. It then reasoned that Yuanxin's sales prices to the United States would decrease in the future because they would continue to mirror those of its third-country sales. While Commerce's analysis of Yuanxin's third-country sales was reasonable, its conclusion that Yuanxin's future pricing would necessarily follow that of its third-country sales borders on conjecture. That is, it was reasonable to compare Yuanxin's U.S. sales price of [[ ]] to its third-country sales price of [[ ]] and to conclude that they were roughly comparable during the POR. The record, however, is bare of evidence indicating that these prices are tied together such that they will rise or fall proportionally in the future.

Moreover, even if the Department's conclusion that prices would drop proportionally was justified, Commerce's purpose in a new shipper review is not to establish a sales price that will remain constant. Rather, using its totality of the circumstances analysis, the Department's purpose is to determine whether the transaction or transactions under review are commercially reasonable and thus indicative of future commercial behavior. Here, there is nothing on the record suggesting that the post-POR third-country sales were other than commercially reasonable. Thus, standing alone, the Department's prediction that "Yuanxin's subsequent hypothetical post-POR U.S. single-clove garlic sales prices would then also decrease by [[ ]]" says nothing about the commercial reasonableness of plaintiff's sale during the POR, nor does it say anything about the commercial reasonableness of future sales, even if they are made at a lower price. Bona Fides Mem. at 5. Thus, Commerce's unconvincing third-country sales analysis is not supported by substantial evidence, nor is it sufficiently probative to be considered as part of the Department's totality of the circumstances analysis. On remand, however, the Department shall take into account its third-country sales price comparison, which shows that Yuanxin's third-country sales were at a relatively high price that was roughly equal to its U.S. sales price.

V. Other Aspects of Commerce's Analysis

Because decisions with respect to certain other aspects of the Department's finding that Yuanxin's price was abnormally high will

depend on the remand results, the court will reserve on their consideration until the review of those results. In like manner, questions concerning Commerce's finding that plaintiff's sole entry was of an unusually small quantity will be reviewed following remand because only then will it be known whether the quantity comparison was valid.

VI. The Department's Determination That the Nature of Yuanxin's Sale Was Atypical Was Supported by Substantial Evidence

Although the Department's findings as to Yuanxin's sales price and quantity will be affected by the remand results, Commerce's findings concerning the nature of the garlic sale need not wait. As the final part of Commerce's bona fide analysis, the Department examined the nature of Yuanxin's transaction. Bona Fides Mem. at 8. In the Preliminary Results, "the Department noted that Yuanxin sold [its] single-clove garlic to [the Reseller] who then resold it to [the Wholesaler], . . . but that Yuanxin had not provided price or quantity information on the resale transaction between [the Reseller] and [the Wholesaler]." Bona Fides Mem. at 8. After the Preliminary Results, however, the Department received additional information regarding both of the transactions which "the Department finds indicative that Yuanxin's sale was atypical of normal business practices." Bona Fides Mem. at 8.

In particular, the Reseller "provided additional information regarding the details of its sale of subject merchandise to [the Wholesaler]" and reported that the Reseller "had no prior experience in the garlic industry . . . but that it wanted to get into the business of trading garlic." Bona Fides Mem. at 8. Indeed, the Reseller was a sporting and athletic goods manufacturer. The Department also found that the Wholesaler, the company that ultimately received the garlic, "is the same company that purchased [[ ]] [during the prior POR and] . . . that [the Wholesaler], an importer with at least some prior experience as an importer of single-clove garlic specifically . . . contacted [the Reseller] in the early summer of 2009 so that it might find an exporter of single-clove garlic." Bona Fides Mem. at 8. Furthermore, here Yuanxin itself acted as the importer of record, and the Reseller's only connection with the transaction was "that it took possession of the garlic upon arrival at the port. After paying for the ocean freight, [the Reseller] reported that it released the bill of lading to [the Wholesaler] . . . [and] that it is unable to provide further information on the shipment after the release of the bill of lading." Bona Fides Mem. at 8. In an attempt to explore the issues surrounding the second sale from the Reseller to the Wholesaler, the Depart-

ment issued a questionnaire to the Wholesaler, but the Wholesaler did not respond. Bona Fides Mem. at 8.

Based on the information submitted by the Reseller, Commerce found it "highly unusual that [the Wholesaler], a company with previous experience not only [[ ]] from the PRC, but also participating in antidumping proceedings before the Department,[8] would seek out a company with no experience whatsoever in the garlic industry to locate a PRC supplier." Bona Fides Mem. at 8. In addition, while the Wholesaler had acted as the importer of record for its previous [[ ]], in this review the Wholesaler asked the Reseller "to act as its intermediary to import the subject merchandise into the United States." Bona Fides Mem. at 8. Because the Wholesaler did not respond to its questionnaire, however, "the Department [was] unable to determine why [the Wholesaler] decided to structure its purchase of single-clove garlic in this manner, which so clearly differs from its [[ ]]." Bona Fides Mem. at 8; Bona Fides Mem. at 9 ("[The Wholesaler's] failure to provide information makes it impossible for the Department to fully explore whether the circumstances of Yuanxin's sale were typical of normal business practices or otherwise commercially reasonable."). Hence, while Commerce stated that it "lacks any understanding of why [the Wholesaler] would choose to import through [the Reseller]," it found that "[t]he structure of Yuanxin's [new shipper review] sale . . . is unusual, and apparently inefficient, in light of [the Wholesaler's] previous [[ ]]." Bona Fides Mem. at 9.

Yuanxin objects to this conclusion. First, plaintiff insists that "[t]here is no nexus between Yuanxin and [the Wholesaler]. Presumably, Yuanxin and [the Wholesaler] did not know each other, since [the Wholesaler] ask[ed] [the Reseller] to find a supplier in China of single-clove garlic. Thus, Yuanxin had no role in [the Reseller] selling to [the Wholesaler]." Pl.'s Br. 31. For this reason, "Yuanxin's sale is the only one for which it can take responsibility and which Commerce can appropriately analyze," and "Commerce provides no authority to support its decision that it can ignore the sale by the exporter, and go downstream to analyze subsequent sales." Pl.'s Br. 32–33.

Further, plaintiff contends that "Commerce cites not a single objection to the sale between Yuanxin and [the Reseller]. The silence is deafening concerning this transaction. . . . The record is clear: there is no evidence on the record even remotely suggesting that Yuanxin's sale to [the Reseller] was anything less than normal." Pl.'s Br. 32. Therefore, according to plaintiff, "[s]ince Commerce's concern is only

[8] [In particular, the Wholesaler participated in the [[ ]] before Commerce. Bona Fides Mem. at 8.]

with the second transaction between [the Reseller] and [the Wholesaler], its decision was not based on substantial evidence on the record and not reasonabl[y] determined." Pl.'s Br. 3.

In response, defendant argues that "Yuanxin does not reference record evidence to support its conclusions regarding the relationship between Yuanxin and [the Wholesaler]; it states only that, given the nature of the sales transactions, '[p]resumably, Yuanxin and [the Wholesaler] did not know each other.'" Def.'s Mem. 38 (quoting Pl.'s Br. 31). Additionally, relying on *Hebei* and *Chenhe*, defendant points out that "this Court has affirmed Commerce's examination of the downstream customer's behavior and commercial transactions— circumstances that are beyond the scope of the United States sales in question—in Commerce's bona fides analysis." Def.'s Mem. 38 (citing *Hebei*, 374 F. Supp. 2d at 1343–44; *Shandong Chenhe*, 34 CIT at __, Slip Op. 10–129, at 6).

As to plaintiff's contention that Commerce did not find anything objectionable about the first sale (i.e., that between Yuanxin and its U.S. customer, the Reseller), Commerce counters that it did, in fact, identify issues with Yuanxin's sale to the Reseller: "Commerce found the structure of Yuanxin's sale to [the Reseller] to be 'unusual' and 'inefficient, in light of [the Wholesaler's] previous [[ ]].'" Def.'s Mem. 38 (quoting Bona Fides Mem. at 9); Def.-Ints.' Resp. 31 ("Yuanxin's assertion that 'there is no evidence on the record even remotely suggesting that Yuanxin's sale to [the Reseller] was anything less than normal' is contradicted by the Department's *Final Bona Fides Memo*. In particular, the Department's analysis highlights the unusual circumstances whereby [the Reseller] (a company that 'had no experience in the garlic industry' at the time it began interacting with Yuanxin) was approached by [the Wholesaler] (a company 'with previous experience not only [[ ]] from the PRC, but also participating in antidumping proceedings before the Department') to identify a supplier. Thus, the Department's analysis clearly does identify unusual circumstances in the Yuanxin to [the Reseller] transaction, both when analyzed individually as well as when analyzed in relation to [the Wholesaler's] [[ ]].") (citations omitted).

Additionally, the Department points out that Yuanxin, and not the Reseller, acted as the importer of record, "and that [the Reseller] acted as a middleman between an established exporter [(Yuanxin)] and an experienced importer [(i.e., the Wholesaler)], even though [the Reseller] had no previous experience in the garlic industry." Def.'s Mem. 38–39. Hence, "[i]t was the entire series of events, including Yuanxin's sale to [the Reseller] and [its] particular role in the impor-

tation and sale of the garlic, that called into question the nature of the transaction." Def.'s Mem. 39. Therefore, according to Commerce, "[i]t was . . . reasonable for Commerce to find that, considering the experiences of the companies involved in the transaction, the evidence in totality indicates that the sale was not based on normal business practices." Def.'s Mem. 39.

Commerce has the authority to consider a variety of factors in determining whether a transaction is commercially reasonable. *See Hebei New Donghua*, 29 CIT at 616–17, 374 F. Supp. 2d at 1343–44 (sustaining Commerce's consideration of a customer's post-sale behavior); *Windmill*, 26 CIT at 231–32, 193 F. Supp. 2d at 1313–14. 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, plaintiff's assertion that "Yuanxin's sale is the only one . . . which Commerce can appropriately analyze" is incorrect. In other words, it was entirely within Commerce's authority to consider the sale between the Reseller and Wholesaler as one aspect of its bona fide analysis.

Furthermore, as noted, plaintiff is also incorrect that Commerce found no issues with the sale between Yuanxin and the Reseller. Indeed, even in the Preliminary Bona Fides Memorandum, the Department was concerned with the structure of Yuanxin's sale. Prelim. Bona Fides Mem. at 5–6. Thus, the peculiar circumstances presented here could be considered by Commerce in its totality of the circumstances analysis, and it was not unreasonable for Commerce to find that the sales arrangement involved here was atypical. Indeed, Yuanxin does not attempt to explain why a sporting goods manufacturer acted as a middleman for its sale to the Wholesaler, a company that had previously purchased single-clove garlic directly from Hejia. Therefore, the court finds reasonable Commerce's conclusion that the circumstances surrounding Yuanxin's sale were "atypical of normal business practice."

CONCLUSION AND ORDER

In sum, the Department has not explained its departure from the practice it established in *Hejia* and has not supported with substantial evidence its determination that it was appropriate to compare Yuanxin's sales price and quantity for its single-clove garlic to the sales prices and quantities for multi-clove garlic in the Customs data. In addition, while Commerce's analysis of Yuanxin's third-country sales was reasonable, its conclusion about Yuanxin's future pricing

based on these third-country sales was not reasonable, nor was it supported by substantial evidence. The Department, however, reasonably considered the nature of Yuanxin's transaction as part of its totality of the circumstances analysis. Its conclusion that the circumstances surrounding Yuanxin's transaction were atypical of normal business practices and indicative of a non-bona fide sale was supported by substantial evidence.

For the foregoing reasons, it is hereby

ORDERED that plaintiff's motion for judgment on the agency record is granted, in part, and Commerce's final determination rescinding plaintiff's new shipper review is remanded; it is further

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

ORDERED that, on remand, if Commerce wishes to rely upon a comparison of Yuanxin's sales price to the AUV from the Customs data, it must explain its departure from the practice it established in *Hejia*, and demonstrate with substantial evidence (1) that Yuanxin's single-clove garlic is not a unique product when compared to multi-clove garlic, (2) that there is not a distinct market for single-clove garlic, and (3) that factors relating to product uniqueness and distinct market do not affect the price that single-clove garlic commands. In addition, the Department shall take into account plaintiff's arguments relating to *Fish Fillets*, *Stainless Steel*, and *Wooden Bedroom Furniture*, as well as the evidence relating to the relatively high offer prices for single-clove garlic in India and the high prices for plaintiff's third-country sales; it is further

ORDERED that, in the event that a comparison of Yuanxin's sales price to the AUV from the Customs data is found invalid, the Department must use another methodology to determine the commercial reasonableness of Yuanxin's sales price; it is further

ORDERED that the Department determine, based upon the methodology used for its price analysis, a reasonable methodology for examining the quantity of Yuanxin's sale; it is further

ORDERED that, regardless of the sales price determination it reaches, Commerce must support with substantial evidence its sales quantity findings; it is further

ORDERED that the Department shall reopen the record to solicit information regarding whether single-clove garlic is a unique product, whether there is a distinct or specialized market for single-clove garlic, and whether these facts affect the price that single-clove garlic commands; it is further

ORDERED that the Department may reopen the record to solicit information for any other purpose; it is further

ORDERED that the remand results shall be due on September 10, 2013; comments to the remand results shall be due thirty (30) days following filing of the remand results; and replies to such comments shall be due fifteen (15) days following filing of the comments.

Dated: June 18, 2013
New York, New York

/s/ Richard K. Eaton
RICHARD K. EATON

Slip Op.13–85

FORMER EMPLOYEES OF WEATHER SHIELD MANUFACTURING, INC., Plaintiff, v. U.S. SECRETARY OF LABOR, Defendant.

Before: Judith M. Barzilay, Senior Judge
Court No. 10–00299
Public Version

[Plaintiffs' motion for judgment on the agency record is denied and the Department of Labor's remand results are sustained.]

Dated: July 1, 2013

Cassidy Levy Kent (USA) LLP (*James R. Cannon, Jr.*) and *Williams Mullen, PC* (*Dean A. Barclay and J. Forbes Thompson*) for Plaintiff Former Employees of Weather Shield Manufacturing, Inc.

Stuart F. Delery, Acting Assistant Attorney General; *Jeanne E. Davidson*, Director; *Patricia M. McCarthy*, Assistant Director, Commercial Litigation Branch, Civil Division, United States Department of Justice (*Antonia R. Soares*) for Defendant United States; *Vincent Costantino*, Office of the Solicitor, United States Department of Labor, of Counsel.

OPINION

This matter comes before the court upon Plaintiffs' motion for judgment on the agency record filed pursuant to USCIT R. 56.1. The case returns to the court for the fourth time following the U.S. Department of Labor's ("Labor") negative determination on remand. *See Weather Shield Manufacturing, Inc. Corporate Office, Medford, WI: Notice of Negative Determination on Third Remand*, 78 Fed. Reg. 775 (Dep't of Labor Jan. 4, 2013) ("*Remand Results*"). Plaintiffs are former administrative support employees of Weather Shield Manufacturing, Inc. ("Weather Shield"), a producer of doors and windows, who challenge Labor's decision denying their application for Trade Adjustment Assistance ("TAA") under Section 222 of the Trade Act of 1974, as amended by the Trade and Globalization Adjustment Assistance Act

of 2009, 19 U.S.C. § 2272. Labor has again determined that Plaintiffs are ineligible for TAA benefits for the 2008 to 2009 period, and Plaintiffs maintain that this determination is not supported by substantial evidence. The court has jurisdiction pursuant to 28 U.S.C. § 1581(d). For the reasons set forth below the court sustains Labor's determination.

STANDARD OF REVIEW

Findings of fact made by Labor during TAA investigations "if supported by substantial evidence, shall be conclusive." 19 U.S.C. § 2395(b). "Although substantial evidence must be more than a 'mere scintilla,' it is 'something less than the weight of the evidence, and the possibility of drawing two inconsistent conclusions from the evidence does not prevent an administrative agency's finding from being supported by substantial evidence.'" *Former Employees of Barry Callebaut v. Chao*, 357 F.3d 1377, 1381 (Fed. Cir. 2004) (quoting *Consolo v. Fed. Mar. Comm'n*, 383 U.S. 607, 620 (1966)). Rather, the role of the court is to "merely vet the determination," and to affirm where that determination "is reasonable and supported by the record as a whole . . . ." *Nippon Steel Corp. v. United States*, 458 F.3d 1345, 1352 (Fed. Cir. 2006) (quotation omitted).

DISCUSSION

The TAA program provides a range of benefits to workers who have lost their jobs due to increased imports or shifts in production to a foreign country. *See* 19 U.S.C. § 2272. Under the statute, Labor must first determine whether a "significant number or proportion of the workers in such workers' firm have become totally or partially separated or are threatened to become totally or partially separated" from employment. *See* 19 U.S.C. § 2272(a)(1). That requirement is satisfied here.

Once the separation element has been satisfied, Labor must then determine if one of two other provisions of the statute are satisfied. *See* 19 U.S.C. §§ 2272(a)(2)(A) & (B). Under § 2272(a)(2)(A), Labor must determine whether: (1) "sales or production, or both, of such firm have decreased absolutely;" (2) "imports of articles . . . like or directly competitive with articles produced . . . by such firm have increased;" and (3) that increase in imports "contributed importantly to such workers' separation or threat of separation and to the decline in the sales or production of such firm." 19 U.S.C. § 2272(a)(2)(A)(i) - (iii).

Under § 2272(a)(2)(B), Labor will investigate whether (1) "there has been a shift by such workers' firm to a foreign country in the production of articles . . . like or directly competitive with articles which are

produced . . . by such firm;" or the firm "acquired from a foreign country articles . . . that are like or directly competitive with articles which are produced . . . by such firm;" and (2) this shift "contributed importantly to such workers' separation or threat of separation." 19 U.S.C. § 2272(a)(2)(B)(i) - (ii).

In its previous remand order, the court directed Labor to provide a fuller explanation for a downward adjustment in Weather Shield's 2008 sales data, and to further investigate whether Weather Shield's customers were purchasing imports. Following issuance of that order, Labor sent a number of emails to Weather Shield requesting that it explain why its 2008 sales were adjusted downward from [[ ]] to [[ ]]. Supplemental Updated Administrative Record ("SUAR") 32–34. This adjustment was material because 2009 sales were [[ ]], so the new 2008 sales number turned a decrease in sales during the 2008–2009 period into an increase. Brandon Brunner, Weather Shield's corporate counsel, responded that the original higher 2008 number had included intercompany sales and the lower number was adjusted to reflect net sales to customers only. *Id.* at 32.

Because 19 U.S.C. § 2272(a)(2)(A)(i) contemplates an award of TAA if either sales or production have decreased, Labor also requested production data from Weather Shield for the relevant period. *Id.* at 35–38. After receiving several follow-up requests from Labor, Brunner responded that he "had requested these numbers and will provide them shortly. This request is not as easily provided as you may think and is taking the efforts of several people running several different quires [sic] of our electronic data." *Id.* at 35. Brunner followed up the next day stating that Weather Shield had manufactured [[ ]] window and door units in 2008 and [[ ]] in 2009. *Id.* at 41. Noting that these numbers reflected a [[ ]] decrease in production during the same period that Weather Shield reported a [[ ]] sales increase, Labor asked Weather Shield to explain the "contradictory pattern" evidenced by this data. *Id.* at 40. Labor did not receive an immediate response to this inquiry and so it sent a follow-up email with a reminder that this information was necessary to conclude the investigation. *Id.* At that point, Brunner responded that he did not know the answer to the question, and was unable to divert resources to the request. *Id.*

Upon receiving this response from Brunner, Labor reiterated the importance of the requested information to the remand investigation, and issued to Weather Shield a subpoena warning letter. *Id.* at 46–47. The letter provided a deadline by which Weather Shield was to ex-

plain the inconsistent sales and production data, and stated that if Weather Shield failed to provide an explanation, Labor would issue a subpoena in order to obtain it. *Id.* at 47. When Weather Shield failed to provide an explanation by the deadline, Labor issued a subpoena citing 19 U.S.C. §§ 2272(d)(3)(B) & 2321 and 29 C.F.R. 90.14(a).[1] At that point, Weather Shield submitted a letter to Labor saying that the production numbers previously reported were incorrect, and that production had actually increased from [[ ]] units in 2008 to [[ ]] units in 2009. *Id.* at 81. Labor received two sets of comments from Plaintiffs challenging the sales and production data Weather Shield provided. *Id.* at 382–86, 467–69; *Remand Results*, 78 Fed. Reg. at 777–78. Ultimately, however, Labor found the information provided by Weather Shield reliable, and the company's increased sales and production between 2008 and 2009 formed a basis for the *Remand Results'* negative determination.

Plaintiffs argue that Labor's determination cannot be sustained because Weather Shield never explained why it changed its production numbers, and the agency should have investigated the change further. Additionally, Plaintiffs call into question the accuracy of Weather Shield's production data by relying on the company's closure of its Greenwood, WI manufacturing facility in 2009. *Id.* at 15. "One would expect," Plaintiffs argue, a plant closure to lead to a decrease in production, yet Weather Shield reported an increase and Labor failed to inquire further into this "apparent contradiction." Pl. Br. 16. Regarding the sales data, Plaintiffs point out that the original 2008 and 2009 sales numbers were reported at the same time. Plaintiffs argue that it is therefore "logical to assume" that the numbers were based on the same type of data, and that if the 2008 number was adjusted downward after excluding intercompany sales the 2009 number may merit a similar adjustment. Pl. Br. 18. Because Labor failed to inquire into this possibility, Plaintiffs argue that the court cannot sustain the *Remand Results* as supported by substantial evidence.

After reviewing the record, the court concludes that Labor's determination regarding Weather Shield's increased sales and production is supported by substantial evidence. Upon providing the adjusted production numbers, Brunner informed Labor that the numbers originally provided were incorrect and that he was providing corrected numbers. *Id.* at 81. Likewise, Brunner informed Labor that the 2008 sales numbers were adjusted downward because the original

[1] These provisions establish Labor's authority to issue subpoenas during TAA investigations, and to petition the U.S. District Courts for an order requiring compliance should a party refuse to obey the subpoena.

numbers included intercompany sales. *Id.* at 32. Accordingly, Labor was not faced with a record containing unaddressed or unexplained contradictions. While Weather Shield's explanations were not extensive, they did provide a basis according to which Labor could weigh Weather Shield's adjusted numbers. *See Former Employees of Marathon Ashland Pipe Line, LLC v. Chao*, 370 F. 3d 1375, 1385 (Fed. Cir. 2004) ("[Labor] is entitled to base an adjustment assistance eligibility determination on statements from company officials if [Labor] reasonably concludes that those statements are creditworthy and are not contradicted by other evidence.").

The question then becomes whether Labor reasonably concluded that Brunner's statements were creditworthy, and the court concludes that it did. First, after gathering the information set forth above during several months of email and letter correspondence, Labor issued an Affirmation of Information. *Id.* at 176–78. The Affirmation requested that a representative of Weather Shield affirm a number of statements if true, including the following:

> Weather Shield window and door sales in 2008 total [[ ]] (U.S. dollars).
>
> Weather Shield window and door sales in 2009 total [[ ]] (U.S. dollars).
>
> Weather Shield window and door production in 2008 total [[ ]] (units).
>
> Weather Shield window and door production in 2009 total [[ ]] (units).

Id. at 177. The Affirmation then stated that the signer understood that

> providing false information is a Federal offense (18 U.S.C. § 1001) and is a violation of the Trade Act (19 U.S.C. § 2316). By signing the below, I agree to the following statement:
>
> **"Under penalty of law, I declare that to the best of my knowledge and belief the information I have provided in this document is true, correct, and complete."**

Id. at 178 (emphasis in original). After writing "Yes" under each of the statements above, Brunner signed the Affirmation. Labor determined that it was reasonable to rely on information provided subject to such penalties, and the court concludes that this reliance was reasonable. *See Former Employees of Barry Callebaut*, 357 F.3d at 1383 (finding that a statement that an affidavit is signed "subject to punishment"

for supplying false information is indicia that the affidavit is sufficiently "trustworthy to constitute substantial evidence").

That Labor was reasonable in relying on the sales and production data provided by Weather Shield is bolstered by the fact that while Plaintiffs raise questions regarding Labor's determination, they point to no evidence in the record contradicting the evidence on which Labor relied. The closest they come is in arguing that the 2009 Greenwood, WI plant closure is inconsistent with increased production, or that the 2009 sales data may warrant the same downward adjustment the 2008 data did. While these may have been legitimate avenues of inquiry for Labor to undertake, the agency's failure to do so did not render the inquiries it did undertake, and the evidence upon which it relied, so infirm as to fail the substantial evidence standard. *Former Employees of Barry Callebaut*, 357 F.3d at 1381.

Additionally, these were not the first proceedings in which Labor investigated Weather Shield. In fact, Brunner had been Weather Shield's primary representative in previous proceedings in which separated workers were awarded TAA, *see Weather Shield Manufacturing, Inc., Corporate Office, Medford, WI; Notice of Revised Determination on Remand*, 75 Fed. Reg. 51,851 (Dep't of Labor Aug. 23, 2010), and this prior experience gave Labor no reason to question his credibility. Def. Br. 20. Moreover, while Weather Shield and Brunner were not responsible for providing the benefits that would have accompanied an award of TAA, they are the ones that would suffer the penalties of responding untruthfully to Labor. Labor reasonably considered this while weighing the information provided. *Remand Results*, 78 Fed. Reg. at 778. Taking all of these facts together, the court concludes that it was reasonable for Labor to rely on the sales and production data provided during the investigation, and that Labor's determination that TAA was unavailable under 19 U.S.C. § 2272(a)(2)(A) because of the increase in Weather Shield's sales and production was supported by substantial evidence.

Labor also addressed the issue of imports during its remand investigation. In the previous remand order, the court expressed concern that Labor had not sufficiently investigated whether [[ ]], a customer of Weather Shield, was sold imports by its other suppliers. On remand, Labor engaged in an extensive survey, SUAR 241–93, 475–77, during which it contacted all of [[ ]] suppliers and determined the size of those suppliers, whether the suppliers' sales to [[ ]] increased or decreased during the relevant period, and the extent to which those sales consisted of imports. *Remand Results*, 78 Fed. Reg. at 779. The information gathered revealed that most of the suppliers did not sell imports to [[ ]]. Moreover, even though

some suppliers did sell [[ ]] imported goods, those goods accounted for less than 2% of the company's non-Weather Shield purchases in 2008 and 2009. SUAR 477, 522. The court is satisfied that substantial evidence supported the conclusion Labor reached based upon this information, namely that increased imports did not contribute importantly to the relevant worker separations.

Plaintiffs appear satisfied as well because they do not challenge this conclusion here. Rather, Plaintiffs argue that Labor failed to sufficiently investigate evidence that Weather Shield received imported door parts from a supplier named [[ ]]. In support, Plaintiffs submitted ship manifest data showing that [[ ]] was the consignee on ten shipments of door parts from Taiwan in 2008 that were ultimately delivered to Weather Shield. *Id.* at 386. Plaintiffs argue that this information may show a "shift . . . to a foreign country in the production of articles . . . like or directly competitive with articles which are produced . . . by such firm" thus qualifying the Plaintiffs for TAA eligibility under 19 U.S.C. § 2272(a)(2)(B). The court notes that this is a different basis for eligibility than has been asserted by Plaintiffs up to this point. However, given the nature of the TAA statutory regime, the court finds that it is appropriate to consider whether Plaintiffs are entitled to relief under this provision. *See Former Employees of Invista, S.A.R.L. v. U.S. Secretary of Labor*, 34 CIT __, 714 F. Supp. 2d 1320, 1336 (2010). ("[B]ecause of the *ex parte* nature of the certification process, and the remedial purpose of the [TAA] program, the agency is obligated to conduct [its] investigation with the utmost regard for the interest of the petitioning workers.") (quotation omitted).

After receiving this information, Labor inquired into whether Weather Shield imported doors or windows during the relevant period. SUAR 84. Brunner responded saying that Weather Shield had not, but stated that he was unsure whether its suppliers had. *Id.* To aid in Labor's investigation, Brunner supplied a list of Weather Shield's top twenty vendors and their contact information. *Id.* at 105. Brunner also stated that the items purchased from [[ ]] were not complete door units, but [[ ]] which were then placed into door frames manufactured by Weather Shield. *Id.* at 142. In other words, according to Brunner the [[ ]] purchased from [[ ]] and the door frame manufactured by Weather Shield, were assembled into "door units" which were then sold by Weather Shield. *Id.*

Additionally, the Affirmation of Information covered imports as well, and in it Brunner affirmed the following statements:

> Weather Shield did not import finished windows in 2008.
>
> Weather Shield did not import finished windows in 2009.

> Weather Shield did not import finished doors in 2008.
>
> Weather Shield did not import finished doors in 2009.
>
> In 2008, no entity which is part of the Schield Family Companies entered into contracts to bring into the U.S.A. either finished windows, finished doors, or articles that are like or directly competitive with either finished windows or finished doors.
>
> In 2009, no entity which is part of the Schield Family Companies entered into contracts to bring into the U.S.A. either finished windows, finished doors, or articles that are like or directly competitive with either finished windows or finished doors.

Id. at 177–78. Finally, Labor conducted its own search seeking to turn up evidence of imports similar to the [[ ]] imports, and the search retuned no results. *Id.* at 481–82, 485–88.

As an initial matter, the court notes that both Brunner and Labor focus on the fact that the goods received from [[ ]] were [[ ]], which are not "like or directly competitive with" the completed door units sold by Weather Shield. *See, e.g., id.* at 84, 178. However, it is not correct to focus only on completed door units because TAA eligibility can be found if a company shifts production to, or acquires from, a foreign country articles "like or directly competitive with" those produced by the company. There is no requirement that the shift in production, or foreign acquisition, involve only articles "like" those produced by the company for final sale. Accordingly, if Weather Shield produced [[ ]] itself, TAA eligibility could be impacted if Weather Shield shifted production to, or acquired from, a foreign country [[ ]] "like" the ones it produces.

However, the evidence on the record indicates that Weather Shield does not produce [[ ]]. When questioned on this point, Brunner stated that Weather Shield purchased the [[ ]] from [[ ]], incorporated them into Weather Shield-manufactured door frames, and then sold the completed door units. *Id.* 142. The parts imported in ten shipments in 2008 by [[ ]], namely [[ ]], were not "like or directly competitive with" items produced by Weather Shield, namely door frames and completed door units. Moreover, Labor's own search turned up no other similar goods imported and ultimately destined for Weather Shield. The court therefore concludes that Labor sufficiently investigated this matter after Plaintiff submitted evidence of

the 2008 imports, and that it reasonably concluded that no shift in production, or acquisition of foreign articles, contributed importantly to Plaintiffs' separation.

CONCLUSION

Labor's *Remand Results* are supported by substantial evidence and otherwise in accord with the law and shall be sustained.

Dated: July 1, 2013
New York, NY

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

Slip Op. 13–87

APPLETON PAPERS INC., Plaintiff, v. UNITED STATES, Defendant, and PAPER RESOURCES LLC, Defendant-Intervenor.

Before: Nicholas Tsoucalas, Senior Judge
Consol. Court No.: 12–00116
PUBLIC VERSION

Held: Plaintiff's motion for judgment on the agency record is denied because the Department of Commerce's final scope ruling is supported by substantial evidence and is otherwise in accordance with the law.

Dated: July 11, 2013

King & Spalding LLP (*Gilbert B. Kaplan*, *Brian E. McGill*, and *Joseph W. Dorn*) for Appleton Papers Inc., Plaintiff.

Stuart F. Delery, Principal Deputy Assistant Attorney General; *Jeanne E. Davidson*, Director, *Reginald T. Blades, Jr.*, Assistant Director, Commercial Litigation Branch, Civil Division, United States Department of Justice (*Joshua E. Kurland* and *Carrie A. Dunsmore*); Office of the Chief Counsel for Import Administration, United States Department of Commerce, *Whitney Rolig*, Of Counsel, for the United States, Defendant.

Greenberg Traurig, LLP (*Rosa S. Jeong* and *Philippe M. Bruno*) for Paper Resources LLC, Defendant-Intervenor.

OPINION

TSOUCALAS, Senior Judge:

This consolidated action comes before the court on plaintiff Appvion, Inc.'s[1] ("Appvion") motion for judgment on the agency record challenging the United States Department of Commerce's ("Com-

[1] By letter dated June 21, 2013, Appleton Papers Inc. notified the court that it changed its name to Appvion, Inc. on May 13, 2013. *See* Letter to the Hon. Tina Kimble, Clerk of the Court, re:Appleton Papers Inc. v. United States (June 21, 2013), ECF No. 55.

merce") determination in *Final Scope Ruling for Paper Resources, LLC's Lightweight Thermal Paper Converted and Packaged in the People's Republic of China Using Jumbo Rolls Produced in a Third Country*, Case Nos. A-570–920 and C570–921 (Mar. 23, 2012), Public Rec. 2/32 ("*Final Scope Ruling*").[2] *See Preliminary Scope Ruling for Paper Resources, LLC's Lightweight Thermal Paper Converted and Packaged in the People's Republic of China Using Jumbo Rolls Produced in a Third Country*, Case Nos. A570–920 and C-570–921 (Dec. 21, 2011), CR 2/11 ("*Preliminary Scope Ruling*"). Commerce and defendant-intervenor Paper Resources LLC ("Paper Resources") oppose Appvion's motion. For the reasons stated below, Appvion's motion is denied.

BACKGROUND

Lightweight thermal paper ("LWTP") "is a paper coated with thermal active chemicals . . . which react to form an image when heat is applied." CR 1/1 at 2. It is "specially intended to be used in special printers containing thermal print heads." *Id.* "LWTP is typically produced in jumbo rolls that are converted to narrower width rolls appropriate for its specific end uses."[3] *Id.* Production of LWTP occurs in three stages: (1) manufacturing jumbo rolls ("JRs") of LWTP; (2) applying thermal coating to the JRs; and (3) slitting and repackaging the coated JRs, a process called "conversion." *Id.* at 3–4.

LWTP from the People's Republic of China ("PRC") is subject to antidumping duty ("AD") and countervailing duty ("CVD") orders. *See AD Orders: LWTP From Germany and the PRC*, 73 Fed. Reg. 70,959 (Nov. 24, 2008); *LWTP from the PRC: Notice of Amended Final Affirmative CVD Determination and Notice of CVD Order*, 73 Fed. Reg. 70,958 (Nov. 24, 2008) ("*CVD Order*," and collectively, the "*Orders*"). The *Orders* contain identical scope language, covering:

> certain [LWTP], . . . irrespective of dimensions; with or without a base coat on one or both sides; with thermal active coating(s) on one or both sides that is a mixture of the dye and the developer that react and form an image when heat is applied; with or without a top coat; and without an adhesive backing.

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[2] All citations to the record are from the countervailing duty inquiry (C-570–921). The record for the antidumping duty inquiry (A-570–920) contains identical documents. *See* Def.'s Resp. Pl.'s Mot. J. Agency R. at 2 n.1. Hereinafter, all documents in the amended public record will be designated "PR" and all documents in the confidential record designated "CR" without further specification except where relevant. Documents listed in parts one and two of the record will be cited as "1/X" and "2/X," respectively, with "X" referring to the document number within that record.

[3] LWTP's end uses include "ATM receipts, credit card receipts, gas pump receipts, retail store receipts, etc." CR 1/1 at 2.

CVD Order, 73 Fed. Reg. at 70,958 (internal footnotes omitted). An explanatory footnote to the scope definition states that "[b]oth jumbo and converted rolls (as well as LWTP in any other form, presentation, or dimension) are covered by the scope of these orders." Id. at 70,958 n.1.

Paper Resources imports LWTP that is manufactured in JR form and coated in [[ ]] then is converted in the PRC by Shanghai Hanhong Paper Company ("Hanhong"). *See* PR 2/1 at 1. In February 2011, Paper Resources requested that Commerce determine that LWTP manufactured in this fashion is outside the scope of the *Orders* because its country of origin is not the PRC. CR 1/1 at 1, 4–10. Commerce initiated a scope inquiry in April 2011. *See* PR 1/9 at 1.

In the *Preliminary Scope Ruling*, Commerce found that Paper Resources's LWTP was outside the scope of the *Orders* because its country of origin was not the PRC. CR 2/11 at 11–12. Using its substantial transformation analysis, Commerce concluded that the conversion process was insufficient to change the country of origin of [[ ]] JRs because (1) JRs and converted rolls were of the same class or kind of merchandise; (2) conversion operations required only "minimal" capital investment and expertise; and (3) conversion did not alter the JRs' end use, mechanical properties, or essential characteristic. *See id.* at 6–12. Commerce also declined to include an anti-circumvention inquiry in its country of origin analysis. *Id.* at 13–15.

Commerce upheld the results of its preliminary determination in the *Final Scope Ruling*. *See* PR 2/32 at 3–4. Additionally, Commerce declined Appvion's request to impose a mandatory country of origin certification program on Hanhong and Paper Resources because it did not first make an affirmative determination that either party circumvented the *Orders*. *Id.* at 6.

Appvion challenges Commerce's scope determination and the decision not to impose a mandatory country of origin certification program. *See* Pl.'s Br. Supp. Mot. J. Agency R. at 2–4 ("Pl.'s Br."). The court held oral argument on June 27, 2013. Oral Argument, *Appleton Papers Inc. v. United States*, Consol. Ct. No. 12–00116 (Ct. Int'l Trade June 27, 2013) ("Oral Arg.").

JURISDICTION

The Court has jurisdiction over this matter pursuant to section 516A(a)(2)(B)(vi) of the Tariff Act of 1930 (the "Act"),[4] as amended, 19 U.S.C. § 1516a(a)(2)(B)(vi) (2006), and 28 U.S.C. § 1581(c).

[4] All further references to the Act will be to the relevant provisions of Title 19 of the United States Code, 2006 edition, and all applicable supplements thereto.

STANDARD OF REVIEW

This Court must uphold Commerce's scope determination unless 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). "Substantial evidence is 'such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.'" *Huaiyin Foreign Trade Corp. (30) v. United States*, 322 F.3d 1369, 1374 (Fed. Cir. 2003) (quoting *Consol. Edison Co. v. NLRB*, 305 U.S. 197, 229 (1938)). This Court grants "significant deference to Commerce's interpretation of its own orders," *Allegheny Bradford Corp. v. United States*, 28 CIT 830, 842, 342 F. Supp. 2d 1172, 1183 (2004), "[h]owever, Commerce cannot 'interpret' an antidumping order so as to change the scope of that order, nor can Commerce interpret an order in a manner contrary to its terms." *Duferco Steel, Inc. v. United States*, 296 F.3d 1087, 1095 (Fed. Cir. 2002) (citing *Eckstrom Indus., Inc. v. United States*, 254 F.3d 1068, 1072 (Fed. Cir. 2001)).

"Courts look for a reasoned analysis or explanation for an agency's decision as a way to determine whether a particular decision is arbitrary, capricious, or an abuse of discretion." *Wheatland Tube Co. v. United States*, 161 F.3d 1365, 1369 (Fed. Cir. 1998). "An abuse of discretion occurs where the decision is based on an erroneous interpretation of the law, on factual findings that are not supported by substantial evidence, or represent an unreasonable judgment in weighing relevant factors." *WelCom Prods., Inc. v. United States*, 36 CIT __, __, 865 F. Supp. 2d 1340, 1344 (2012) (citing *Star Fruits S.N.C. v. United States*, 393 F.3d 1277, 1281 (Fed. Cir. 2005)). "[A]n agency action is arbitrary when the agency offers insufficient reasons for treating similar situations differently." *SKF USA Inc. v. United States*, 263 F.3d 1369, 1382 (Fed. Cir. 2001).

DISCUSSION

Appvion does not argue that the conversion process in the PRC substantially transformed the [[ ]] JRs. Oral Arg. at 14:05; *see* CR 2/8 at 6 ("Paper Resources is correct that [Appvion] does not contend that the converting operations are sufficient to transform [JRs]."). Instead, Appvion argues that Paper Resources's LWTP is subject merchandise because the *Orders* cover all LWTP converted in the PRC. Pl.'s Br. at 12–15. Accordingly, Appvion insists it was inappropriate for Commerce to conduct a substantial transformation analysis. *Id.* at 20. Appvion also argues that Commerce abused its discretion by declining to consider evidence of circumvention in its scope ruling. *See id.* at 22–26. Finally, Appvion contends that Commerce's failure to impose a mandatory country of origin certification program was arbitrary, ca-

pricious, and an abuse of discretion. *See id.* at 27–30.

I. COMMERCE'S INTERPRETATION OF THE SCOPE LANGUAGE

Appvion argues that the *Orders* cover all LWTP converted in the PRC, regardless of the origin of the underlying JRs. *Id.* at 13. According to Appvion, Commerce abused its discretion by using the substantial transformation test to "preclude[] relief for a portion of subject merchandise," namely, LWTP converted in the PRC using JRs from a third country. *Id.* at 20. However, Appvion fails to demonstrate that Commerce altered the scope of the *Orders* or misapplied the substantial transformation test.

"'Commerce cannot interpret an antidumping order so as to change the scope of that order, nor can Commerce interpret an order in a manner contrary to its terms.'" *King Supply Co. v. United States*, 674 F.3d 1343, 1348 (Fed. Cir. 2012) (quoting *Walgreen Co. v. United States*, 620 F.3d 1350, 1354 (Fed. Cir. 2010)). "While the petition, factual findings, legal conclusions, and preliminary orders can aid in the analysis, they cannot substitute for the language of the order itself, which remains the 'cornerstone' in any scope determination." *Walgreen*, 620 F.3d at 1357 (citing *Duferco Steel*, 296 F.3d at 1097). Therefore, it is the "explicit terms" of an order that "must control [Commerce's] subsequent decisions in scope rulings." *Gleason Indus. Prods., Inc. v. United States*, 31 CIT 393, 398 (2007) (not reported in the Federal Supplement) (citing *Duferco Steel*, 296 F.3d at 1096–97).

Appvion cannot demonstrate that Commerce unlawfully altered the scope of the *Orders*. AD and CVD orders cover a particular class or kind of merchandise from a particular country. *See* 19 U.S.C. §§ 1671, 1673; *Ugine & ALZ Belg., N.V. v. United States*, 31 CIT 1536, 1550, 517 F. Supp. 2d 1333, 1345 (2007) ("Commerce's [AD] and CVD orders must specify both the class or kind of merchandise and the particular country from which the merchandise originates."), *aff'd after remand*, 551 F.3d 1339 (Fed. Cir. 2009). The *Orders* state that "[b]oth jumbo and converted rolls . . . are covered by the scope of these orders." *CVD Order*, 73 Fed. Reg. at 70,958 n.1. Accordingly, the *Orders* cover JRs and converted rolls of Chinese origin. *Ugine*, 31 CIT at 1550, 517 F. Supp. 2d at 1345. The scope definition simply does not address whether LWTP converted in the PRC using JRs from a third country is subject merchandise. Because it did not alter the plain meaning of the *Orders*, Commerce's decision to conduct a country of origin analy-

sis was reasonable.[5] *See id.* at 1551, 517 F. Supp. 2d at 1345 ("[I]f merchandise does not meet one of the parameters — either class or kind, or country of origin — it is outside the scope of the [AD] or CVD order.").

Appvion also argues that Commerce abused its discretion by using the substantial transformation analysis to exclude otherwise subject LWTP from the scope of the *Orders*. Pl.'s Br. at 20. According to Appvion, application of the substantial transformation test, and specifically the change in class or kind factor, is improper in cases where the scope covers upstream and downstream forms of a product and manufacturing occurs across multiple countries. *Id.* In such cases, Appvion contends, the downstream processing "inherently cannot be sufficient to move the merchandise from one class or kind to another," and always indicates that a substantial transformation did not occur. *Id.*

Appvion admitted before Commerce and the court that conversion was not a substantial transformation. *See* CR 2/8 at 6; Oral Arg. at 14:05. To the extent that Appvion is challenging the propriety of Commerce's use of the substantial transformation analysis, however, this argument is unconvincing. This Court has upheld Commerce's use of the substantial transformation analysis as a means of determining the country of origin of merchandise produced in multiple countries. *See E.I. DuPont de Nemours & Co. v. United States*, 22 CIT 370, 373–76, 8 F. Supp. 2d 854, 858–59 (1998) (applying *Chevron* deference to the substantial transformation test). The substantial transformation test "provides a yardstick for determining whether the processes performed on merchandise in a country are of such significance as to require that the resulting merchandise be considered the product of the country in which the transformation occurred." *Id.* at 373–74, 8 F. Supp. 2d at 858. This is precisely the analysis that Commerce undertook below with regards to the conversion process. *See* CR 2/11 at 6–12; PR 2/32 at 3–4. As the JRs from [[ ]] were not substantially transformed in the PRC, they were

[5] Appvion also argues that Commerce's interpretation of the scope language does not reflect the intent of the petition, as it intended the *Orders* to cover all LWTP converted in the PRC when drafting the proposed scope language. *See* Pl.'s Br. at 15. However, Appvion does not identify any evidence in the record supporting this assertion. *See* Pl.'s Br. at 15; PR 2/32 at 4 ("[T]here was no specific discussion during the investigation of LWTP, in either the AD or CVD segments, as to whether JRs produced in a third-country and converted in the PRC would be subject to the [*Orders*]."); *cf. Minebea Co. v. United States*, 16 CIT 20, 22–24, 782 F. Supp. 117, 120–121 (1992) (Tsoucalas, J.) (finding that the an order covered certain products not explicitly mentioned in the scope definition where petition and numerous post-petition submissions evidenced petitioner's intent to include those products within the scope), *aff'd*, 984 F.2d 1178 (Fed. Cir. 1993).

not of Chinese origin. *See DuPont*, 22 CIT at 373–74, 8 F. Supp. 2d at 858. Accordingly, Paper Resources's LWTP was never subject merchandise. *See Ugine*, 31 CIT at 1551, 517 F. Supp. 2d at 1345.

Ultimately, Appvion's argument boils down to its claim that the *Final Scope Ruling* denies relief from dumped LWTP from the PRC. Pl.'s Br. at 15. Appvion insists that Commerce's determination forces the filing of numerous petitions against any and all countries from which Hanhong sources its JRs. *See id.* at 15. According to Appvion, this result is unreasonable because relief may be denied if fair trade practices mask dumping or total import volume does not surpass negligibility thresholds. *Id.* at 15–17. As Commerce did not articulate a "statutorily consistent mechanism" by which Appvion can obtain relief, Appvion insists that Commerce's decision is erroneous. *Id.* at 15.

Appvion simply fails to articulate a legal basis by which to determine that Paper Resources's LWTP is within the scope of the *Orders*. Commerce was not required to include the LTWP within the scope of the *Orders* simply because it was converted by Hanhong. *See DuPont*, 22 CIT at 375, 8 F. Supp. 2d at 859 ("[A]ntidumping orders apply to merchandise from particular countries, not individual producers . . . ."). Rather, the dispositive issue was the country of origin. *See Ugine*, 31 CIT at 1551, 517 F. Supp. 2d at 1345. And, as stated above, the country of origin of Paper Resources's LWTP was [[ ]], not the PRC.

II. CIRCUMVENTION

Appvion also argues that Commerce abused its discretion by failing to consider evidence that Hanhong and Paper Resources were circumventing the *Orders*. *See* Pl.'s Br. at 22–26. According to Appvion, Hanhong's "shift to third-country suppliers represents a change in the commercial practices (*e.g.*, pattern of trade) indicating circumvention of existing relief." *Id.* at 23. Appvion insists that Commerce also should have considered the following evidence: Hanhong and Paper Resources waited three years to request a scope ruling from Commerce; Paper Resources [[ ]]; Hanhong and Paper Resources [[ ]]; and Hanhong [[ ]]. *See* Pl.'s Br. at 23–26.

Generally, Commerce addresses circumvention issues under 19 U.S.C. § 1677j, which grants it the power to include merchandise within the scope of an order where that merchandise is of the same class or kind as the covered merchandise and a large portion of the

merchandise's value is derived from production in a covered country, but minor downstream processing or assembly occurs in the U.S. or a third country. *See* 19 U.S.C. § 1677j. Additionally, Commerce has discretion to consider evidence of circumvention as part of a country of origin analysis. *See Issues and Decision Memorandum for the Less-Than-Fair-Value Investigation of Certain Artist Canvas from the PRC* at 7, Case No. A-570–899 (Mar. 22, 2006) (recognizing that Commerce "may consider" the potential for circumvention of an order in its country of origin analysis). Commerce's discretion is not unlimited, however, as it may not use circumvention evidence to expand the scope of an order. *E. Jordan Iron Works, Inc. v. United States*, 32 CIT 419, 422, 556 F. Supp. 2d 1355, 1358 (2008).

Here, Commerce declined to consider evidence of circumvention for several reasons. *See* CR 2/11 at 13–15. First, Commerce explained that the *Orders* did not cover [[ ]], the country in which the JRs are produced, and therefore there was no concern that relief under the *Orders* would be "eviscerated by moving minor processing outside the country covered by the order." *Id.* at 14. Second, Commerce noted that the case did not lend itself to a section 1677j analysis because downstream processing occurred in the covered country rather than in the U.S. or a third country. *Id.* at 14–15. Commerce also noted that this Court previously upheld scope determinations conducted without considering evidence of circumvention. *Id.* at 15.

Commerce's decision was adequately explained and consistent with the law. This Court has held that "a 'scope ruling is not the proper mechanism for addressing circumvention concerns.'" *See Laminated Woven Sacks Comm. v. United States*, 34 CIT __, __, 716 F. Supp. 2d 1316, 1328 (2010) (Tsoucalas, J.) (quoting *E. Jordan Iron Works*, 32 CIT at 422, 556 F. Supp. 2d at 1358). Moreover, because conversion did not substantially transform the [[ ]] JRs, CR 2/11 at 6–12 (unchanged in PR 2/32), Commerce risked expanding the scope of the *Orders* by considering evidence of potential circumvention. *See* E. Jordan Iron Works, 32 CIT at 422, 556 F. Supp. 2d at 1358. Accordingly, Appvion cannot demonstrate that Commerce abused its discretion.

III. COUNTRY OF ORIGIN CERTIFICATION

Finally, Appvion argues that Commerce's failure to impose a mandatory country of origin certification program was arbitrary, capricious, and an abuse of discretion. *See* Pl.'s Br. at 27. Appvion insists that Commerce ignored evidence in the record evidencing a "high

likelihood of past and current circumvention." *Id.* Appvion also argues that Commerce failed to explain why it treated the instant case differently than other cases in which it imposed country of origin and end-use certification programs without an affirmative finding of circumvention. *Id.* at 28–30.

Commerce has a certain amount of discretion to act in order to "prevent[ ] the intentional evasion or circumvention" of the Act. *See Tung Mung Dev. Co. v. United States*, 26 CIT 969, 979, 219 F. Supp. 2d 1333, 1343 (2002), *aff'd*, 354 F.3d 1371 (Fed. Cir. 2004). To that end, Commerce may impose measures such as mandatory certification programs where it believes they will be effective in preventing future circumvention of its orders. *See, e.g.*, *Issues and Decision Memorandum for the Final Determination of the Anticircumvention Inquiry of Certain Tissue Paper Products from the PRC* at 9–12, Case No. A-570–894 (Sept. 19, 2008) (imposing country of origin certification requirements to address circumvention).

Appvion fails to demonstrate that Commerce abused its discretion or acted in an arbitrary and capricious manner. First, this Court has held that "certification is not part of an ordinary scope analysis." *Laminated Woven Sacks*, 34 CIT at __, 716 F. Supp. 2d at 1328. Second, Commerce adequately explained its decision. In the *Preliminary Scope Ruling*, Commerce explained that Appvion's country of origin concerns could be "appropriately dealt with by [Customs and Border Protection]." CR 2/11 at 6. In the *Final Scope Ruling*, Commerce did not impose a country of origin certification program because it did not make an affirmative finding of circumvention. *See* PR 2/32 at 6. As Commerce explained, there was "no precedent of [Commerce] establishing a certification program to preempt unfounded circumvention."[6] *Id.* Commerce also noted that end-use certification cases are not relevant because they involve different concerns — "avoid[ing] liquidation of components intended to be used for subject merchandise." *Id.* Because Commerce provided a "reasoned analysis" of its decision, the court finds that Commerce neither abused its discretion nor acted in an arbitrary and capricious manner. *See* Wheatland Tube, 161 F.3d at 1369.

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[6] Appvion argues that Commerce's decision was inconsistent with *Crystalline Silicon Photovoltaic Cells, Whether or Not Assembled Into Modules, From the PRC: Preliminary Determination of Sales at Less Than Fair Value, Postponement of Final Determination* and Affirmative Preliminary Determination of Critical *Circumstances*, 77 Fed. Reg. 31,309 (May 25, 2012) ("*Silicon Cells*"), in which it imposed country of origin certification without an affirmative finding of circumvention. Pl.'s Br. at 28. To the extent that *Silicon Cells* altered Commerce's policy, it is not relevant here because it was issued after the *Final Scope Ruling*. *Silicon Cells*, 77 Fed. Reg. at 31,309.

CONCLUSION

For the foregoing reasons, the court finds that the *Final Scope Ruling* is supported by substantial evidence on the record and is otherwise in accord with the law.

Dated: July 11, 2013
New York, New York

/s/ Nicholas Tsoucalas
NICHOLAS TSOUCALAS SENIOR JUDGE