U.S. Court of International Trade

Slip Op. 17–94

EVONIK REXIM (NANNING) PHARMACEUTICAL CO. LTD. AND EVONIK CORPORATION, Plaintiffs, and BAODING MANTONG FINE CHEMISTRY CO., LTD. AND GEO SPECIALTY CHEMICALS, INC., Consolidated Plaintiffs, v. UNITED STATES, Defendant, and GEO SPECIALTY CHEMICALS, INC., Defendant-Intervenor.

Before: Jennifer Choe-Groves, Judge
Consol. Court No. 15–00296
PUBLIC VERSION

[Sustaining in part and remanding in part the U.S. Department of Commerce's final determination in the 2013–2014 administrative review of the antidumping duty order on glycine from the People's Republic of China.]

Dated: August 1, 2017

Matthew T. McGrath, Barnes, Richardson & Colburn, LLP, of Washington, DC, argued for Plaintiffs Evonik Rexim (Nanning) Pharmaceutical Co. Ltd. and Evonik Corporation. With him on the brief was *Stephen W. Brophy*.

Ronald M. Wisla, Kutak Rock LLP, of Washington, DC, argued for Consolidated Plaintiff Baoding Mantong Fine Chemistry Co., Ltd. With him on the brief was *Lizbeth R. Levinson*.

David M. Schwartz, Thompson Hine LLP, of Washington, DC, argued for Consolidated Plaintiff and Defendant-Intervenor GEO Specialty Chemicals, Inc.

Robert M. Norway, Trial Attorney, Commercial Litigation Branch, Civil Division, U.S. Department of Justice, of Washington, DC, argued for Defendant United States. With him on the brief were *Benjamin C. Mizer*, Principal Deputy Assistant Attorney General, *Jeanne E. Davidson*, Director, and *Reginald T. Blades, Jr.*, Assistant Director. Of counsel on the brief was *Nanda Srikantaiah*, Office of the Chief Counsel for Trade Enforcement & Compliance, U.S. Department of Commerce, of Washington, DC.

OPINION AND ORDER

Choe-Groves, Judge:

This case involves glycine, which is a free-flowing crystalline material, like salt or sugar. Glycine is produced at varying levels of purity and is used as a sweetener or taste enhancer, a buffering agent, reabsorbable amino acid, chemical intermediate, and a metal complexing agent. *See* Issues and Decision Memorandum for the Final Results of Antidumping Duty Administrative Review at 3, A-570–836, (Oct. 5, 2015), *available at* http://enforcement.trade.gov/frn/summary/prc/2015–26270–1.pdf (last visited July 25, 2017) ("I&D

Memo"). Evonik Rexim (Nanning) Pharmaceutical Co. Ltd. and Evonik Corporation (collectively, "Evonik" or "Plaintiffs"), Baoding Mantong Fine Chemistry Co., Ltd. ("Baoding"), and GEO Specialty Chemicals, Inc. ("GEO") (collectively, "Consolidated Plaintiffs") bring this consolidated action for judicial review of decisions made by the U.S. Department of Commerce ("Commerce" or "Department") during the 2013–2014 administrative review of the antidumping duty order on glycine from the People's Republic of China ("China" or "PRC"). *See Glycine From the People's Republic of China*, 80 Fed. Reg. 62,027 (Dep't Commerce Oct. 15, 2015) (final results of antidumping duty administrative review and partial rescission of antidumping duty administrative review; 2013–2014) ("Final Results"); I&D Memo; *see also Glycine From the People's Republic of China*, 60 Fed. Reg. 16,116 (Dep't Commerce Mar. 29, 1995) (antidumping duty order). Before the court are Rule 56.2 motions for judgment on the agency record filed by Evonik, Baoding, and GEO. *See* Evonik's Mot. J. Agency R. Under USCIT Rule 56.2, May 20, 2016, ECF No. 31; 56.2 Mot. J. Agency R., May 19, 2016, ECF No. 30; Mot. J. Agency R., May 20, 2016, ECF No. 32. For the reasons set forth below, the court sustains in part and remands in part Commerce's final determination.

BACKGROUND

Commerce initiated an administrative review of the antidumping duty order on glycine from China on April 30, 2014, which covered subject merchandise that entered the United States between March 1, 2013 and February 28, 2014. *See Initiation of Antidumping and Countervailing Duty Administrative Reviews and Request for Revocation in Part*, 79 Fed. Reg. 24,398, 24,400 (Dep't Commerce Apr. 30, 2014). The Department issued preliminary results on April 8, 2015. *See Glycine From the People's Republic of China*, 80 Fed. Reg. 18,814, 18,814 (Dep't Commerce Apr. 8, 2015) (preliminary results of the antidumping duty administrative review and preliminary intent to rescind, in part; 2013–2014); Decision Memorandum for the Preliminary Results of Antidumping Duty Administrative Review, A-570–836, (Mar. 31, 2015), *available at* http://enforcement.trade.gov/frn/summary/prc/2015–07952–1.pdf (last visited July 25, 2017) ("Preliminary Results Memo"). After Commerce issued preliminary results, Evonik, Baoding, and GEO each submitted timely administrative case briefs contesting various aspects of Commerce's determinations. *See* Case Brief of Evonik Rexim (Nanning) Pharmaceutical Co., Ltd., CD 80 at bar code 3275324–01, PD 216 at bar code 3275328–01 (May 8, 2015); Administrative Case Brief of Baoding Mantong Fine Chemistry Co., Ltd, CD 83 at bar code 3275402–01, PD

220 at bar code 3275404–01 (May 8, 2015) ("Baoding's Administrative Case Brief"); GEO Specialty Chemicals' Case Brief, CD 82 at bar code 3275332–01, PD 218 at bar code 3275335–01 (May 8, 2015).

GEO challenged the inclusion of certain information in Baoding's brief regarding the final determination in a prior administrative review of the antidumping duty order on glycine from China. *See* Corrections to Transcript of July 22, 2015 Public Hearing for 2013–2014 Administrative Review, PD 228 at bar code 3294933–01 (July 30, 2015). Commerce rejected Baoding's case brief because Commerce found that the brief contained untimely-filed new factual information. *See* Resp. to August 7, 2015, Letter from Baoding Mantong Fine Chemistry Co., Ltd. and Rejection of May 8, 2015, and August 7, 2015, Submissions by Baoding Mantong Fine Chemistry Co., Ltd., PD 236 at bar code 3300878–01 (Aug. 27, 2015) ("Commerce Aug. 27 Letter"). The Department offered Baoding the opportunity to resubmit a redacted version of the case brief by August 31, 2015. *See id.* Three days after that deadline expired, Baoding submitted the redacted version of its case brief and a letter that urged Commerce to exercise its discretion to accept the late-filed brief. *See* Submission of Baoding Mantong's Revised Administrative Case Brief and Revised Administrative Case Brief of Baoding Mantong Fine Chemistry Co., Ltd, CD 86 at bar code 3302223–01, PD 237 at bar code 3302224–01 (Sept. 3, 2015). The Department rejected Baoding's redacted brief as untimely and informed the interested parties that it would not consider any arguments in Baoding's original brief. *See* Rejection of September 3, 2015, Submission by Baoding Mantong Fine Chemistry Co., Ltd., PD 240 at bar code 3307996–01 (Sept. 22, 2015). Commerce required GEO to submit a new version of its rebuttal brief redacting all references to issues raised in Baoding's original case brief. *See id.*

Commerce published the final results of the administrative review and accompanying memorandum on October 5, 2015. *See* Final Results, 80 Fed. Reg. at 62,027. With respect to Evonik, the Department determined that Evonik's sales during the review period were not *bona fide*, rescinded Evonik's review, and indicated that it would instruct U.S. Customs and Border Protection to liquidate Evonik's entries at the PRC-wide antidumping duty rate. *See id.* ; I&D Memo at 20–24; Final Analysis of *Bona Fide* Nature of Evonik Rexim (Nanning) Pharmaceutical Co., Ltd.'s Sales, CD 88 at bar code 3404119–01, PD 249 at bar code 340412201 (Oct. 5, 2015) ("Commerce Final *Bona Fide* Sales Memo for Evonik"). With regard to Baoding, Commerce determined that Baoding's sale during the review period was *bona fide* and assigned a calculated dumping margin

of 143.87 percent. *See* Final Results, 80 Fed. Reg. at 62,027; I&D Memo at 11–12; Final Analysis Memorandum and Business Proprietary *Bona Fide* Analysis for Baoding Mantong Fine Chemistry Co., Ltd., CD 89 at bar code 3404441–01, PD 250 at bar code 3404464–01 (Oct. 5, 2015) ("Commerce Final *Bona Fide* Sale Memo for Baoding"). To calculate Baoding's normal value, Commerce used import statistics for aqueous ammonia as the surrogate value for Baoding's liquid ammonia factor of production input and used financial statements from two Indonesian companies to determine the surrogate financial ratios. *See* Final Results, 80 Fed. Reg. at 62,027; I&D Memo at 11–12. The Department granted Baoding an offset to normal value for its sales of hydrochloric acid and ammonium chloride, which were generated as by-products of Baoding's glycine production process. *See* Final Results, 80 Fed. Reg. at 62,027; I&D Memo at 11–12.

The Parties commenced separate actions contesting several of Commerce's determinations in the Final Results, and the court consolidated these actions on January 21, 2016. *See* Order, Jan. 21, 2016, ECF No. 25 (granting Defendant's motion for consolidation). Plaintiffs and Consolidated Plaintiffs filed their respective Rule 56.2 motions and the court held oral argument on March 8, 2017. Evonik subsequently filed a motion to sever and stay its claim regarding the application of the PRC-wide antidumping duty rate. *See* Mot. Sever Claim and to Stay Severed Claim, May 25, 2017, ECF No. 68. The court granted the motion to sever this claim from Evonik's complaint and to stay the claim pending the final disposition of a similar claim in *Baoding Mantong Fine Chemistry Co., Ltd. v. United States*, Court No. 12–00362. *See* Order, June 1, 2017, ECF No. 70; *Evonik Rexim (Nanning) Pharmaceutical Co. Ltd. v. United States*, Court No. 17–00132.

JURISDICTION AND STANDARD OF REVIEW

The court has jurisdiction over Commerce's final determination in an administrative review of an antidumping duty order. *See* 28 U.S.C. § 1581(c) (2012);[1] Section 516A(a)(2)(B)(iii) of the Tariff Act of 1930, as amended, 19 U.S.C. § 1516a(a)(2)(B)(iii) (2012).[2] The court will uphold the Department's "determinations, findings, or conclusions" unless "unsupported by substantial evidence on the record, or otherwise not in accordance with law." 19 U.S.C. § 1516a(b)(1)(B)(i). When reviewing substantial evidence challenges to Commerce's decisions in an administrative review, the court assesses whether the agency

[1] Further citations to Title 28 of the U.S. Code are to the 2012 edition.

[2] Further citations to the Tariff Act of 1930, as amended, are to the relevant provision of Title 19 of the U.S. Code, 2012 edition.

action is "unreasonable" given the record as a whole. *See Nippon Steel Corp. v. United States*, 458 F.3d 1345, 1350–51 (Fed. Cir. 2006).

DISCUSSION

The court will address the Parties' arguments as follows: (I) Commerce's determinations regarding Evonik and (II) Commerce's determinations regarding Baoding.

I. Commerce's Determinations Regarding Evonik

A. Evonik's Sales During the Period of Review

Evonik contests Commerce's determination that Evonik's sales during the period of review were not *bona fide*. *See* Evonik Pls.' Mem. Law Support Rule 56.2 Mot. J. Agency R. 7–14, May 20, 2016, ECF No. 31–2 ("Evonik Rule 56.2 Memo in Support"). Evonik argues that the Department relied improperly on facts such as high sales prices and the absence of factor of production information.[3] *See id.* Defendant asserts that Commerce conducted a proper analysis and its determination was supported by substantial evidence. *See* Def.'s Opp. to Pls.', Consolidated Pl.'s, and Def.-Intervenor's Mots. J. Upon Agency R. 15–21, Dec. 9, 2016, ECF No. 51 ("Def. Mem. Opp. Rule 56.2 Mots.").

The amount of an antidumping duty is calculated from the difference between the "normal value"[4] and "export price"[5] of the subject imports. *See* 19 U.S.C. § 1675(a)(2)(A). Commerce may exclude sales that would otherwise be included in the calculation of the export price if Commerce determines that the sales are not *bona fide*. *See Tianjin Tiancheng Pharma. Co. v. United States*, 29 CIT 256, 259, 366 F. Supp. 2d 1246, 1249 (2005). A sale is not *bona fide* when it is "unrepresentative or extremely distortive." *Am. Silicon Techs. v. United States*, 24 CIT 612, 616, 110 F. Supp. 2d 992, 995 (2000). The Department employs a "totality of the circumstances" analysis when evalu-

[3] Evonik also complains that Commerce improperly relied on Evonik's lack of [[ ]]. *See* Evonik's Rule 56.2 Memo in Support 11.

[4] Normal value is the "the price at which the foreign like product is first sold . . . for consumption in the exporting country, in the usual commercial quantities and in the ordinary course of trade and, to the extent practicable, at the same level of trade as the export price or constructed export price." 19 U.S.C. § 1677b(a)(1)(B). The price used to calculate normal value should be from "a time reasonably corresponding to the time of the sale used to determine the export price or constructed export price." 19 U.S.C. § 1677b(a)(1)(A); *see also infra* note 11 (discussing calculation of normal value in a non-standard case involving a nonmarket economy).

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

ating whether a sale is *bona fide* and considers, *inter alia*, factors such as: (1) the timing of the sale; (2) the price and quantity of the sale; (3) the expenses arising from the transaction; (4) whether the goods were resold at a profit; and (5) whether the transaction was at arm's-length. *See Tianjin Tiancheng*, 29 CIT at 260, 366 F. Supp. 2d at 1250. The weight that Commerce gives to each factor depends on the specific circumstances of each case. *See id.* at 275, 366 F. Supp. 2d at 1263.

Commerce concluded that Evonik's sales were not *bona fide* because of "(1) the atypical nature of Evonik's price; and (2) the atypical circumstances surrounding the sales." Commerce Final *Bona Fide* Sales Memo for Evonik at 8. Commerce considered Evonik's price per kilogram of glycine compared to Baoding's price and the highest U.S. spot market price.[6] *See id.* The Department determined that this pricing was "'aberrational' and not based on any commercial circumstances." *Id.* at 7.[7] Commerce considered other "atypical circumstances" together with the aberrational price to support its conclusion. *See id*. at 8.[8] Commerce also found it unusual that Evonik could not provide certain factor of production information from its supplier. *See id.* Despite Evonik's argument that the Department relied merely on the high sales price in reaching its conclusion, *see* Evonik Rule 56.2 Memo in Support 7–14, it is clear to the court that the Department engaged in a "totality of the circumstances" analysis that considered an array of record evidence before the agency. *See* Commerce Final *Bona Fide* Sales Memo for Evonik at 7–8. The court finds, therefore, that Commerce's conclusion that Evonik's sales were not *bona fide* was supported by substantial evidence.

B. Commerce's Assignment of the PRC-Wide Rate to Evonik

Evonik's Rule 56.2 motion challenged Commerce's assignment of the PRC-wide antidumping duty rate. *See* Evonik Rule 56.2 Memo in Support 14–16. Evonik filed a subsequent motion to sever and stay

[6] Commerce found Evonik's price per kilogram of glycine was [[ ]] than Baoding's price and [[ ]] than the highest U.S. spot market price. *See* Commerce Final *Bona Fide* Sales Memo for Evonik at 7; Comments of GEO Specialty Chemicals, Inc. on the Resp. of Evonik Rexim (Nanning) Pharmaceutical Co., Ltd. to the Second Suppl. Questionnaire for Sections A and C at Attach. B, CD 57 at bar code 3242121–01, PD 144 at bar code 3242123–01 (Nov. 18, 2014).

[7] Commerce further questioned "[[ ]]." Commerce Final *Bona Fide* Sales Memo for Evonik at 8.

[8] For example, Commerce questioned the arm's-length nature of the sales because there was evidence that Evonik did not charge [[ ]]. *See id.*; *Bona Fide* Nature of Evonik Rexim (Nanning) Pharmaceutical Co., Ltd.'s Sales at 6, CD 72 at bar code 3268213–01, PD 206 at bar code 3268214–01 (Mar. 31, 2015) (Commerce's preliminary analysis of Evonik's *bona fide* sales).

this claim. *See* Motion to Sever a Single Claim and to Stay the Severed Claim, May 25, 2017, ECF No. 68. The court granted Evonik's motion on June 1, 2017 and thus will not address Evonik's antidumping duty rate issue in this opinion. *See* Order, June 1, 2017, ECF No. 70 (granting Evonik's motion to sever and stay a single claim); *Evonik Rexim (Nanning) Pharmaceutical Co. Ltd. v. United States*, Court No. 17–00132.

II. Commerce's Determinations Regarding Baoding

A. Baoding's Sale During the Period of Review

GEO argues that Commerce erred in finding that Baoding's sale during the review period was *bona fide*. *See* Brief Supp. Pl. GEO Specialty Chemicals, Inc.'s Rule 56.2 Mot. J. Upon Agency R. 12–22, May 20, 2016, ECF No. 32 ("GEO Rule 56.2 Memo in Support"). GEO asserts that the sale was not *bona fide* because the quantity of the sale was lower than in prior years and the sale was not at arm's-length.[9] *See id.* Defendant contends that Commerce's determination was based on an appropriate application of the "totality of the circumstances" analysis and was supported by substantial evidence. *See* Def. Mem. Opp. Rule 56.2 Mots. 9–15.

As discussed above, when Commerce conducts a *bona fide* sales analysis, it weighs several factors and makes a final determination based on the "totality of the circumstances." *See Tianjin Tiancheng*, 29 CIT at 260, 366 F. Supp. 2d at 1250. Commerce provided the following explanation in support of its conclusion that Baoding's sale was *bona fide*:

> In considering all of the above factors, we conclude that Baoding Mantong's sale was *bona fide* based on the following findings: 1) the sale was completed prior to the completion of the POR; 2) the price was [different] than the U.S. spot-market price of glycine during early 2014; 3) the quantity was not atypical; 4) there were no unusual expenses arising from the POR sale; 5) there is no record evidence that the merchandise was not resold at a profit; and 6) the sale was made to an unaffiliated customer with terms set by negotiation and payment received in a timely manner, indicating that the sale was made at arm's length.

Antidumping Duty Administrative Review of Baoding Mantong Fine Chemistry Co., Ltd. at 5, CD 78 at bar code 3268465–01 (Mar. 31, 2015) (preliminary results analysis of Baoding's *bona fide* sale)

[9] GEO also contends that Baoding's price was [[ ]] the U.S. spot market price. *See* GEO Rule 56.2 Memo in Support 17–18.

("Commerce Preliminary *Bona Fide* Sale Memo for Baoding").

Commerce found that although the quantity of the sale was smaller than sales in recent years, Baoding had sold a similar quantity of glycine during the 2003–2004 administrative review period. *See* Commerce Final *Bona Fide* Sale Memo for Baoding at 5; Second Suppl. Resp. of Baoding Mantong Fine Chemistry Co., Ltd. at 4, CD 58 at bar code 3243010–01, PD 147 at bar code 3243011–01 (Nov. 11, 2014) ("Baoding's Second Suppl. Resp."). The Department noted that Baoding's low volume sale "was not historically atypical." Commerce Final *Bona Fide* Sale Memo for Baoding at 5. Commerce determined that Baoding's pricing was commercially realistic because a comparable U.S. sales price could be detrimental to Baoding's interests with respect to the antidumping calculation.[10] *See id.* The Department found that record evidence established that Baoding's sale was completed during the period of review, there were no unusual expenses related to the transaction, and the product was sold by Baoding for a profit. *See id.* at 4–5; Section A Resp. of Baoding Mantong Fine Chemistry Co., Ltd. at Ex. A-7, CD 11 at bar code 3211346–04, PD 46 at bar code 3211355–03 (June 24, 2014); Sections C and D Resp. of Baoding Mantong Fine Chemistry Co., Ltd. at C10–C11 and App. C-1, CD 21–22 at bar code 3216145–01–03, PD 57–58 at bar code 3216156–01–03 (July 15, 2014) ("Baoding's Sections C and D Resp."); Baoding's Second Suppl. Resp. at 3 and Ex. S2–1. Commerce concluded that the transaction between Baoding and its purchaser appeared to be at arm's-length because Baoding and the purchaser were not affiliated through family members and did not have any other apparent personal, financial, or business ties. *See* Commerce Final *Bona Fide* Sale Memo for Baoding at 6; Commerce Preliminary *Bona Fide* Sale Memo for Baoding at 5; Suppl. Resp. of Baoding Mantong Fine Chemistry Co., Ltd. at 5, CD 39–40 at bar codes 3226883–01–02, PD 86–87 at bar codes 3326887–01–02 (Sept. 5, 2014) ("Baoding's First Suppl. Resp."); Third Suppl. Resp. of Baoding Mantong Fine Chemistry Co., Ltd. at 1, CD 62 at bar code 3258275–01, PD 157 at bar code 3258867–01 (Feb. 6, 2015) ("Baoding's Third Suppl. Resp."). Considering all factors in totality, the court finds that Commerce's deliberation of the record evidence was reasonable and the determination that Baoding's sale was *bona fide* was supported by substantial evidence.

[10] Baoding's price per kilogram was [[ ]] than the U.S. spot market price. *See* Commerce Final *Bona Fide* Sale Memo for Baoding at 5; Comments of GEO Specialty Chemicals, Inc. on Section A Questionnaire Resps. of Baoding Mantong Fine Chemistry Co., Ltd. and Evonik Rexim (Nanning) Pharmaceutical Co., Ltd. at 6 and Ex. B, CD 13 at bar code 3211346–01, PD 47 at bar code 3213644–01 (July 3, 2014).

B. Commerce's Surrogate Value Selection

i. Baoding's Liquid Ammonia Factor of Production

Baoding argues that Commerce did not choose the best available information when it selected the surrogate value[11] for liquid ammonia to calculate Baoding's normal value. *See* Mem. Points and Authorities Support of Consolidated Pl.'s Rule 56.2 Mot. J. Agency R. 13–22, May 19, 2016, ECF No. 30–1 ("Baoding Rule 56.2 Memo in Support"). Baoding asserts that Commerce selected aqueous ammonia (listed as HTS Item 2814.2000) incorrectly for the liquid ammonia factor of production input. *See* Baoding Rule 56.2 Memo in Support 13–22. Baoding argues that Commerce should have selected anhydrous ammonia (listed as HTS Item 2814.1000) for the input instead of aqueous ammonia. *See id.* Baoding explains:

> In the final results, Commerce used a surrogate price derived from Indonesian import statistics for ammonia in aqueous solution (HTS Item 2814.2000), rather than the import statistics for anhydrous ammonia (HTS Item 2814.1000), to value the reported liquid ammonia inputs. The administrative record showed that the liquid ammonia used by Baoding Mantong had the chemical formula, molecular weight, purity level and HTS classification consistent with anhydrous ammonia. . . .
>
> That product, also known as ammonium hydroxide, has an entirely different chemical formula, molecular weight, and HTS classification as compared to liquid (anhydrous) ammonia and was, therefore, not specific to the liquid ammonia inputs used by Baoding Mantong to produce the subject merchandise.

Id. at 16, 20.

Defendant argues that because Commerce rejected Baoding's untimely submission of the redacted version of its May 8, 2015 case brief, Baoding failed to exhaust its administrative remedies and is barred from challenging Commerce's surrogate value selection for

[11] When subject merchandise is exported from a nonmarket economy and Commerce determines that available information does not permit the use of the standard normal value calculation, Commerce calculates normal value based on surrogate values for "the factors of production utilized in producing the merchandise" added to the "amount for general expenses and profit plus the cost of containers, coverings, and other expenses." 19 U.S.C. § 1677b(c)(1)(B). The Department will generally select, to the extent practicable, surrogate values that are publicly available, product-specific, representative of a broad-market average, and contemporaneous with the period of review. *See Qingdao Sea-Line Trading Co. v. United States*, 766 F.3d 1378, 1386 (Fed. Cir. 2014).

liquid ammonia before the court.[12] *See* Def. Mem. Opp. Rule 56.2 Mots. 42–43. Baoding counters that exhaustion should not preclude the court from reaching the issue because Commerce erred in determining that the case brief contained untimely-submitted factual information and abused its discretion in rejecting the late-filed redacted case brief. *See* Baoding Rule 56.2 Memo in Support 22–29.

Commerce characterized the disputed sentence in Baoding's brief as new factual information "rebutting, clarifying, or correcting information on the record." Commerce Aug. 27 Letter. The one sentence at issue in Baoding's administrative case brief reads as follows: "Because Baoding Mantong's attempt to correct those errors was made only after the completion of the Department's verification, the Department determined not to accept Baoding Mantong's corrections to the record. *Id*." Baoding's Administrative Case Brief at 8.

In order to assess whether Commerce properly characterized the sentence at issue, the court looks to the regulatory definition, which reads in relevant part:

Factual information. "Factual information" means:

(i) Evidence, including statements of fact, documents, and data submitted either in response to initial and supplemental questionnaires, or, to rebut, clarify, or correct such evidence submitted by any other interested party;

(ii) Evidence, including statements of fact, documents, and data submitted either in support of allegations, or, to rebut, clarify, or correct such evidence submitted by any other interested party.

19 C.F.R. § 351.102(b)(21) (2012).[13] The court finds that the sentence at issue is clearly a legal argument made by counsel in its brief, and is neither a statement of fact, document, nor data that would qualify as "evidence" within the meaning of the relevant regulatory definition for "factual information." Moreover, it is well-settled that arguments made by counsel are not evidence. *See Gemtron Corp. v. Saint-Gobain Corp.*, 572 F.3d 1371, 1380 (Fed. Cir. 2009).

The court concludes that Commerce excluded Baoding's brief from the record improperly because the text at issue in Baoding's case brief is not new factual information under the applicable regulatory defi-

[12] The court must, where appropriate, require parties to exhaust administrative remedies before bringing a claim to the CIT. *See* 28 U.S.C. § 2637(d). Requiring exhaustion ensures that the agency has an opportunity to correct any of its own mistakes before dealing with judicial review of its actions, serves to protect administrative agency authority, and promotes judicial efficiency. *See Corus Staal BV v. United States*, 502 F.3d 1370, 1379–80 (Fed. Cir. 2007) (citing *McCarthy v. Madigan*, 503 U.S. 140, 145 (1992)).

[13] All further citations to Title 19 of the Code of Federal Regulations are to the 2012 edition.

nition. The court finds that Commerce's rejection of Baoding's entire late-filed brief and all arguments regarding the surrogate value selection for liquid ammonia was erroneous. The Department should have considered the arguments in Baoding's brief and any ensuing arguments from other parties when calculating Baoding's normal value.

Commerce did not mention the issue of liquid ammonia, whether anhydrous or aqueous, in its Final Results and I&D Memo. In its brief before the court, Defendant merely asserted that "Commerce properly selected aqueous ammonia to use in its surrogate value calculation." Def. Mem. Opp. Rule 56.2 Mots. 36. Defendant also noted in its brief that the Department used anhydrous ammonia, the input proposed by Baoding here, in two prior administrative reviews stemming from the same antidumping order on glycine from China. *See id.* In an attempt to distinguish those results from the instant review, Defendant explained in its filing that "[t]he record in this review, unlike the records of the 2005–2006 review and the [2006–2007] review, [did] not contain documentation of the chemical reaction used by Baoding to produce glycine or any records that show the type of ammonia used in that reaction." *Id.*

Although Commerce has discretion to determine which evidence is the "best available information," Commerce's findings must be reasonable and supported by substantial evidence on the record. *See Qingdao Sea-Line Trading Co.*, 766 F.3d at 1386; *Shakeproof Assembly Components, Div. of Ill. Tool Works, Inc. v. United States*, 268 F.3d 1376, 1382 (Fed. Cir. 2001). The court examines the information used by the Department by inquiring "whether a reasonable mind could conclude that Commerce chose the best available information." *Zhejiang DunAn Hetian Metal Co. v. United States*, 652 F.3d 1333, 1341 (Fed. Cir. 2011). In this case, Commerce improperly excluded Baoding's arguments from consideration.

While Commerce did not mention any reasons for selecting aqueous ammonia in its Final Results or I&D Memo, Defendant confirmed that Commerce relied on its selection in its normal value calculations. *See* Def. Mem. Opp. Rule 56.2 Mots. 34–36. The court notes that Commerce used anhydrous ammonia, not aqueous ammonia, in two prior reviews of the same antidumping order for glycine. *See Glycine from the People's Republic of China*, 73 Fed. Reg. 55,814 (Dep't Commerce Sept. 26, 2008) (final results of antidumping duty administrative review and final rescission, in part; 2006–2007); *Glycine from the People's Republic of China*, 72 Fed. Reg. 58,809 (Dep't Commerce Oct. 17, 2007) (final results of antidumping duty administrative review and final rescission, in part; 2005–2006). The court does not conclude

that the factor of production input of aqueous ammonia was incorrect as a factual matter. Rather, in light of the deficiencies in the Department's explanation, the court directs the Department to accept Baoding's administrative case brief, review the relevant record (including the arguments put forth by Baoding and GEO), and reach a well-reasoned and adequately-explained finding as to the appropriate surrogate value for Baoding's liquid ammonia input.

ii. Selection of Financial Ratios

GEO challenges Commerce's selection of surrogate financial ratios by arguing that Commerce failed to explain adequately why the production process of the selected companies was comparable to that of Baoding's production of glycine. *See* GEO Rule 56.2 Memo in Support 28–32. Defendant argues that Commerce selected surrogate financial ratios of companies with similar production capability to Baoding, which represented the best available information. *See* Def. Mem. Opp. Rule 56.2 Mots. 31–35.

Commerce has wide discretion when selecting the best available information to determine the most accurate dumping margin. *See Qingdao Sea-Line Trading Co.*, 766 F.3d at 1386; *Shakeproof Assembly Components*, 268 F.3d at 1382. Commerce must choose financial ratios from "producers of identical or comparable merchandise in the surrogate country" when selecting surrogate financial statements. *See* 19 C.F.R. § 351.408(c)(4). The Department normally engages in a three-part analysis to determine whether the company in question produces "comparable merchandise," focusing on physical characteristics, end uses, and production processes. *See Jiaxing Brother Fastener Co. v. United States*, 34 CIT 1455, 1464–65, 751 F. Supp. 2d 1345, 1354–55 (2010); *Shanghai Foreign Trade Enterprises Co. v. United States*, 28 CIT 480, 490, 318 F. Supp. 2d 1339, 1348 (2004). Commerce also has a practice of selecting financial information from producers who have production experience similar to the respondent. *See, e.g.*, *Glycine from the People's Republic of China*, 72 Fed. Reg. 58,809 (Dep't Commerce Oct. 17, 2007) (final results of antidumping duty administrative review and final rescission, in part; 2005–2006) and Issues and Decision Memorandum for the Final Results of the 2005–2006 Antidumping Duty Administrative Review at 11–13, A-570–836, (Oct. 9, 2007), *available at* http://enforcement.trade.gov/frn/summary/prc/E7–20452–1.pdf (last visited July 25, 2017); *Persulfates from the People's Republic of China*, 70 Fed. Reg. 6,836 (Dep't Commerce Feb. 9, 2005) (final results of antidumping duty administrative review; 2002–2003) and Issues and Decision Memorandum for

the 2002–2003 Antidumping Duty Administrative Review of Persulfates from the People's Republic of China at 4–6, A-570–847, (Feb. 9, 2005), *available at* http://enforcement.trade.gov/frn/summary/prc/E5–537–1.pdf (last visited July 25, 2017); *Certain Frozen and Canned Warmwater Shrimp from the People's Republic of China*, 69 Fed. Reg. 70,997 (Dep't Commerce Dec. 8, 2004) (notice of final determination of sales at less than fair value) and Issues and Decision Memorandum for the Antidumping Duty Investigation of Certain Frozen and Canned Warmwater Shrimp from the People's Republic of China at 62, A-570–893, (Dec. 8, 2004), *available at* http://enforcement.trade.gov/frn/summary/prc/04–26976–1.pdf (last visited July 25, 2017).

GEO submitted the financial information of several Indonesian pharmaceutical companies for Commerce to determine surrogate financial ratios. *See* I&D Memo at 13. The Department explained that the companies suggested by GEO employed "much more advanced" processes than Baoding's production of glycine, and thus were not reflective of Baoding's business activities. *See id.* at 18–19; Preliminary Results Memo at 19. Instead, Commerce used financial ratios from two Indonesian producers, PT Budi Starch and Sweetener Tbk ("PT Budi") (a starch and sweetener manufacturer) and PT Lautan Luas Tbk ("PT Lautan") (a chemical company), after finding that these companies had production processes comparable to Baoding's. *See* I&D Memo at 17–18; Preliminary Results Memo at 19. Commerce attempted to justify the selection of PT Budi and PT Lautan by explaining why the companies suggested by GEO were inadequate, *see* I&D Memo at 18, but failed to cite any record evidence or to provide adequate explanations to demonstrate why PT Budi's and PT Lautan's production experiences were comparable to Baoding's business activities. The Department's explanation contained mere conclusory statements regarding the similarity in production processes between Baoding, PT Budi, and PT Lautan. *See* I&D Memo at 19 ("[T]he companies have a comparable production process to producers of glycine . . . ."); Preliminary Results Memo at 19 ("After considering all surrogate financial statements, the Department determined to use the financial information of two Indonesian producers of merchandise with comparable production processes as glycine for the purposes of these preliminary results . . . ."); Surrogate Values for the Preliminary Results of Review at 7, PD 204 at bar code 3268210–01 (Mar. 31, 2015) ("[PT Budi and PT Lautan] engage in production processes comparable to the merchandise under review."). Although Commerce is given broad discretion to select the best available information when choosing surrogate values, the Department failed to adequately support its determination that PT Budi and PT Lautan engaged in

production processes comparable to Baoding's glycine production. This issue is remanded for Commerce to address the court's concerns and support its selection of the companies used to determine surrogate financial ratios with substantial evidence on the record.

C. Baoding's By-Product Offset

GEO argues that Commerce erred in granting Baoding a by-product offset when calculating its normal value. *See* GEO Rule 56.2 Memo in Support 22–28. According to GEO, Baoding did not provide sufficient evidence to support Commerce's decision to grant the by-product offset. *See id.* Defendant counters that Baoding submitted documentation such as receipts, payment vouchers, and inventory out-slips, which enabled Commerce to determine the amount of the offset for the review period. *See* Def. Mem. Opp. Rule 56.2 Mots. 24–28.

Commerce is tasked with calculating the normal value through use of surrogate values when subject merchandise is imported from a nonmarket economy country. *See* 19 U.S.C. § 1677b(c)(1). The Department must examine the "quantities of raw materials employed" by a company in reviewing factors of production to calculate normal value. *See id.* at § 1677b(c)(3)(B). Not all raw materials are incorporated into the finished product, however, and Commerce often offsets normal value by revenue derived from sales of by-products generated during the production of subject merchandise. *See Arch Chems., Inc. v. United States*, 33 CIT 954, 956 (2009); *Ass'n of Am. School Paper Suppliers v. United States*, 32 CIT 1196, 1205 (2008). Generally, the Department requires a party requesting a by-product offset to demonstrate that there was a quantity of by-product generated during the period of review and that the by-product had commercial value. *See Am. Tubular Prod., LLC. v. United States*, 38 CIT __, __, Slip Op. 14–116, at *17 (Sept. 26, 2014); *Arch Chems.*, 33 CIT at 956; I&D Memo at 11. The burden of substantiating any by-product offset falls to the respondent, who must present Commerce with sufficient information to support claims for the offset. *See Arch Chems.* 33 CIT at 956.

Commerce examined several factors when it considered whether to grant Baoding a by-product offset for its production of hydrochloric acid and ammonium chloride. First, Baoding introduced evidence on the record demonstrating the quantity of the by-products generated from the production of glycine. *See* Baoding's Sections C and D Resp. at D-15–D-16. Although Baoding did not maintain production records for the by-products, it showed that they were the result of the chemical process used to create glycine and were produced at a determin-

able rate during production. *See id.* Baoding was able to determine the amount of hydrochloric acid and ammonium chloride generated from the production of one metric ton of glycine. *See id.* By dividing the total amount of by-product sold during the period of review by the total production quantity of glycine, Baoding was able to calculate the requested offset. *See id.* Baoding corroborated this calculation by providing Commerce with receipts and inventory out-slips of the by-products sold during the review period. *See* Baoding's First Suppl. Resp. at App. S1–11. Second, Commerce considered whether Baoding sold the by-products to outside purchasers for revenue. *See* I&D Memo at 11–12. Commerce relied on evidence, including Baoding's inventory out-slips, payment vouchers, and receipts, when it concluded that Baoding's hydrochloric acid and ammonium chloride by-products had commercial value. *See id.* ; Baoding's First Suppl. Resp. at App. S1–11; Baoding's Third Suppl. Resp. at 6. The court holds, therefore, that Commerce's determination to grant Baoding a by-product offset was supported by substantial evidence.

CONCLUSION

For the foregoing reasons, the court concludes that: (1) Commerce's determination that Evonik's sales were not *bona fide* was supported by substantial evidence, (2) the Department's determination that Baoding's sale was *bona fide* was supported by substantial evidence, (3) Commerce's determination that Baoding improperly included new factual information in its administrative case brief was not supported by substantial evidence, (4) the Department's selection of surrogate financial ratios was not supported by substantial evidence, and (5) Commerce's determination to award Baoding a by-product offset was supported by substantial evidence. Therefore, in accordance with the foregoing, it is hereby

ORDERED that Commerce's determination that Evonik's sales were not *bona fide* is sustained; and it is further

ORDERED that Commerce's determination that Baoding's sale was *bona fide* is sustained; and it is further

ORDERED that Commerce's determination to award Baoding a by-product offset is sustained; and it is further

ORDERED that this matter is remanded for Commerce to (1) accept Baoding's administrative case brief as originally submitted to the Department on May 8, 2015, accept GEO's rebuttal brief as originally submitted to the Department on May 13, 2015, and address Baoding's and GEO's arguments regarding the surrogate value selection for liquid ammonia; and (2) further explain Commerce's selection of the companies used for Baoding's surrogate financial ratios; and it is further

ORDERED that Commerce shall file its remand determination with the court on or before September 1, 2017; and it is further

ORDERED that the Parties shall file comments on the remand determination on or before October 2, 2017; and it is further

ORDERED that the Parties shall file any replies to the comments on or before October 16, 2017.

Dated: August 1, 2017
New York, New York

/s/ Jennifer Choe-Grove
JENNIFER CHOE-GROVES, JUDGE

Slip Op. 17–97

MICRO SYSTEMS ENGINEERING, INC., Plaintiff, v. UNITED STATES, Defendant.

Before: Jennifer Choe-Groves, Judge
Court No. 13–00317

[Granting Plaintiff's USCIT Rule 12(c) motion for judgment on the pleadings.]

Dated: August 7, 2017

Elon A. Pollack, Stein Shostak Shostak Pollack & O'Hara, LLP, of Los Angeles, CA, for plaintiff.

Alexander Vanderweide, Trial Attorney, Commercial Litigation Branch, Civil Division, U.S. Dept. of Justice, of New York, NY, for defendant. With him on brief were *Chad A. Readler*, Acting Assistant Attorney General, *Amy M. Rubin*, Assistant Director.

JUDGMENT

Choe-Groves, Judge:

This case involves the classification of certain parts used to manufacture subassemblies for pacemakers imported by Micro Systems Engineering, Inc. ("Plaintiff"). *See* Summons, Aug. 28, 2013, ECF No. 1; Compl. ¶ 5, Aug. 9, 2016, ECF No. 13. Plaintiff imported forty entries of the merchandise between January 2011 and June 2011.[1] *See* Summons. U.S. Customs and Border Protection ("Customs") classified and liquidated the merchandise under various provisions of the Harmonized Tariff Schedule of the United States ("HTSUS"). *See* Compl. ¶ 5; Answer ¶ 5, Feb. 15, 2017, ECF No. 21. Plaintiff's complaint alleges that Customs misclassified the imported merchandise because the parts are specially designed or adapted for use in heart

[1] This case initially concerned forty-two entries, but Entry Nos. UPS-1492397–9 and UPS-2641343–1 were severed and dismissed from this case on March 2, 2017. *See* Order, Mar. 2, 2017, ECF No. 23 (granting Plaintiff's consent motion to sever and dismiss).

pacemakers and are classifiable under the Nairobi Protocol to the Florence Agreement on the Importation of Educational, Scientific, and Cultural Materials ("Nairobi Protocol"). *See* Compl. ¶ 7. The HTSUS implemented the Nairobi Protocol under subheading 9817.00.96, which is a duty free provision that exempts payment of certain merchandise processing fees. *See* 19 C.F.R. § 24.23(c)(1)(i). Defendant agrees that the imported pacemaker components contained in the entries at issue are classifiable under HTSUS subheading 9817.00.96. *See* Answer n.1, ¶ 7.

Before the court is Plaintiff's Motion for Judgment on the Pleadings filed pursuant to USCIT Rule 12(c). *See* Mot. J. Pleadings, Mar. 22, 2017, ECF No. 24. USCIT Rule 12(c) permits a party to move for judgment on the pleadings "after the pleadings are closed and if it would not delay trial." *Forest Labs., Inc. v. United States*, 29 CIT 1401, 1402, 403 F. Supp. 2d 1348, 1349 (2005), *aff'd*, 476 F.3d 877 (Fed. Cir. 2007). A judgment on the pleadings is appropriate where there are no material facts in dispute and the moving party is entitled to judgment as a matter of law. *See New Zealand Lamb Co., Inc. v. United States*, 40 F.3d 377, 380 (Fed. Cir. 1994) (citing *Gen. Conference Corp. of Seventh-Day Adventists v. Seventh-Day Adventist Congregational Church*, 887 F.2d 228, 230 (9th Cir. 1989), *cert. denied*, 493 U.S. 1079 (1990)). Plaintiff asserts that there are no factual or legal disputes for the court to review and the court should enter judgment in Plaintiff's favor because Defendant admits that the imported goods are classifiable under the Nairobi Protocol. *See* Mot. J. Pleadings 3. Defendant responds as follows:

> Micro Systems is correct that the Government admits that the imported substrates, cap sensors, and coils contained in the entries covered by this action are properly afforded secondary classification under subheading 9817.00.96, HTSUS. *See* Answer ¶ 7. However, the Government does not agree that Micro Systems has established that it is entitled to refunds on "TANT Caps" contained in Entry Nos. UPS-1590276–6 and UPS-2470970–7, "Tabs" contained in Entry Nos. UPS1283211–5 and UPS-2539341–0, and "AOTs" contained in Entry Nos. UPS1272304–1 and UPS-1384281–6. "TANT Caps," "Tabs," and "AOTs" are not the subject of the Complaint, and "TANT Caps" and "Tabs" are not the subject of the protests covering the entries in which they are contained. *See* Compl. ¶ 7; *see also* Entry Papers and Protests.

Def.'s Resp. Pl.'s Mot. J. Pleadings 2, Apr. 17, 2017, ECF No. 27. Plaintiff agrees that "TANT Caps" and "Tabs" are not classifiable

under the Nairobi Protocol. *See* Reply in Supp. Pl.'s Mot. J. Pleadings 1, May 26, 2017, ECF No. 33. Plaintiff maintains, however, that the "AOTs" should be afforded duty-free treatment under the Nairobi Protocol. *See id.* Plaintiff represents that, after providing Defendant with documents and technical specifications, Defendant agrees that the "AOTs" qualify for duty-free treatment under the Nairobi Protocol. *See id.* The Parties are in agreement that the imported substrates, cap sensors, coils, and AOTs contained in the entries at issue in this action are classifiable under the Nairobi Protocol. The Parties are also in agreement that "TANT Caps" and "Tabs" are not classifiable under the Nairobi Protocol. Judgment on the pleadings is appropriate here because the pleadings do not raise any triable material issue of fact and Plaintiff is entitled to judgment as a matter of law regarding the classification of the imported substrates, cap sensors, coils, and AOTs.

Therefore, upon consideration of Plaintiff's Motion for Judgment on the Pleadings, and all other papers and proceedings in this action, and upon due deliberation, it is hereby

ORDERED that judgment is granted in favor of Plaintiff; it is further

ORDERED that the imported substrates, cap sensors, coils, and AOTs contained in the entries set forth on the attached Schedule are classifiable under HTSUS subheading 9817.00.96, which is a duty free provision that exempts payment of merchandise processing fees; it is further

ORDERED that, in accordance with this judgment, U.S. Customs and Border Protection shall reliquidate and issue refunds for those entries on the attached Schedule containing substrates, cap sensors, coils, and AOTs; it is further

ORDERED that any refunds payable by reason of this judgment shall be paid with any interest as provided by law; it is further

ORDERED that all claims with respect to "TANT Caps" contained in Entry Nos. UPS-1590276–6 and UPS-2470970–7 are dismissed; and it is further

ORDERED that all claims with respect to "Tabs" contained in Entry Nos. UPS-1283211–5 and UPS-2539341–0 are dismissed.

Dated: August 7, 2017
New York, New York

/s/ Jennifer Choe-Groves
JENNIFER CHOE-GROVES, JUDGE

SCHEDULE

Court No. 13–00317
Port: Cleveland, OH (4101)

Protest No.	Entry No.	Description of Merchandise
4101–12–100417	UPS-1439875–0	Substrate Nos. 358018, 362539
	UPS-1455049–1	Substrate No. 380143
	UPS-1467605–6	Substrate No. 358018
	UPS-1494247–4	Substrate No. 358018
4101–12–100430	UPS-1765499–3	Substrate Nos. 355686, 369164
	UPS-1782685–6	Substrate Nos. 355686, 358018
	UPS-1829299–1	Substrate Nos. 358018, 362539
4101–12–100775	UPS-2622837–5	Substrate Nos. 375850, 358018
	UPS-2648611–4	Substrate No. 358018
	UPS-2695243–8	Substrate No. 375851
	UPS-2726160–7	Substrate
	UPS-2748481–1	Substrate Nos. 375851, 375850
	UPS-2812258–4	Substrate No. 375850
4101–12–100416	UPS-1547077–2	Substrate No. 362539
	UPS-1547087–1	Substrate Nos. 358018, 355686
	UPS-1590276–6	Substrate No. 371594
	UPS-1685871–0	Substrate No. 355686
	UPS-1702034–4	Substrate No. 355686
	UPS-1717033–9	Substrate Nos. 369164, 362539
	UPS-1733939–7	Substrate No. 362539
4101–12–100415	UPS-1209282–7	Substrate Nos. 358018, 355686
	UPS-1202813–6	Substrate No. 362539
	UPS-1184562–1	Substrate Nos. 358018, 362539
	UPS-1178068–7	Substrate Nos. 358018, 380143
	UPS-1154883–7	Substrate Nos. 362539
	UPS-1286564–4	Substrate No. 358018
	UPS-1272304–1	Cap Sensor, AOTs
	UPS-1270044–5	Substrate No. 369164
	UPS-1255860–3	Substrate Nos. 362539, 355686
	UPS-1314435–3	Substrate Nos. 355686, 380695
	UPS-1283211–5	Coil
	UPS-1384281–6	Cap Sensor, AOTs
4101–12–100728	UPS-2461979–9	Substrate Nos. 358018, 362539
	UPS-2470970–7	Cap Sensor
	UPS-2476717–6	Substrate
	UPS-2506937–4	Substrate Nos. 375850, 375851
	UPS-2507255–0	Substrate No. 369164

Protest No.	Entry No.	Description of Merchandise
	UPS-2521936–7	Substrate No. 380143
	UPS-2539341–0	Coil
	UPS-2541579–1	Substrate No. 375851

Slip Op. 17–98

MICRO SYSTEMS ENGINEERING, INC., Plaintiff, v. UNITED STATES, Defendant.

Before: Jennifer Choe-Groves, Judge
Court No. 13–00376

[Granting Plaintiff's USCIT Rule 12(c) motion for judgment on the pleadings.]

Dated: August 7, 2017

Elon A. Pollack, Stein Shostak Shostak Pollack & O'Hara, LLP, of Los Angeles, CA, for plaintiff.

Alexander Vanderweide, Trial Attorney, Commercial Litigation Branch, Civil Division, U.S. Dept. of Justice, of New York, NY, for defendant. With him on brief were *Chad A. Readler*, Acting Assistant Attorney General, *Amy M. Rubin*, Assistant Director.

JUDGMENT

Choe-Groves, Judge:

This case involves the classification of certain parts used to manufacture subassemblies for pacemakers imported by Micro Systems Engineering, Inc. ("Plaintiff"). *See* Summons, Nov. 8, 2013, ECF No. 1; Compl. ¶ 5, Feb. 13, 2017, ECF No. 15. Plaintiff imported twenty-four entries of the merchandise between June 2011 and February 2012.[1] *See* Summons. U.S. Customs and Border Protection ("Customs") classified and liquidated the merchandise under various provisions of the Harmonized Tariff Schedule of the United States ("HTSUS"). *See* Compl. ¶ 5; Answer ¶ 5, Mar. 23, 2017, ECF No. 16. Plaintiff's complaint alleges that Customs misclassified the imported merchandise because the parts are specially designed or adapted for use in heart pacemakers and are classifiable under the Nairobi Protocol to the Florence Agreement on the Importation of Educational, Scientific, and Cultural Materials ("Nairobi Protocol"). *See* Compl. ¶¶ 7–9. The HTSUS implemented the Nairobi Protocol under subheading 9817.00.96, which is a duty free provision that exempts payment of certain merchandise processing fees. *See* 19 C.F.R. § 24.23(c)(1)(i). Defendant agrees that the imported pacemaker components contained in the entries at issue are classifiable under HTSUS subheading 9817.00.96. *See* Answer ¶¶ 7–9.

[1] This case initially concerned forty-three entries. *See* Summons. The nineteen entries covered in Protest Nos. 4196–13–100098, 4196–13–100058, 4196–13–100210, 4196–13–100065, 4196–13–100059, 4196–13–100140, and 4101–13–100192 were severed and dismissed from this case on May 10, 2017 and August 1, 2017. *See* Order, May 10, 2017, ECF No. 25 (granting Plaintiff's consent motion to sever and dismiss); Order, Aug. 1, 2017, ECF No. 29 (granting Plaintiff's consent motion to sever and dismiss).

Before the court is Plaintiff's Motion for Judgment on the Pleadings filed pursuant to USCIT Rule 12(c). *See* Mot. J. Pleadings, May 9, 2017, ECF No. 23. USCIT Rule 12(c) permits a party to move for judgment on the pleadings "after the pleadings are closed and if it would not delay trial." *Forest Labs., Inc. v. United States*, 29 CIT 1401, 1402, 403 F. Supp. 2d 1348, 1349 (2005), *aff'd*, 476 F.3d 877 (Fed. Cir. 2007). A judgment on the pleadings is appropriate where there are no material facts in dispute and the moving party is entitled to judgment as a matter of law. *See New Zealand Lamb Co., Inc. v. United States*, 40 F.3d 377, 380 (Fed. Cir. 1994) (citing *Gen. Conference Corp. of Seventh-Day Adventists v. Seventh-Day Adventist Congregational Church*, 887 F.2d 228, 230 (9th Cir. 1989), *cert. denied*, 493 U.S. 1079 (1990)). Plaintiff asserts that there are no factual or legal disputes for the court to review and the court should enter judgment in Plaintiff's favor because Defendant admits that the imported goods are classifiable under the Nairobi Protocol. *See* Mot. J. Pleadings 3. Defendant responds as follows:

> [W]e agree with Micro Systems that the substrates, coils, diodes and integrated circuits in the remaining . . . entries before the Court "are properly classified under HTSUS 9817.00.96 (Nairobi Protocol), which carries 0% duties *ad valorem* and are excepted from payment of merchandise processing fees." Pl. Motion at 2–3.

Def.'s Resp. Pl.'s Mot. J. Pleadings 2, May 15, 2017, ECF No. 26. The Parties are in agreement that the imported substrates, coils, diodes, and integrated circuits contained in the entries at issue in this action are classifiable under the Nairobi Protocol. Judgment on the pleadings is appropriate here because the pleadings do not raise any triable material issue of fact and Plaintiff is entitled to judgment as a matter of law regarding the classification of the imported substrates, coils, diodes, and integrated circuits.

Therefore, upon consideration of Plaintiff's Motion for Judgment on the Pleadings, and all other papers and proceedings in this action, and upon due deliberation, it is hereby

ORDERED that judgment is granted in favor of Plaintiff; it is further

ORDERED that the imported substrates, coils, diodes, and integrated circuits contained in the entries set forth on the attached Schedule are classifiable under HTSUS subheading 9817.00.96, which is a duty free provision that exempts payment of merchandise processing fees; it is further

ORDERED that, in accordance with this judgment, U.S. Customs and Border Protection shall reliquidate and issue refunds for those

entries on the attached Schedule containing substrates, coils, diodes, and integrated circuits; and it is further

ORDERED that any refunds payable by reason of this judgment shall be paid with any interest as provided by law.

Dated: August 7, 2017
New York, New York

/s/ Jennifer Choe-Groves
JENNIFER CHOE-GROVES, JUDGE

SCHEDULE

Court No. 13–00376
Port: Cleveland, OH (4101)

Protest No.	Entry No.	Description of Merchandise
4101–12–100774	UPS-2820507–4	Substrate No. 382159
	UPS-2853368–1	Substrate No. 375851
	UPS-2935425–1	Substrate Nos. 358018, 375850
	UPS-2974236–4	Substrate No. 369164
	UPS-2983617–4	Substrate Nos. 380143, 375850
4101–13–100366	UPS-5249407–3	Substrate No. 369164
	UPS-5322143–4	Substrate No. 381978
	UPS-5216520–2	Substrate No. 358018
	UPS-5295260–9	Substrate No. 358018
	UPS-5181551–8	Integrated Circuits
4101–13–100397	UPS-5267472–4	Substrate Nos. 375850, 375851, 388143
	UPS-5558872–3	Substrate Nos. 375850, 380143
	UPS-5322139–2	Substrate No. 380143
	UPS-5399461–8	Substrate No. 375851
	UPS-5434839–2	Substrate No. 365754
4101–13–100398	UPS-5251974–7	Diodes
	UPS-5481026–8	Diodes

Port: Los Angeles International Airport (2720)

Protest No.	Entry No.	Description of Merchandise
2720–13–100071	UPS-3938534–5	Coil (Frame, Shield)
2720–13–100147	UPS-4502677–6	Coil Circuit
	UPS-4542473–2	Coil Frame
2720–13–100170	UPS-4632367–7	Coil Frame, Shield
	UPS-4696268–0	Coil Frame
	UPS-4764926–0	Coil Shield
	UPS-4953780–2	Coil (Frame Circuit)

Slip Op. 17–99

MICRO SYSTEMS ENGINEERING, INC., Plaintiff, v. UNITED STATES, Defendant.

Before: Jennifer Choe-Groves, Judge
Court No. 14–00005

[Granting Plaintiff's USCIT Rule 12(c) motion for judgment on the pleadings.]

Dated: August 7, 2017

Elon A. Pollack, Stein Shostak Shostak Pollack & O'Hara, LLP, of Los Angeles, CA, for plaintiff.

Alexander Vanderweide, Trial Attorney, Commercial Litigation Branch, Civil Division, U.S. Dept. of Justice, of New York, NY, for defendant. With him on brief were *Chad A. Readler*, Acting Assistant Attorney General, *Amy M. Rubin*, Assistant Director.

Choe-Groves, Judge:

This case involves the classification of certain parts used to manufacture subassemblies for pacemakers imported by Micro Systems Engineering, Inc. ("Plaintiff"). *See* Summons, Jan. 6, 2014, ECF No. 1; Compl. ¶ 5, Aug. 2, 2016, ECF No. 14. Plaintiff imported nine entries of the merchandise between August 2011 and January 2012.[1] *See* Summons. U.S. Customs and Border Protection ("Customs") classified and liquidated the merchandise under various provisions of the Harmonized Tariff Schedule of the United States ("HTSUS"). *See* Compl. ¶ 5; Answer ¶ 5, Mar. 23, 2017, ECF No. 23. Plaintiff's complaint alleges that Customs misclassified the imported merchandise because the parts are specially designed or adapted for use in heart pacemakers and are classifiable under the Nairobi Protocol to the Florence Agreement on the Importation of Educational, Scientific, and Cultural Materials ("Nairobi Protocol"). *See* Compl. ¶ 7. The HTSUS implemented the Nairobi Protocol under subheading 9817.00.96, which is a duty free provision that exempts payment of certain merchandise processing fees. *See* 19 C.F.R. § 24.23(c)(1)(i). Defendant agrees that the imported pacemaker components contained in the entries at issue are classifiable under HTSUS subheading 9817.00.96. *See* Answer n.1, ¶ 7, Feb. 15, 2017, ECF No. 21.

[1] This case initially concerned thirty-nine entries, but the thirty entries covered in Protest Nos. 4101–13–100120, 4196–13–100069, 4196–13–100142, 4196–13–100240, 4196–13–100036, and 4196–13–100034 were severed and dismissed from this case on May 10, 2017. *See* Order, May 10, 2017, ECF No. 31 (granting Plaintiff's consent motion to sever and dismiss).

Before the court is Plaintiff's Motion for Judgment on the Pleadings filed pursuant to USCIT Rule 12(c). *See* Mot. J. Pleadings, May 9, 2017, ECF No. 30. USCIT Rule 12(c) permits a party to move for judgment on the pleadings "after the pleadings are closed and if it would not delay trial." *Forest Labs., Inc. v. United States*, 29 CIT 1401, 1402, 403 F. Supp. 2d 1348, 1349 (2005), *aff'd*, 476 F.3d 877 (Fed. Cir. 2007). A judgment on the pleadings is appropriate where there are no material facts in dispute and the moving party is entitled to judgment as a matter of law. *See New Zealand Lamb Co., Inc. v. United States*, 40 F.3d 377, 380 (Fed. Cir. 1994) (citing *Gen. Conference Corp. of Seventh-Day Adventists v. Seventh-Day Adventist Congregational Church*, 887 F.2d 228, 230 (9th Cir. 1989), *cert. denied*, 493 U.S. 1079 (1990)). Plaintiff asserts that there are no factual or legal disputes for the court to review and the court should enter judgment in Plaintiff's favor because Defendant admits that the imported goods are classifiable under the Nairobi Protocol. *See id.* at 3. Defendant responds as follows:

> We agree with Micro Systems that these substrates "are properly classified under HTSUS 9817.00.96 (Nairobi Protocol), which carries 0% duties *ad valorem* and are excepted from payment of merchandise processing fees." Pl. Motion at 2–3.

Def.'s Resp. Pl.'s Mot. J. Pleadings 2, May 15, 2017, ECF No. 32. The Parties are in agreement that the imported substrates contained in the entries at issue in this action are classifiable under the Nairobi Protocol. Judgment on the pleadings is appropriate here because the pleadings do not raise any triable material issue of fact and Plaintiff is entitled to judgment as a matter of law regarding the classification of the imported substrates.

Therefore, upon consideration of Plaintiff's Motion for Judgment on the Pleadings, and all other papers and proceedings in this action, and upon due deliberation, it is hereby

ORDERED that judgment is granted in favor of Plaintiff; it is further

ORDERED that the imported substrates contained in the entries set forth on the attached Schedule are classifiable under HTSUS subheading 9817.00.96, which is a duty free provision that exempts payment of merchandise processing fees; it is further

ORDERED that, in accordance with this judgment, U.S. Customs and Border Protection shall reliquidate and issue refunds for those entries on the attached Schedule containing substrates; and it is further

ORDERED that any refunds payable by reason of this judgment shall be paid with any interest as provided by law.

Dated: August 7, 2017
New York, New York

/s/ Jennifer Choe-Groves
JENNIFER CHOE-GROVES, JUDGE

SCHEDULE

Court No. 14–00005
Port: Cleveland, OH (4101)

Protest No.	Entry No.	Description of Merchandise
4101–13–100193	UPS-4688147–6	Substrate, Part No. 380143
	UPS-5021804–5	Substrate, Part No. 380143
	UPS-4771421–3	Substrate, Part No. 358018
	UPS-5135668–7	Substrate, Part No. 358018
	UPS-4806542–5	Substrate, Part No. 375851
	UPS-4850454–8	Substrate, Part No. 375850
	UPS-4838964–3	Substrate, Part No. 369164
	UPS-4875845–8	Substrate, Part No. 369164
	UPS-5101677–8	Substrate, Part No. 369164

Slip Op. 17–100

TRI UNION FROZEN PRODUCTS, INC. et al., Plaintiffs and Consolidated Plaintiffs, v. UNITED STATES, Defendant, and AD HOC SHRIMP TRADE ACTION COMMITTEE, Defendant-Intervenor.

Before: Claire R. Kelly, Judge
Consol. Court No. 14–00249

[Sustaining the final results of redetermination, pursuant to court remand, in the eighth administrative review of the antidumping duty order on certain frozen warmwater shrimp from the Socialist Republic of Vietnam.]

Dated: August 8, 2017

Robert George Gosselink, *Jarrod Mark Goldfeder*, and *Jonathan Michael Freed*, Trade Pacific, PLLC, of Washington, DC, for Plaintiffs Tri Union Frozen Products, Inc., Mazzetta Company LLC, and Ore-Cal Corporation, and for Consolidated Plaintiff Quoc Viet Seaproducts Processing Trading and Import-Export Co., Ltd.

William Henry Barringer, *Matthew Paul McCullough*, and *Matthew Robert Nicely*, Curtis, Mallet-Prevost, Colt & Mosle LLP, of Washington, DC, for Consolidated Plaintiffs Vietnam Association of Seafood Exporters and Producers and certain of its individual member companies.

Nathaniel Jude Maandig Rickard and *Roop Kiran Bhatti*, Picard, Kentz & Rowe, LLP, of Washington, DC, for Consolidated Plaintiff and Defendant-Intervenor Ad Hoc Shrimp Trade Action Committee.

Kara Marie Westercamp, Trial Attorney, Commercial Litigation Branch, Civil Division, U.S. Department of Justice, of Washington, DC, for Defendant. With her on the brief were *Chad A. Readler*, Acting Assistant Attorney General, *Jeanne E. Davidson*, Director, and *Patricia M. McCarthy*, Assistant Director. Of Counsel on the brief was *James H. Ahrens II*, Attorney, Office of the Chief Counsel for Trade Enforcement and Compliance, U.S. Department of Commerce.

OPINION

Kelly, Judge:

Before the court for review is the U.S. Department of Commerce's ("Commerce") second remand determination filed pursuant to the court's order in *Tri Union Frozen Products, Inc. et al. v. United States*, 41 CIT __, __, 227 F. Supp. 3d 1387, 1402 (2017) ("*Tri Union II*"). *See* Final Results of Redetermination Pursuant to Court Remand, July 26, 2017, ECF No. 144–1 ("Second Remand Results").

In *Tri Union II* the court remanded to Commerce the first remand determination in the eighth administrative review of the antidumping duty order on certain frozen warmwater shrimp from the Socialist Republic of Vietnam ("Vietnam") for further explanation and consideration of the surrogate data selected to value the labor factor of production ("FOP") in this review. *Tri Union II*, 41 CIT at __, 227 F. Supp. 3d at 1402. Specifically, the court remanded for Commerce to: (1) articulate a reasonable method by which a petitioner can demonstrate aberration or unreliability where, as here, there is a claim of

widespread, systemic labor abuse, and (2) address the record evidence of widespread labor abuses in the Bangladeshi shrimp industry that undermines Commerce's implicit findings that the data from the Bangladesh Bureau of Statistics ("BBS data") is non-aberrational, reliable, and thus the best information available. *See id.* The court further ordered Commerce to explain why the Bangladeshi wage rate data is reliable and not aberrational despite the record data or, if the data is found to be aberrational and unreliable, to either explain or reconsider the determination that the Bangladeshi labor wage rate data is the best available information. *See id.*

For the reasons that follow, Commerce's Second Remand Results comply with the court's order in *Tri Union II* and accordingly are sustained.

BACKGROUND

The court assumes familiarity with the facts of this case as discussed in the previous two opinions ordering remand to Commerce, *see Tri Union Frozen Products, Inc. et al. v. United States*, 40 CIT __, __, 163 F. Supp. 3d 1255, 1263–66 (2016) ("*Tri Union I*"); *Tri Union II*, 41 CIT at __, 227 F. Supp. 3d at 1390–93, and here recounts the facts relevant to the court's review of the Second Remand Results.

In the final determination of this administrative review, Commerce selected Bangladesh as the primary surrogate country for valuing respondents' factors of production. *See* Certain Frozen Warmwater Shrimp from the Socialist Republic of Vietnam: Issues and Decision Memorandum for the Final Results, A-552–802, 9–17, (Sept. 19, 2014), ECF No. 27–4 ("Final Decision Memo"). Over objections from Ad Hoc Shrimp Trade Action Committee ("Ad Hoc Shrimp"), Commerce also selected labor wage rate data from the Bangladeshi shrimp industry to value the labor factor of production. *Id.* at 47–48. Commerce determined that the BBS data was the best available information on the record to value labor in this review, stating that its finding is in keeping with its practice to use "industry-specific labor rates from the primary surrogate country." *Id.* at 47. Commerce explained that it was unable to use data from its preferred source, ILO Chapter 6A, as Bangladesh does not report data to the ILO; therefore, Commerce used data published by the BBS to value the labor factor of production. *Id.* at 47–48.

Plaintiffs Tri Union Frozen Products, Inc., Mazzetta Company LLC, Ore-Cal Corporation, Consolidated Plaintiff Quoc Viet Seaproducts Processing Trading and Import-Export Co., Consolidated Plaintiffs Vietnam Association of Seafood Exporters and Producers (including certain of its individual member companies), and Consolidated Plain-

tiff Ad Hoc Shrimp respectively moved for judgment on the agency record challenging various aspects of Commerce's final determination. *See* Mem. Supp. Mot. Tri Union Frozen Products, Inc. J. Agency R., Mar. 30, 2015, ECF No. 48; Mem. Supp. Mot. Quoc Viet Seaproducts Processing Trading and Import-Export Co., Ltd. J. Agency R., Mar. 30, 2015, ECF No. 46; Resp't Pls. VASEP and Individual VASEP Members' Br. Supp. Mot. J. Agency R., Mar. 30, 2015, ECF No. 50; Mot. Ad Hoc Shrimp Trade Action Committee for J. Agency R. Under USCIT Rule 56.2, Mar. 30, 2015, ECF No. 49–3 ("Ad Hoc Shrimp Br.").[1] Ad Hoc Shrimp challenged as unsupported by substantial evidence Commerce's use of the BBS data to value the labor factor of production in this review, arguing that the BBS data is aberrational and unreliable and renders the final results of the review unsupported by substantial evidence. Ad Hoc Shrimp Br. 15–30. Additionally, Ad Hoc Shrimp argued that Commerce failed to explain why the BBS data was reliable and non-distortive. *See id.* at 23–24. In response, Defendant requested remand for Commerce to consider Ad Hoc Shrimp's arguments that the BBS wage rate data is aberrational. *See* Def.'s Resp. in Opp'n to Pls.' Mots. J. Agency R. 88–89, Sept. 10, 2015, ECF No. 73.

In *Tri Union I* the court sustained Commerce's final determination in all respects other than Commerce's use of the BBS data to value the labor factor of production. *Tri Union I*, 40 CIT at __, 163 F. Supp. 3d at 1313. The court granted Defendant's request to remand "for Commerce to reconsider Ad Hoc Shrimp's arguments concerning Commerce's reliance on Bangladeshi labor wage rate data" from the BBS, to value the labor factor of production in this review. *Id.*

On first remand, Commerce continued to rely on the BBS data to value the labor FOP, providing further explanation of its decision to do so in light of Ad Hoc Shrimp's arguments that the Bangladeshi wage rate data is aberrational and unreliable due to systemic labor abuses in the Bangladeshi shrimp industry. *See* Final Results of Redetermination Pursuant to Court Remand 5–42, Sept. 1, 2016, ECF No. 118–1 ("First Remand Results"). Commerce continued to find that the BBS data provided the best available information for valuing the labor FOP as it reflects the agency's "strong preference to use surrogate values from the primary surrogate country," is specific to the shrimp industry, and, while not contemporaneous, is closer to

[1] The challenges raised by Plaintiffs Tri Union Frozen Products, Inc., Mazzetta Company LLC, Ore-Cal Corporation, Consolidated Plaintiff Quoc Viet Seaproducts Processing Trading and Import-Export Co., and Consolidated Plaintiffs Vietnam Association of Seafood Exporters and Producers (including certain of its individual member companies) to Commerce's final determination were rejected in *Tri Union I*; the court sustained Commerce's final determination with regard to those issues. *See Tri Union I*, 40 CIT at __, 163 F. Supp. 3d at 1256, 1267–1312, 1313.

the period of review than other data on the record. *Id.* at 8–10. Commerce also contended that Ad Hoc Shrimp did not demonstrate the data to be aberrational and unreliable because Ad Hoc Shrimp did not provide a "measurable means (*i.e.*, a benchmark)" by which to assess the data as distortive. *Id.* at 29. Commerce further emphasized that its statutory directive does not require it to consider socio-political factors that may influence industry wage rates. *See id.* at 17.

Ad Hoc Shrimp challenged Commerce's continued reliance on the BBS data in the First Remand Results, again contending that the data is aberrational, unreliable, and therefore not the best available information with which to value the labor FOP. *See* Consolidated Pl. Ad Hoc Shrimp Trade Action Committee's Comments on Final Results of Redetermination to Court Remand 6–30, Dec. 2, 2016, ECF No. 125. Ad Hoc Shrimp argued that Commerce failed to adequately explain why, in light of the record evidence of widespread labor abuse within the Bangladeshi shrimp industry, the BBS data is reliable and non-aberrational. *See id.*

In *Tri Union II* the court remanded the First Remand Results for further consideration of Ad Hoc Shrimp's argument that record evidence of alleged labor abuses in the Bangladeshi shrimp industry renders the BBS data aberrational, unreliable, and not reflective of actual labor conditions in a market economy at comparable economic development to the Socialist Republic of Vietnam. *Tri Union II*, 41 CIT at __, 227 F. Supp. 3d at 1402. Specifically, the court remanded for Commerce to: (1) articulate a reasonable method by which a petitioner can demonstrate aberration or unreliability where, as here, there is a claim of widespread, systemic labor abuse; and (2) address the record evidence of widespread labor abuses in the Bangladeshi shrimp industry that undermines Commerce's implicit findings that the data from the BBS data is non-aberrational, reliable, and thus the best information available. *See id.* The court further ordered Commerce to explain why the Bangladeshi wage rate data is reliable and not aberrational despite the record data or, if the data is found to be aberrational and unreliable, to either explain or reconsider the determination that the Bangladeshi labor wage rate data is the best available information. *See id.*

Commerce filed the Second Remand Results on July 26, 2017. Commerce reconsidered its requirement of a quantitative analysis for evaluating a claim of aberrational labor data, concluding that a quantitative analysis is not reasonable where, as here, the petitioner has presented evidence of systemic labor abuse. *See* Second Remand Results at 9–10. Commerce explained that, because "wages among economically comparable countries and across industries often vary con-

siderably," it determined that "a quantitative comparison of wage rates between countries, or within a single country, does little to address whether or not a labor value is 'aberrational.'" *Id.* at 10. Commerce concluded that "the petitioner cannot reasonably be expected to 'demonstrate quantitatively' that potential surrogate labor values are aberrational when its claims stem from systematic labor abuses." *Id.* at 9–10. Commerce determined that, in light of the record here and the alternate data available, the Bangladeshi wage rate data does not constitute the best available information for valuing the labor factor of production in this review, *id.* at 11, ultimately selecting the Indian wage rate data from the ILO on the record instead. *Id.* at 12–13.

Following publication of the Second Remand Results, Ad Hoc Shrimp filed comments in support of the remand determination. *See* Consolidated Pl. Ad Hoc Shrimp Trade Action Committee's Comments on Remand Results, July 26, 2017, ECF No. 145. Ad Hoc Shrimp stated its position that "the legal deficiencies of the Final Results of [the eighth administrative review] have been addressed" and requested that the court sustain the Second Remand Results. *Id.* at 2. Ad Hoc Shrimp further noted that, because it was "the only party to have exhausted administrative remedies before the agency below," the "case should be considered as submitted for decision." *Id.* Defendant also filed comments requesting that the court sustain the Second Remand Results, as Commerce complied with the court's order in *Tri Union II* and no parties challenge the Second Remand Results. *See* Def.'s Resp. Pl.'s Comments on Remand Results, July 28, 2017, ECF No. 146.

JURISDICTION AND STANDARD OF REVIEW

The court has jurisdiction pursuant to Tariff Act of 1930, as amended, 19 U.S.C. § 1516a(a)(2)(B)(iii) (2012)[2] and 28 U.S.C. § 1581(c) (2012), which grant the court authority to review actions contesting the final determination in an administrative review of an antidumping duty order. The court will uphold Commerce's 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). "The results of a redetermination pursuant to court remand are also reviewed 'for compliance with the court's remand order.'" *Xinjiamei Furniture (Zhangzhou) Co. v. United States*, 38 CIT

[2] Further citations to the Tariff Act of 1930, as amended, are to the relevant provisions of Title 19 of the U.S. Code, 2012 edition.

__, __, 968 F. Supp. 2d 1255, 1259 (2014) (quoting *Nakornthai Strip Mill Public Co. v. United States*, 32 CIT 1272, 1274, 587 F. Supp. 2d 1303, 1306 (2008)).

DISCUSSION

To determine normal value for subject merchandise exported from a nonmarket economy country,[3] Commerce uses surrogate values for the FOPs "based on the best available information[4] regarding the values of such factors in a market economy country or countries considered to be appropriate by the administering authority."[5] 19 U.S.C. § 1677b(c)(1); *see* 19 C.F.R. §§ 351.408(a)–(c) (2014).[6] Commerce determines what data constitutes the best available information using criteria developed through practice.[7] *Qingdao Sea–Line Trading Co. v. United States*, 766 F.3d 1378, 1386 (Fed. Cir. 2014). Commerce has a regulatory preference to value all FOPs using data from a single surrogate country, 19 C.F.R. § 351.408(c)(2), and its current practice is to value labor using industry-specific data from the primary surrogate country, as published in Chapter 6A of the ILO Yearbook of Labor Statistics. *Antidumping Methodologies in Proceedings Involving Non Market Economies: Valuing the Factor of Production, Labor*, 76 Fed. Reg. 36,092, 36,093 (Dep't Commerce Jun. 21,

[3] The term "nonmarket economy country" means any foreign country that Commerce determines "does not operate on market principles of cost or pricing structures, so that sales of merchandise in such country do not reflect the fair value of the merchandise." 19 U.S.C. § 1677(18)(A). In such cases, Commerce must "determine the normal value of the subject merchandise on the basis of the value of the factors of production utilized in producing the merchandise . . . [together with other costs and expenses]." 19 U.S.C. § 1677b(c)(1).

[4] As "best available information" is not statutorily defined, Commerce has discretion to determine what data constitutes the best available information in a given case and to value the FOPs accordingly. *See QVD Food Co. v. United States*, 658 F.3d 1318, 1323 (Fed. Cir. 2011); *Nation Ford Chemical Co. v. United States*, 166 F.3d 1373, 1377 (Fed. Cir. 1999) (Commerce has considerable discretion in choosing the surrogate values that most accurately reflect the price that the NME producer would have paid had it purchased the FOP from a market economy country). This discretion is broad but is not unlimited; "the critical question is whether the methodology used by Commerce is based on the best available information and establishes the antidumping margins as accurately as possible." *Shakeproof Assembly Components v. United States*, 268 F.3d 1376, 1382 (Fed. Cir. 2001).

[5] Commerce selects for each FOP a surrogate value from a market economy country that is economically comparable to the NME country and a significant producer of the merchandise in question. 19 U.S.C. §§ 1677b(c)(4)(A)–(B); 19 C.F.R. § 351.408(b) (2014).

[6] Further citations to Title 19 of the Code of Federal Regulations are to the 2014 edition.

[7] To determine what constitutes the best available information, Commerce evaluates the quality and reliability of data sources from the countries offered to value respondents' FOPs favoring data that is: (1) specific to the input in question; (2) representative of a broad market average of prices; (3) net of taxes and import duties; (4) contemporaneous with the period of review; and (5) publicly available. *See* Import Admin., U.S. Dep't Commerce, *Non-Market Economy Surrogate Country Selection Process*, Policy Bulletin 04.1 (2004), *available at* http://ia.ita.doc.gov/policy/bull041.html (last visited Aug. 7, 2017); *see also Qingdao Sea–Line Trading Co. v. United States*, 766 F.3d 1378, 1386 (Fed. Cir. 2014).

2011); *see* Final Decision Memo at 47. Where ILO rates are not available, Commerce's preference is to use industry-specific labor wage rate data from the primary surrogate country. *See* Final Decision Memo at 47.

Commerce has acknowledged that aberrational values should not be used to value FOPs. *Antidumping Duties; Countervailing Duties*, 62 Fed. Reg. 27,296, 27,366 (Dep't Commerce May 19, 1997). Where there is evidence that data is aberrational, Commerce must address that evidence in order to demonstrate that the data is nonetheless the best information available. *See Universal Camera Corp. v. NLRB*, 340 U.S. 474, 488 (1951) (noting that "[t]he substantiality of evidence must take into account whatever in the record fairly detracts from its weight."). Commerce's usual practice for determining whether data is aberrational is to require a quantitative analysis, comparing either data from economically comparable countries or historical data from the country at issue to determine if the data is unreliable or an outlier. *See* Second Remand Results at 9.

In *Tri Union II* the court determined that, on first remand, Commerce had not addressed Ad Hoc Shrimp's evidence of alleged systemic labor abuses and thus had not reasonably found the BBS labor data to be the best available information on the record. *See Tri Union II*, 41 CIT at __, 227 F. Supp. 3d at 1396–1402. The court remanded to Commerce to clarify or reconsider its determination. *Id.*, 41 CIT at __, 227 F. Supp. 3d at 1402.

On second remand, Commerce has complied with the court's order. Commerce reconsidered its methodology for determining whether labor data is aberrational, with special attention to how to determine aberration in circumstances of alleged widespread, systemic labor abuse. *See* Second Remand Results at 7–11. Commerce concluded that, due to the distinct nature of the labor FOP, a quantitative analysis for assessing whether prospective surrogate labor values are aberrational is not reasonable.[8] *Id.* at 9–10. Thus, Commerce concluded that, due to the distinct nature of the labor FOP, its "normal practice of determining if a surrogate value is 'aberrational' using a quantitative analysis cannot, and does not, provide a path by which the petitioner can demonstrate that the Bangladeshi wage rate data

[8] Commerce determined that "a quantitative comparison of wage rates between countries, or within a single country, does little to address whether a labor value is 'aberrational,' as wages among economically comparable countries and across industries often vary considerably." Second Remand Results at 10. Commerce likewise determined that "the petitioner cannot reasonably be expected to 'demonstrate quantitatively' that potential surrogate labor values are aberrational when its claims stem from systematic labor abuses." *Id.* at 9–10.

are aberrational, given its claim of systemic labor abuses."[9] *Id.* at 11.

Commerce subsequently reconsidered its determination that the Bangladeshi BBS data constitutes the best available information:

> Although the Department's practice with respect to claims of aberration does not enable the petitioner to demonstrate quantitatively that the Bangladeshi data are aberrational in light of its claim, we acknowledge that additional considerations may affect a determination as to whether potential surrogate value data constitute the best available information. Given the Court's concerns with respect to the evidence of labor abuses in Bangladesh provided by the petitioner, and given that there is no affirmative evidence of systematic labor abuses specific to the shrimp processing industries in certain other potential surrogate countries on the record, we have elected to conclude that the Bangladeshi wage rate is not the best available information on the record with which to value the respondents' labor FOPs.

Id. at 11. Commerce concluded that, notwithstanding the primary surrogate country selection of Bangladesh, the Indian wage rate data on the record constituted the best available information to value the labor FOP in this review. *See id.* at 12–14.

Commerce has complied with the court's order. No party challenges Commerce's Second Remand Results, and the Second Remand Results are sustained.

CONCLUSION

In accordance with the foregoing, Commerce's final determination on second remand complies with the court's order and is sustained. Judgment will enter accordingly.

Dated: August 8, 2017
New York, New York

/*s*/ *Claire R. Kelly*
CLAIRE R. KELLY, JUDGE

[9] Commerce did not indicate how a petitioner could demonstrate labor wage rate data to be aberrational when there is a claim of systemic labor abuses.

Slip Op. 17–101

INMAX SDN. BHD. AND INMAX INDUSTRIES SDN. BHD., Plaintiffs, v. UNITED STATES, Defendant, -and- MID CONTINENT STEEL & WIRE, INC., Intervenor-Defendant.

Court No. 17–00205

[Plaintiffs' application(s) for immediate injunctive relief from cash deposits on entries subject to antidumping-duty order pending completion of administrative and judicial reviews of the basis therefor denied.]

Dated: August 8, 2017

Gregory S. Menegaz, *J. Kevin Horgan*, and *Alexandra H. Salzman*, *deKieffer & Horgan, PLLC*, Washington, D.C., for the plaintiffs.

Stephen C. Tosini, Senior Trial Counsel, Commercial Litigation Branch, Civil Division, U.S. Department of Justice, Washington, D.C., for the defendant. With him in opposition *Chad A. Readler*, Acting Assistant Attorney General, *Jeanne E. Davidson*, Director, and *Patricia M. McCarthy*, Assistant Director.

Adam H. Gordon, *The Bristol Group PLLC*, Washington, D.C., for the intervenor-defendant.

MEMORANDUM & ORDER

AQUILINO, Senior Judge:

The above-encaptioned plaintiffs commenced this action contesting *Certain Steel Nails from Malaysia: Final Results of the Changed Circumstances Review* ("CCR"), published at 82 Fed.Reg. 34476 (July 25, 2017) by the International Trade Administration, U.S. Department of Commerce ("ITA"), as discussed in the agency's accompanying issues and decision memorandum ("IDM") dated July 17, 2017. In thereby invoking this court's jurisdiction pursuant to 28 U.S.C. §1581(c), on August 2, 2017 the plaintiffs interposed an application for a temporary restraining order and a motion for a preliminary injunction, enjoining the defendant

> until the final and conclusive court decision in this litigation from requiring Inmax Industries Sdn. Bhd. to pay the increased antidumping cash deposit rate of 39.35% currently assigned to Inmax Sdn Bhd. instead of the previous 2.66% cash deposit rate on imports assigned to Inmax Industries lawfully by the [ITA] at the conclusion of the original investigation[,]

to quote from the latter's proposed order.

To be granted such extraordinary, interim, equitable relief, a movant must show (1) immediate and irreparable harm, (2) likelihood of success on the merits, (3) the balance of hardship on all parties favors it, and (4) such relief is in the public interest. *See, e.g., FMC Corp. v.*

United States, 3 F.3d 424, 427 (Fed.Cir. 1993); *Zenith Radio Corp. v. United States*, 710 F.2d 806, 809 (Fed.Cir. 1983). In assessing such requirements, the court may employ a "sliding scale", which means that not every one must be established to the same degree, and a strong showing on one can overcome a weaker showing on others. *Corus Group PLC v. Bush*, 26 CIT 937, 942, 217 F.Supp.2d 1347, 1353 (2002), *aff'd*, 352 F.3d 1351 (Fed.Cir. 2003), citing *FMC Corp*., 3 F.3d at 427. "Central to the movant's burden are the likelihood of success and irreparable harm factors." *Sofamor Danek Grp., Inc. v. DePuy-Motech, Inc.*, 74 F.3d 1216, 1219 (Fed.Cir. 1996).

I

Here, the plaintiffs claim "unique" circumstances necessitate the relief prayed for. By way of background, they explain that they are Malaysian exporters of certain steel nails to the United States subject to ITA's *Certain Steel Nails From the Republic of Korea, Malaysia, the Sultanate of Oman, Taiwan and the Socialist Republic of Vietnam: Antidumping Duty Orders*, 80 Fed.Reg. 39994 (July 13, 2015). The plaintiffs apparently are related companies, but during the underlying agency investigation they were not "collapsed" pursuant to ITA's regulation thereon into a single entity.[1] The plaintiffs intimate that this may have been due to the fact that only one of them was commercially exporting subject merchandise during the investigation and point out that the domestic petitioner essentially waived argument over collapsing during the investigation.

When that investigation's final results were published, Inmax Sdn. Bhd. received the 39.35 percent antidumping-duty rate as a result of application of total adverse facts available, and Inmax Industries, not individually investigated, was subjected to the amended "all others" rate of 2.66 percent. As a result of the CCR, however, ITA collapsed the two entities into one and subjected both, as one, to the 39.35 percent cash deposit rate.

The plaintiffs now contend immediate relief is necessary to prevent irreparable harm in that they would lose their right to obtain meaningful judicial review with respect to the cash deposits for entries of merchandise before the completion of the first ITA administrative review, which they anticipate will be in December 2017 and during which the agency has already preliminarily determined a margin for them as collapsed entities of 1.03 percent, and they would thereby

[1] *See* 19 C.F.R. §351.401(f)(1) ("the Secretary will treat two or more affiliated producers as a single entity where those producers have production facilities for similar or identical products that would not require substantial retooling of either facility in order to restructure manufacturing priorities and the Secretary concludes that there is a significant potential for the manipulation of price or production").

lose any benefit of a favorable ruling by the court. They aver that, upon learning of the CCR final results, Inmax Industries ceased production and forewent business opportunities, but also that that entity has shipments en route to the United States that will incur the "extreme high margin" because they cannot be redirected in a cost-effective way, and the plaintiffs complain they are unable to finance the nearly $4 million in cash deposits that would be required until completion of the first administrative review. *See* Plaintiffs' Application, p. 10.

As for likelihood of success on the merits, the plaintiffs argue the initiation of the CCR

> [wa]s based upon factors already known and verified in the investigation and well prior to the Department's final determination in the investigation. No new facts or circumstances exist from the investigation. Nothing in fact changed. The Department's cost verification report from the original investigation observed expressly both "production and sales [by Inmax Industries] had commenced as of the date of the cost verification."[ ] Accordingly, the Department had no basis to find a changed circumstance.

Id. at 14–15, referencing Memorandum from Taija A. Slaughter to Neal M. Halper regarding "Verification of Inmax Sdn. Bhd. in the Antidumping Investigation of Certain Steel Nails from Malaysia," dated February 17, 2015, page 3.

As to balance of hardships, the plaintiffs contend that no other party will suffer hardship and that the current schedule anticipates completion of the first administrative review in December 2017; hence, at most, injunction would merely "postpone a potential new cash deposit rate for the companies" which only amounts to an "inconvenience" to the United States. *Id*. at 20, citing *SKF USA, Inc. v United States*, 28 CIT 170, 175, 316 F. Supp.2d 1322, 1328 (2004).

Lastly, the plaintiffs point to the steadfast judicial position on the subject of the public interest as being best served when the trade laws of the United States are accurately and fairly administered. *Id*. at 21, referencing, *e.g., Chilean Nitrate Corp. v. United States*, 11 CIT 538, 540 (1987).

II

The defendant responds that the plaintiffs submit nothing to substantiate their claim of irreparable harm and "[a]ttorney argument is not evidence" thereof, Def's Resp. at 5, quoting *Icon Health & Fitness, Inc. v. Strava, Inc*., 849 F.3d 1034, 1043 (Fed. Cir. 2017), and that

because the plaintiffs seek to enjoin collection of cash deposits rather than liquidation, there is no basis for presuming harm as a matter of law here, *id*. *See also id*. at 6 ("Congress did not intend that the ordinary operation of the antidumping duty law -- which includes the collection of estimated duties in the form of cash deposits, *see, e.g*., 19 U.S.C. § 1673d(c)(1)(B)(ii) -- could be considered irreparable harm, or it would not have limited section 1516a(c)(2) injunctions to liquidation"), referencing *Hohn v. United States*, 524 U.S. 236, 249 (1998), and *Shandong Dongfang Bayley Wood Co. v. United States*, 41 CIT ___, Slip Op. 17–77 at 7, 2017 WL 2838344 at *3 (July 3, 2017) (rejecting attempt to enjoin collection of cash deposits after preliminary determination for want of residual jurisdiction because plaintiff "ma[de] no argument that this is imminent harm to [it] showing that the ordinary means of obtaining judicial review of a Commerce determination will be inadequate in the circumstances of this litigation"). The defendant also contends that the alleged "harm" is actually the result of plaintiffs' own business decision(s), and that good cause did exist to initiate and conduct the CCR, as indicated in the IDM. *See generally* Defendant's Response at 2–3, quoting IDM at 5 (citing petitioner's CCR Request at Ex. 4, attached as Ex. 1 to Def's Resp.), and at 6. Consequently, the defendant argues the plaintiffs are unlikely to succeed on the merits and that "maintaining a maximum level of security for the unliquidated entries would serve broadly the public interest of revenue collection." *Id*. at 9, quoting *National Fisheries Institute, Inc. v. United States Bureau of Customs & Border Protection*, 34 CIT 1371, 1377, 751 F.Supp.2d 1318, 1325 (2010).

III

USCIT Rule 65(c) requires a movant for extraordinary, interim, equitable relief to post security in an amount that would be "proper to pay the costs and damages sustained by any party found to have been wrongfully enjoined or restrained." Having considered all the papers submitted herein, this court is not persuaded that disregard of this long-standing requirement, which, in effect, is what the plaintiffs seek, would be appropriate. Accordingly, the specific relief for which they now plead must be, and it hereby is, denied.

So ordered.

Dated: New York, New York
August 8, 2017

/s/ Thomas J. Aquilino, Jr.
SENIOR JUDGE