U.S. Customs and Border Protection

Slip Op. 14–61

BORUSAN MANNESMANN BORU SANAYI VE TICARET A. Ş., Plaintiff, v. UNITED STATES, Defendant.

Before: Claire R. Kelly, Judge
Court No. 14–00129

[The Court *sua sponte* dismisses the action for lack of subject matter jurisdiction.]

Dated: June 6, 2014

Donald Bertrand Cameron, *Brady Warfield Mills*, *Julie Clark Medoza*, *Mary Shannon Hodgins*, *Rudi Will Planert*, and *Sarah Suzanne Sprinkle*, Morris, Manning, & Martin, LLP, of Washington, DC for Plaintiff.

Loren Misha Preheim, Senior Trial Counsel, Commercial Litigation Branch, Civil Division, U.S. Department of Justice, of Washington, DC, for Defendant.

Alan Hayden Price, *Adam Milan Teslik*, *Robert Edward DeFrancesco, III*, and *Usha Neelakantan*, Wiley Rein, LLP, of Washington, DC for Defendant-Intervenor.

OPINION

Kelly, Judge:

Plaintiff Borusan Mannesmann Boru Sanayi ve Ticaret A.Ş. ("Plaintiff" or "Borusan") brings this action for a writ of mandamus compelling the U.S. Department of Commerce ("Commerce") to perform a verification in the ongoing countervailing duty investigation of *Certain Oil Country Tubular Goods From India and Turkey*, 78 Fed. Reg. 45,502 (Dep't Commerce July 29, 2013) (initiation of countervailing duty investigations) ("Investigation"), prior to Commerce's issuance of the final determination. Plaintiff alleges jurisdiction under 28 U.S.C. § 1581(i)(2) and (4) (2006),[1] claiming the remedy provided for under the Court's 28 U.S.C. § 1581(c) jurisdiction is manifestly inadequate. The court, *sua sponte*, dismisses this action for lack of subject matter jurisdiction.

[1] Further citation to Title 28 of the U.S. code is to the 2006 edition.

Background[2]

Plaintiff is a producer, exporter and importer of oil country tubular goods ("OCTG") from Turkey and is a mandatory respondent in the Investigation. In the proceedings, Commerce received questionnaire responses from both Plaintiff and the Government of Turkey ("GOT"). Commerce issued a negative preliminary determination in the Investigation on December 23, 2013. *Certain Oil Country Tubular Goods From the Republic of Turkey*, 78 Fed. Reg. 77,420 (Dep't Commerce Dec. 23, 2013) (preliminary negative countervailing duty determination and alignment of final determination with final antidumping determination) ("Preliminary Determination"). One of the alleged subsidy programs in the Investigation, at issue in this case, is the GOT's alleged provision of hot rolled steel ("HRS") to Plaintiff for less than adequate remuneration ("LTAR"). In the Preliminary Determination, Commerce found Plaintiff received *de minimis* subsidies. However, Commerce explained in a section of its Preliminary Determination titled "Programs and Issues That Require More Information" that it had initiated an investigation into whether two entities, Eregli Demir ve Celik Fabrikalari T.A.S. ("Erdemir") and Iskenderun Iron Steel Works Co. ("Isdemir"), had provided respondents with HRS and that it needed more information from the GOT about Ordu Yardimlasma Kurumu ("OYAK"), the Turkish military pension fund that was the majority shareholder of the two entities. Pl.'s Mot. Writ Mandamus, Ex. 2 at 20, May 30, 2014, ECF No. 6–2 (Decision Memorandum for the Negative Preliminary Determination in the Countervailing Duty Investigation of Certain Oil Country Tubular Goods from the Republic of Turkey). Thus, Commerce deferred review of the HRS for LTAR program for a post-preliminary analysis. In the post-preliminary analysis published on April 18, 2014, Commerce found subsidy margins for Plaintiff of 25.76% based solely on the HRS for LTAR program. Pl.'s Mot. Writ Mandamus Ex. 4 at 7–9 (Post-Preliminary Analysis). On April 22, 2014, in response to a verification request from the GOT, Commerce stated that its verifiers "will not be verifying the HRS for LTAR program."[3] Pl.'s Mot. Writ Mandamus, Ex. 7 at Exs. 1, 2 (Email Attachments to May 22, 2014 Letter from

[2] The court has raised the issue of jurisdiction *sua sponte* and for the purposes of this opinion will assume the factual allegations as alleged by Plaintiff in its complaint and briefs are true. *Cedars-Sinai Med. Ctr. v. Watkins*, 11 F.3d 1573, 1583 (Fed. Cir. 1993) (citations omitted).

[3] The email also stated that

> [T]he purpose of a verification is to confirm the accuracy of information already submitted on the record. As such, the verifiers will not accept or examine any new information at verification. Nor is it the proper venue for a discussion of the Department's findings, for which the parties may submit case briefs and request a hearing later in the proceeding. Thus, our verifiers will also not discuss the Department's legal analysis and

Veysel Parlak). On April 25, 2014, Commerce did conduct a one-day verification of the GOT, but its verification report did not verify the information on the HRS for LTAR program. Commerce later stated, on April 30, 2014, that as the program information was provided by the GOT and not by a company, "this [sort of information] is not something [Commerce] would verify as part of Borusan's company verification."[4] Pl.'s Mot. Writ Mandamus, Ex. 5 (May 5, 2014 Memorandum to File from Shane Subler, International Trade Compliance Analyst).

Commerce's final determination is scheduled for publication on July 10, 2014. Pl.'s Mot. Expedited Consideration 1, May 30, 2014, ECF No. 7. Plaintiff brought this action on May 30, 2014, seeking expedited consideration and a writ of mandamus ordering Commerce to conduct verification of the information on the HRS for LTAR program. *See* Compl., May 30, 2014, ECF No. 5; *see also* Pl.'s Mot. Expedited Consideration. The court conducted a telephone conference that same day with both Plaintiff and Defendant. During the telephone conference, the court informed the parties that it was concerned it did not possess jurisdiction to hear the case. The court requested Plaintiff to address two specific issues: (1) why review under 28 U.S.C. § 1581(c) would not be adequate to remedy the alleged harm; and (2) whether there had been final agency action, which would be required under the Administrative Procedure Act ("APA"). Order, May 30, 2014, ECF No. 10. The court asked the Plaintiff to address these two concerns in a memorandum addressed to the court no later than Tuesday, June 3, 2014, which the Plaintiff did.

Discussion

As is often repeated, "federal courts . . . are courts of limited jurisdiction marked out by Congress." *Norcal/Crosetti Foods, Inc. v. United States*, 963 F.2d 356, 358 (Fed. Cir. 1992) (*quoting Aldinger v. Howard*, 427 U.S. 1, 15 (1976), *superseded by statute on other grounds*, Judicial Improvements Act, Pub. L. No. 101–650, 104 Stat. 5089, *as recognized in Exxon Mobil Corp. v. Allapattah Servs., Inc.*, 545 U.S. 546, 557 (2005)). Therefore, the "court may and should raise the question of its jurisdiction *sua sponte* at any time it appears in

determinations in the post-preliminary analyses of the HRS for LTAR programs.Accordingly, we will not be verifying the HRS for LTAR program.

Pl.'s Mot. Writ Mandamus, Ex. 7 at Ex. 2.

[4] From the record before the court, it is not entirely clear why Commerce did not verify this particular information submitted by the GOT.

doubt." *Arctic Corner, Inc. v. United States*, 845 F.2d 999, 1000 (Fed. Cir. 1988) (citations omitted). The court may dismiss a case for lack of subject matter jurisdiction on its own motion because the court must enforce the limits of its jurisdiction. *See, e.g.*, *Cabral v. United States*, 317 Fed.Appx. 979, 980 n.1 (Fed. Cir. 2008) (*citing Arctic Corner, Inc.*, 845 F.2d at 1000).

Under 28 U.S.C. § 1581(i), the Court has jurisdiction to hear "any civil action commenced against the United States, its agencies, or its officers, that arises out of any law of the United States providing for-- . . . (2) tariffs, duties, fees, or other taxes on the importation of merchandise for reasons other than the raising of revenue," and "(4) administration and enforcement with respect to the matters referred to in paragraphs (1)-(3) of this subsection and subsections (a)-(h) of this section." However, § 1581(i) "shall not confer jurisdiction over an antidumping or countervailing duty determination which is reviewable . . . by the Court of International Trade under section 516A(a) of the Tariff Act of 1930 . . . ." 28 U.S.C. § 1581(i). The legislative history of § 1581(i) demonstrates Congress intended "that any determination specified in section 516A of the Tariff Act of 1930, [as amended,] or any preliminary administrative action which, in the course of the proceeding, will be, directly or by implication, incorporated in or superceded by any such determination, is reviewable exclusively as provided in section 516A." H.R.Rep. No. 96–1235, at 48 (1980), *reprinted in* 1980 U.S.C.C.A.N. 3729, 3759–60. Thus, the Court's § 1581(i) jurisdiction is available only if the party asserting jurisdiction can show the Court's § 1581(a)–(h) jurisdiction is unavailable, unless the remedies afforded by those provisions would be manifestly inadequate. *See Miller & Co. v. United States*, 824 F.2d 961, 963 (Fed. Cir. 1987) ("Section 1581(i) jurisdiction may not be invoked when jurisdiction under another subsection of § 1581 is or could have been available, unless the remedy provided under that other subsection would be manifestly inadequate." (citations omitted)).

When jurisdiction under another provision of § 1581 "is or could have been available, the party asserting § 1581(i) jurisdiction has the burden to show how that remedy would be manifestly inadequate." *Id.* at 963 (citations omitted). That judicial review may be delayed by requiring a party to wait for Commerce's final determination in a countervailing duty investigation is not enough to make judicial review under § 1581(c) manifestly inadequate. *Gov't of People's Republic of China v. United States*, 31 CIT 451, 461, 483 F. Supp. 2d 1274, 1282 (2007). Neither the burden of participating in the administrative proceeding nor the business uncertainty caused by such a proceeding is sufficient to constitute manifest inadequacy. *See, e.g.*, *id.* at

461, 483 F. Supp. 2d at 1282 (*citing FTC v. Standard Oil*, 449 U.S. 232, 244, (1980)); *Abitibi–Consolidated Inc. v. United States*, 30 CIT 714, 717–18, 437 F.Supp.2d 1352, 1356–57 (2006). Essentially, the type of review sought by a plaintiff asserting the court's § 1581(i) jurisdiction must not already be provided for by 19 U.S.C. § 1516a (2006).[5] *Abitibi–Consolidated Inc.*, 30 CIT at 717–18, 437 F.Supp.2d at 1356–57.

The Court's § 1581(c) jurisdiction makes final determinations by Commerce reviewable via 19 U.S.C. § 1516a(a)(2). The Court of Appeals for the Federal Circuit has held that § 1516a(a)(2) allows for judicial review of both matters of procedural correctness, as well as the substantive merits of the determination. *See Miller & Co.*, 824 F.2d at 964 ("Under 28 U.S.C. § 1581(c) and 19 U.S.C. § 1516a, the procedural correctness of a countervailing duty determination, as well as the merits, are subject to judicial review." (citations omitted)). That Commerce has conducted the administrative proceeding in a manner that is contrary to law is an allegation made expressly reviewable by 19 U.S.C. § 1516a(b)(1), which directs the court to "hold unlawful any determination, finding, or conclusion found-- . . . (B)(i) in an action brought under paragraph (2) of subsection (a) of this section, to be unsupported by substantial evidence on the record, or otherwise not in accordance with law . . . ."

Plaintiff alleges two counts in its complaint. First it claims Commerce unlawfully refused to verify certain information despite the requirement to verify established by 19 U.S.C. § 1677m(i) and that this refusal "will significantly impair Borusan's ability to meaningfully participate in the countervailing duty investigation with respect to this issue, in violation of the express procedural protections afforded it under the countervailing duty statute." Compl. 9 (*citing NEC Corp. v. United States*, 151 F.3d 1361, 1374 (Fed.Cir. 1998)). Second it claims Commerce's refusal "constitutes the unlawful prejudgment of this issue in violation of the requirement that administrative determinations under the antidumping and countervailing duty laws be conducted fairly and honestly." Compl. 9–10. Plaintiff asks the court, *inter alia*, to direct Commerce to conduct a verification of the information submitted by the GOT regarding the HRS for LTAR program and to issue a report. Both of these counts claim that Commerce has acted contrary to law in conducting its investigation. Such a claim is properly and adequately reviewed in a 19 U.S.C. § 1516a case brought pursuant to 28 U.S.C. § 1581(c).

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

Review under 19 U.S.C. § 1516a does not foreclose the remedy Plaintiff seeks. Plaintiff asks the court to find that Commerce was acting contrary to law when it failed to verify certain information and that in doing so Commerce prejudged the matter. Plaintiff can make the identical claims in a case under 19 U.S.C. § 1516a once the determination is final. More importantly, Plaintiff, if successful, would get all the relief then that it could get now. In such a case, the court could find the determination to be contrary to law and/or not supported by substantial evidence and remand to the agency.

Plaintiff fails to explain why review under § 1581(c) is manifestly inadequate to remedy any harm it has, or will, suffer. In claiming that relief under 19 U.S.C. § 1516a is not adequate relief, Plaintiff states "such review is no substitute for having Commerce base its final determination in the first instance upon a full factual record and to render that determination in a fair and objective manner that is free from improper prejudgment on the part of the agency." Pl.'s Mot. Writ Mandamus 16. Whatever the foregoing statement is meant to convey, it does not explain why § 1581(c) is manifestly inadequate.[6] The court understands that Plaintiff would prefer that if Commerce is to be told it is acting contrary to law that it be told so now, and not after a final determination is issued when Plaintiff will be required to make cash deposits. But such a desire does not make § 1516a manifestly inadequate because "paying deposits pending court review is an ordinary consequence of the statutory scheme." *MacMillan Bloedel Ltd. v. United States*, 16 CIT 331, 333 (1992).

[6] Throughout its papers, Plaintiff argues the court has § 1581(i) jurisdiction based on Commerce's prejudgment of its case by emphasizing the egregiousness of Commerce's alleged conduct in "baldly refusing to verify the factual information that forms the basis for its decision," Pl.'s Resp. to May 30, 2014 Court Order 4, June 3, 2014, ECF No. 12, which Plaintiff argues "amounts to deliberately blinding itself to any information that would undercut the findings and conclusions made in the *Post-Preliminary Analysis* concerning the HRS for LTAR issue." *Id.* at 6. However, what matters for the purpose of this Court's jurisdiction is not the alleged egregiousness of Commerce's conduct but whether § 1581(c) can remedy any harm flowing from that conduct. Plaintiff repeatedly states as a conclusion that § 1581(c) is manifestly inadequate to relieve the harm of an allegedly incomplete record and an allegedly biased decision-maker, but at no point does it explain why. For example, Plaintiff argues "[w]aiting until the final determination to appeal under 1581(c) will not remedy this denial of Plaintiff's rights, because the prejudgment will have been finalized at that point. Plaintiff will have been denied the right to a fair and unbiased decision." *Id.* at 9. Further, Plaintiff claims "[a] post-hoc 'verification' of information after Commerce has already reached a pre-determined final determination would not accomplish the purpose of ensuring that Commerce renders its final determination in a fair and unbiased manner. This further indicates that the remedy under 1581(c) would be manifestly inadequate in this case." *Id.* at 10. These statements are mere conclusions; they do not explain how the judicial review provided for by § 1581(c) would be manifestly inadequate. No harm falls on Plaintiff by virtue of having to wait for the final determination to be issued in little more than 30 days from now. *See* Pl.'s Mot. Expedited Consideration 1 (providing that the final determination is scheduled to be issued July 10, 2014).

Plaintiff incorrectly relies upon *NEC Corp. v. United States*, 151 F.3d 1361 (Fed. Cir. 1998) to argue that relief under 19 U.S.C. § 1516a is manifestly inadequate. *See* Pl.'s Resp. to May 30, 2014 Court Order 5–6; *see also* Pl.'s Mot. Writ Mandamus 10. Plaintiff tries to analogize to *NEC* where the court stated "'requiring NEC to appeal from the conclusion of an investigation that, allegedly, was preordained because of impermissible prejudgment is a classic example of a remedy that was 'manifestly inadequate.'" Pl.'s Resp. to May 30, 2014 Court Order 6 (*quoting NEC Corp.*, 151 F.3d at 1368 (citations omitted)). The facts of *NEC* are very different from the facts here. In *NEC* the plaintiff sought an injunction to stop an investigation at its outset. The Court of International Trade found § 1581(c) would be manifestly inadequate to pursue such a claim because the investigation had not yet started.

> If Plaintiffs were to pursue administrative remedies and to proceed under 1581(c), they would be forced to participate in an investigation conducted by an allegedly biased decision maker who has allegedly prejudged the outcome of the case. This is a fool's errand, particularly when the judicial relief of disqualification can be granted at the outset of the investigation, rather than at the end, thus obviating the need to undo a complicated and time consuming administrative procedure, if Plaintiff should ultimately prevail.

NEC Corp. v. U.S. Dept. of Commerce, 20 CIT 1483, 1484, 967 F.Supp. 1305, 1306 (1996), *aff'd*, 151 F.3d 1361 (Fed. Cir. 1998). Here, whatever the merits of the process, it is nearly over. *See* Pl.'s Mot. Writ Mandamus 16 (providing that the final determination is due on July 10, 2014). No harm can be done now that cannot be remedied in § 1516(c) review.

Plaintiff admits that what it seeks in this action can be achieved in a § 1516(c) action but contends that it does not trust the process. Plaintiff states:

> Court review under 1581(c) of the record would by definition be incomplete and flawed and therefore, manifestly inadequate. Moreover, this failure to develop an adequate record would not be remediable in an action under 1581(c). Certainly, the record as it is presented for appeal will not include any findings for verification and while the court could require verification before its review of the record, it is by no means clear that this would be done. A post-hoc "verification" of information after Commerce has already reached a pre-determined final determination would not accomplish the purpose of ensuring that Commerce

> renders its final determination in a fair and unbiased manner. This further indicates that the remedy under 1581(c) would be manifestly inadequate in this case.

Pl.'s Resp. to May 30, 2014 Court Order 10. Plaintiff discounts the ability of a post-hoc verification upon remand to remedy the ills of an allegedly biased investigation. Plaintiff's preferred remedy is for the court to order what would essentially be a more immediate post-hoc verification in order to prevent an allegedly biased investigation from concluding. It wants at the eleventh hour what it deems inadequate at the twelfth hour. These are very different facts from *NEC*.[7]

Plaintiff is correct that the Court has exercised residual jurisdiction under § 1581(i) to review Commerce's actions during the pendency of an investigation. All but three[8] of the cases cited by the Plaintiff present facts akin to the *NEC* facts, not the facts here. In *Dofasco*, as

[7] The cases that the Plaintiff cites as in accord with *NEC* are also inapposite in that they all allege a type of serious harm that would be avoided by virtue of bringing a § 1581(i) case. Pl.'s Resp. to May 30, 2014 Court Order 7–8. In *Pac Fung Feather Co., Ltd. v. United States*, the Court of International Trade found the requirement of seeking a Customs ruling letter under § 1581(h) was manifestly inadequate to challenge generally promulgated regulations as arbitrary, capricious and contrary to the statutory imperative contained in 19 U.S.C. § 3592(b) (1994). *Pac Fung Feather Co., Ltd. v. United States*, 19 CIT 1451, 1456–57, 911 F.Supp. 529, 534 (1995) *aff'd*, 111 F.3d 114 (Fed. Cir. 1997). The court reasoned that Customs would have no authority to deviate from its general regulations, and that plaintiffs' goods would clearly be subject to the new regulatory quantitative textile restrictions. *Pac Fung Feather Co., Ltd.*, 19 CIT at 1456–57, 911 F.Supp. at 534. The court found that plaintiffs there were not challenging the type of as-applied ruling provided for by § 1581(h), but instead were challenging Customs' general regulatory scheme. *Pac Fung Feather Co., Ltd.*, 19 CIT at 1456, 911 F.Supp. at 533–34. The court held that requiring an importer to obtain such a ruling would be futile. *Pac Fung Feather Co., Ltd.*, 19 CIT at 1456–57, 911 F.Supp. at 534. Defendant's arguments, if successful, would have required the plaintiffs to take an additional and unnecessary step, as the outcome of the ruling letter was predetermined and plaintiffs were not challenging Customs' application of its regulations to them specifically. That was not a case where plaintiffs were being asked to complete the very process that formed the basis of their claim. Thus, the *Pac Fung* plaintiffs, like the importer of *NEC*, were able to avoid an unnecessary administrative exercise that had not yet begun. Likewise in *Hysla S.A. v. United States*, the Court of International Trade found that there had been a demonstration of "grave economic harm which cannot be addressed pursuant to 1581(a-h)." *Hysla S.A. v. United States*, 22 CIT 44, 48 (1998). No such demonstration has been made here. In *Associacao Dos Industriais de Cordoaria E Redes v. United States*, plaintiffs alleged "substantial market disruption and travel expenses and inconvenience associated with coming before Commerce to defend against dumping allegations" as a result of petitioners filing and withdrawing multiple antidumping petitions. *Associacao Dos Industriais de Cordoaria E Redes v. United States*, 17 CIT 754, 755 (1993). Plaintiff here can point to no harm separate and apart from the actual Commerce determination that is yet to come and that can be remedied by review under 28 U.S.C. § 1581(c).

[8] None of these cases helps the Plaintiff. *Sacilor, Acieries et Laminoirs De Lorraine* involved enjoining the release of confidential information. *Sacilor, Acieries et Laminoirs De Lorraine*

in *NEC*, the plaintiff sought to stop an administrative review before it had begun. Waiting until the review had been completed to determine if the review was initiated pursuant to a timely review request would have made any relief meaningless. Therefore the court found § 1581(c) was manifestly inadequate because the case was in line with those where "the review that the plaintiff seeks to prevent will have already occurred by the time relief under another provision of section 1581 is available." *Dofasco Inc. v. United States*, 28 CIT 262, 270, 326 F.Supp.2d 1340, 1346 (2004), *aff'd*, 390 F.3d 1370 (Fed. Cir. 2004). In *Nissan*, the plaintiffs alleged Commerce had inordinately delayed its completion of a past-due § 751 administrative review for 1980–1984, preliminarily determining to revoke the dumping order, and sought to enjoin Commerce from initiating a potentially invalid subsequent review for the period of 1985–1986. *Nissan Motor Corp. v. United States*, 10 CIT 820, 821–22, 824, 651 F. Supp. 1450, 1453, 1455 (1986). The court held it had jurisdiction to hear the case under § 1581(i), because there was the possibility that Commerce would never complete the administrative review, thereby depriving plaintiffs of a means to prevent a potentially unnecessary administrative review. *Id.* at 822, 651 F. Supp. at 1454. In *Carnation*, plaintiffs alleged that Commerce lacked authority to conduct the two administrative reviews at issue and moved the court to enjoin the publication of any of Commerce's final results. *Carnation Enterprises v. U.S. Dep't of Commerce*, 13 CIT 604, 604–05, 719 F.Supp. 1084, 1085 (1989). Plaintiffs claimed the underlying order for those reviews was invalid. Plaintiffs withdrew from the pending administrative reviews and argued they should not be forced to participate in any current or future reviews in order to challenge the legality of those reviews. The court found §1581(i) jurisdiction because the remedy provided by a §1581(c) case would not alleviate the harm suffered by plaintiffs of having to participate in any allegedly illegal reviews. *Id.* at 611, 719 F.Supp. at 1090. The court further reasoned that "[s]ection 1581(i) enables the

v. United States, 3 CIT 191, 191, 542 F.Supp. 1020, 1021 (1982). In *MacMillan Bloedel*, the plaintiff sought "a writ of mandamus directing the Department of Commerce to conduct an investigation to determine whether Macmillan Bloedel should be excluded from a countervailing duty order." *MacMillan Bloedel*, 16 CIT at 331. However, there the court dismissed plaintiff's action for lack of jurisdiction. *See id.* Plaintiff's *MacMillan Bloedel* citation includes a citation to *Nakajima All Co. v. United States*, 12 CIT 585, 691 F.Supp. 358 (1988), which granted mandamus directing Commerce to complete and publish final results of an administrative review by a specific date so that a delay in completing the proceedings would not extend beyond 6 years. *See Nakajima*, 12 CIT at 591–92, 691 F.Supp. at 363–64. However, in that case § 1581(c) jurisdiction was manifestly inadequate because the timeliness issue would have been moot if plaintiff were required to wait for the administrative proceeding to be completed. *See MacMillan Bloedel*, 16 CIT at 332 (discussing *Nakajima*).

court to entertain actions pertaining to antidumping proceedings provided there is no challenge to a determination specified in 19 U.S.C. § 1516a." *Id.* at 612, 719 F.Supp. at 1090–91. These cases all sought to stop an allegedly unnecessary or ultra vires administrative proceeding before plaintiffs were burdened with them.

Here, Plaintiff is not claiming that it will be spared an illegal proceeding. It claims that the proceeding it has already endured was defective and it hopes to forestall the final determination which it fears will be wrong. Yet, the only harm Plaintiff could suffer is to have a determination rendered against it that is not supported by substantial evidence and/or contrary to law. It has a remedy for that harm.

Plaintiff's remedy is to continue participating in the administrative proceedings below until they are concluded in a little over one month from now. Plaintiff may, if it chooses, then appeal from Commerce's final determination and file suit in this Court under § 1581(c). Because the court finds that the remedy available to Plaintiff under § 1581(c) is not manifestly inadequate, the court will not address whether Commerce's alleged refusal to conduct verification could constitute final agency action as required by APA § 704, sufficient to form the basis of an APA claim that would be reviewable under the court's § 1581(i) jurisdiction.

Conclusion

For the foregoing reasons, Plaintiff's Complaint is dismissed for lack of subject matter jurisdiction. Judgment will be entered accordingly.

Dated: June 6, 2014
New York, New York

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

Slip Op. 14–62

PEER BEARING COMPANY-CHANGSHAN, Plaintiff, v. UNITED STATES, Defendant, and THE TIMKEN COMPANY, Defendant-Intervenor.

Before: Timothy C. Stanceu, Judge
Consol. Court No. 11–00022

[Affirming in part and remanding in part a decision of the U.S. Department of Commerce in an action contesting the final results of an administrative review of an antidumping duty order on tapered roller bearings from China]

Dated: June 10, 2014

John M. Gurley and *Diana Dimitriuc Quaia*, Arent Fox LLP, of Washington, DC, for plaintiff and defendant-intervenor Peer Bearing Company-Changshan.

L. Misha Preheim, Trial Attorney, and *Patricia M. McCarthy*, Assistant Director, Commercial Litigation Branch, Civil Division, U.S. Department of Justice, of Washington, DC, for defendant. With them on the brief were *Stuart F. Delery*, Assistant Attorney General, and *Jeanne E. Davidson*, Director. Of counsel on the brief was *Joanna V. Theiss*, Office of the Chief Counsel for Import Administration, U.S. Department of Commerce, of Washington, DC.

Herbert C. Shelley and *Christopher G. Falcone*, Steptoe & Johnson LLP, of Washington, DC, for defendant-intervenors Changshan Peer Bearing Company Ltd. and Peer Bearing Company.

William A. Fennell, *Terence P. Stewart*, and *Stephanie R. Manaker*, Stewart and Stewart, of Washington, DC, for plaintiff and defendant-intervenor The Timken Company.

OPINION AND ORDER

Stanceu, Judge:

This consolidated case arose from challenges to the final determination ("Final Results") that the International Trade Administration, U.S. Department of Commerce ("Commerce" or the "Department") issued to conclude the twenty-second periodic administrative review of an antidumping duty order (the "Order") on tapered roller bearings ("TRBs") and parts thereof, finished and unfinished, from the People's Republic of China ("China" or "PRC"). *Tapered Roller Bearings & Parts Thereof, Finished & Unfinished, From the People's Republic of China: Final Results of the 2008–2009 Antidumping Duty Admin. Review*, 76 Fed. Reg. 3,086 (Jan. 19, 2011) ("*Final Results*"). The twenty-second administrative review pertained to entries of TRBs and parts thereof from China (the "subject merchandise") occurring during the period of June 1, 2008 through May 31, 2009 (the "period of review" or "POR"). *Id.*, 76 Fed. Reg. at 3,086.

Before the court is the decision ("Remand Redetermination") Commerce submitted in response to the court's remand order in *Peer Bearing Co.-Changshan v. United States*, 36 CIT __, 884 F. Supp. 2d 1313 (2012) ("*Peer Bearing-Changshan*"). Final Results of Redetermination Pursuant to Ct. Remand (May 13, 2013), ECF No. 100 (public version), ECF No. 101 (confidential version) ("*Remand Redetermination*").[1] For the reasons stated herein, the court orders a second remand on two issues in this case and affirms the Remand Redetermination on a third issue.

[1] Unless otherwise specified, all citations to Final Results of Redetermination Pursuant to Court Remand ("Remand Redetermination") filed on May 13, 2013 are to the public version, ECF No. 100 ("*Remand Redetermination*").

I. BACKGROUND

Background is provided in the court's prior opinions and is supplemented herein. *Peer Bearing-Changshan*, 36 CIT at __, 884 F. Supp. 2d at 1317–18; *Peer Bearing Co.-Changshan v. United States*, 35 CIT __, __, Slip Op. 11–125, at 2 (Oct. 13, 2011) (denying a motion to dismiss one of the claims brought in this consolidated action).

Plaintiffs Peer Bearing Company-Changshan ("CPZ"), a Chinese producer and exporter of TRBs, and its affiliated U.S. reseller, Peer Bearing Company, initiated the above-captioned matter to contest the Final Results. *See* Compl. (Feb. 2, 2011), ECF No. 6. The Timken Company ("Timken"), a domestic TRB producer, initiated a separate action contesting the Final Results and is a defendant-intervenor in this action. *See* Compl. (Mar. 10, 2010), ECF No. 9 (Court No. 11–00039). The two cases have since been consolidated. *See* Order (June 13, 2011), ECF No. 27 (consolidating *Timken Co. v. United States* (Court No. 11–00039) into the above-captioned matter). The other defendant-intervenors are Changshan Peer Bearing Company Ltd., a new company formed after the shares of CPZ were acquired during the POR (on September 11, 2008) by various companies controlled by Swedish company SKF, and its affiliated U.S. reseller, also known as Peer Bearing Company, a new U.S. entity that was formed when the SKF companies acquired the former Peer Bearing Company at the same time they acquired CPZ. *See Peer Bearing-Changshan*, 36 CIT at __, 884 F. Supp. 2d at 1317. CPZ and the former Peer Bearing Company are no longer in existence; each transferred its responsibilities for participating in antidumping proceedings to a separate company, PBCD, LLC, which also assumed liability for paying antidumping duties. *Id.* Commerce determined that Changshan Peer Bearing Company Ltd., the new Chinese producer, and the new U.S. entity, Peer Bearing Company, are not successors in interest to the former entities, and as a result Peer Bearing Company-Changshan and Changshan Peer Bearing Company were separate respondents in the twenty-second review. *Id*.

In the Final Results, Commerce assigned a weighted-average antidumping duty margin of 38.39% to PBCD and a weighted-average antidumping duty margin of 14.13% to the new exporter/producer, Changshan Peer Bearing Company, to which Commerce referred as "SKF". *Id.* at __, 884 F. Supp. 2d at 1317–18. In this Opinion and Order, the court also refers to Changshan Peer Bearing Company as "SKF." The court refers to the former producer and respondent as "CPZ" and to the entity now litigating the claims brought by CPZ as "PBCD."

Pursuant to the court's remand order, Commerce filed the Remand Redetermination on May 1, 2013. The various parties have filed comments on the Remand Redetermination with the court. PBCD raises objections to the Remand Redetermination on one issue. Pl. Peer Bearing Co.-Changshan's Comments on Def.'s Final Results of Redetermination Pursuant to Ct. Remand (June 12, 2013), ECF No. 106 (public version) ("PBCD's Comments"). SKF objects on two issues. Pls.' Comments on Final Results of Redetermination Pursuant to Remand (June 12, 2013), ECF No. 103 ("SKF's Comments"). Timken supports the Remand Redetermination in the entirety. Comments on Final Results of Redetermination Pursuant to Ct. Remand (June 12, 2013), ECF No. 105 ("Timken's Comments"). The changes Commerce made in the Remand Redetermination resulted in a decrease of PBCD's margin from 38.39% to 22.82% and an increase in SKF's margin from 14.13% to 22.12%. *See Remand Redetermination* 68.

II. DISCUSSION

A. Jurisdiction and Standard of Review

The court exercises jurisdiction under section 201 of the Customs Courts Act of 1980, 28 U.S.C. § 1581(c), pursuant to which the court reviews actions commenced under section 516A of the Tariff Act of 1930 ("Tariff Act"), 19 U.S.C. § 1516a, including an action contesting the final results of an administrative review that Commerce issues under section 751 of the Tariff Act, 19 U.S.C. § 1675(a).[2] When reviewing the final results of an administrative review, the court "shall hold unlawful any determination, finding, or conclusion found . . . to be unsupported by substantial evidence on the record, or otherwise not in accordance with law. . . ." 19 U.S.C. § 1516a(b)(1)(B)(i).

B. Remaining Issues

Three issues remain in dispute in this case. In the Remand Redetermination, Commerce addressed each of these issues and departed from the decision in the Final Results with respect to two of them, as summarized below.

The first remaining issue is PBCD's challenge to the Department's decision that certain TRBs resulting from processing and assembly operations conducted in Thailand by a CPZ affiliate were of Chinese origin and therefore within the scope of the Order. The court remanded this issue for the Department's reconsideration, and in re-

[2] Unless otherwise specified, all statutory citations herein are to the 2006 edition of the United States Code and all citations to regulations are to the 2011 edition of the Code of Federal Regulations.

sponse, Commerce modified its country-of-origin analysis in minor respects but again determined that the country of origin of the TRBs in question was China. *Remand Redetermination* 9–36, 45–58. PBCD opposes the origin determination on various grounds. PBCD's Comments 3–19. As discussed later in this Opinion and Order, the court concludes that the Department's decision to include the TRBs within the Order was contrary to law.

The second remaining issue is PBCD's challenge to the Department's surrogate value determination for bearing-quality steel bar that PBCD used in producing TRBs. In response to the court's remand order in *Peer Bearing-Changshan*, Commerce calculated a new surrogate value for the bearing-quality steel bar. *Remand Redetermination* 36–39, 60–61, 63–67. PBCD supports the redetermined surrogate value. PBCD's Comments 3. SKF opposes it on the ground that Commerce should not have used a surrogate value but instead should have valued all steel bar input using data pertaining to SKF's own market economy purchases of bearing-quality steel bar. SKF's Comments 12–16. For the reasons discussed herein, the court sustains the redetermined surrogate value.

The final remaining issue is Timken's challenge to the Department's determination of the factors of production ("FOPs") used to calculate the normal value of certain TRBs that had been manufactured by the former producer, CPZ, but were sold from SKF's acquired inventory by the newly formed Peer Bearing Company. Specifically, Timken claimed that Commerce incorrectly used the FOPs pertaining to SKF and instead should have used the FOPs pertaining to CPZ because CPZ had produced the merchandise in question. *Peer Bearing-Changshan*, 36 CIT at __, 884 F. Supp. 2d at 1338. In the Remand Redetermination, Commerce recalculated the normal value of the TRBs at issue using certain record FOP data pertaining to the brief period between the beginning of the POR and the acquisition. *Remand Redetermination* 39. Timken supports the decision Commerce made to resolve this issue. Timken's Comments 1. SKF opposes it on various grounds. SKF's Comments 3–12. As discussed later in this Opinion and Order, the court orders reconsideration of the decision, concluding that Commerce failed to address the issue of which record data pertaining to CPZ was most appropriate for use in valuing the factors of production.

C. Commerce Erred in Finding that Certain TRBs Processed in Thailand Were Within the Scope of the Antidumping Duty Order

In the Final Results, Commerce found that certain TRBs that had resulted from processing conducted in Thailand by a PBCD affiliate were products of China and therefore within the scope of the Order. *Peer Bearing-Changshan*, 36 CIT at __, 884 F. Supp. 2d. at 1319. The manufacturing operations performed in Thailand included grinding and honing of unfinished, Chinese-origin cups and cones and assembly operations using the finished cups and cones and Chinese-origin cages and rollers. *Id.* Commerce applied what it termed its "substantial transformation" test to reach a decision that it described as based upon a "totality of the circumstances." *Id.* In explaining how it reached its conclusion, Commerce discussed six criteria: (1) the class or kind of merchandise within the scope of the Order; (2) the nature and sophistication of the upstream processing (i.e., the processing conducted in China) and the third-country processing (i.e., the processing conducted in Thailand); (3) the identification of the processing that imparts the essential physical or chemical properties of a TRB; (4) the cost of production and value added by the third-country processing; (5) the level of investment in the third country and the potential for circumvention; and (6) whether unfinished and finished bearings are both intended for the same ultimate end use. *Id*. Commerce found that the TRBs had not been "substantially transformed" by operations in Thailand and thus were of Chinese origin and within the scope of the Order. *Id.* at __, 884 F. Supp. 2d. at 1319–20.

In *Peer Bearing-Changshan*, the court reviewed the Final Results and identified numerous deficiencies with the Department's decision. *Id.* at __, 884 F. Supp. 2d. at 1324–25. Among the deficiencies the court identified was the Department's failure to provide reasoning why its first criterion, "class or kind of merchandise," was relevant to the origin issue the case presents. *Id.* at __, 884 F. Supp. 2d. at 1320–23. That question is, namely, "whether the Chinese-origin parts, finished and unfinished, which were converted into finished TRBs by the processing in Thailand, were 'substantially transformed' by that processing." *Id.* at __, 884 F. Supp. 2d. at 1320. The court also criticized a finding Commerce reached under its sixth, "ultimate use" criterion, which was that an unfinished TRB is intended for the same ultimate end use as a finished TRB. *Id.* at __, 884 F. Supp. 2d at 1323–24. Observing that the substantial transformation issue presented by this case does not involve unfinished TRBs, the court took issue with this finding. *Id.* at __, 884 F. Supp. 2d. at 1324 ("No individual part exported from China to Thailand plausibly could have been found to be an unfinished bearing, and Commerce made no

finding to that effect."). Additionally, the court held that the record lacked substantial evidence to support the Department's finding, under its fourth criterion, that no significant value had been added to the finished TRBs as a result of the processing conducted in Thailand. *Id.* at __, 884 F. Supp. 2d. at 1322–23. The court did not sustain the Department's country-of-origin finding and directed Commerce to reconsider its determination in the entirety. *Id.* at __, 884 F. Supp. 2d. at 1324–25, 1339. The court specified that "[a]ny determination Commerce reaches on remand must rely solely on criteria relevant to whether the parts exported to Thailand were substantially transformed and must be based on findings supported by substantial record evidence." *Id.* at __, 884 F. Supp. 2d. at 1325.

In the Remand Redetermination, Commerce again determined that the TRBs processed in Thailand are products of China and, therefore, within the scope of the Order. *Remand Redetermination* 9–10. Although Commerce discussed the deficiencies the court identified in *Peer Bearing-Changshan*, the Remand Redetermination, despite the court's order to rely solely on relevant criteria, made no essential changes to the criteria Commerce applied previously.

On remand, Commerce again concluded that its first criterion, "class or kind/scope," was relevant to its origin determination and "weighs against a finding of substantial transformation where the upstream and downstream products are within the same class or kind/scope." *Remand Redetermination* 11. In response to the court's order, Commerce gave reasoning for its conclusion, stating that "the class or kind/scope criterion is relevant to a country-of-origin analysis because if the downstream product becomes a different class or kind of product, or falls outside the scope of the order, this weighs in favor of a finding that the product is a new and different article of commerce (i.e., substantially transformed) in the third country." *Id.* at 10 (footnote omitted). Commerce also stated that its conclusion under its first criterion "is not definitive of the ultimate question," reasoning that "[t]he Court is correct to note that, as the Department itself noted in the prior review, the central issue is whether the unfinished components shipped by PBCD to Thailand for further processing and assembly are substantially transformed, not whether the inputs and-outputs of Thai processing are both products included in the scope of the *TRBs Order*." *Id.* at 11.

Commerce proceeded to find that the remaining five criteria ("nature/sophistication of processing," "physical/chemical properties and essential component," "cost of production/value added," "level of investment," and "ultimate use") also "suggested against a finding

that the Thai processing constitutes substantial transformation." *Id.* at 45.

Commerce made new findings to respond to the court's ruling that record evidence did not support the Department's earlier finding, made under the fourth, "cost of production/value added" criterion, that no significant value had been added to the finished TRBs as a result of the processing conducted in Thailand. Commerce reported in the Remand Redetermination that it calculated three weighted-average per-unit cost of production ("COP") ratios to determine the value added in Thailand, each of which it derived by dividing the sum of the reported manufacturing labor and overhead costs incurred in Thailand by the sum of those costs and the COP incurred in China, which included materials costs as well as manufacturing labor and overhead. *Id.* at 21–22. Commerce calculated three separate ratios because it performed the calculations using COP-related data (which were on the record but not used for this purpose in the Final Results) for (1) CPZ-produced TRBs sold by the CPZ-affiliated Peer Bearing Company prior to the acquisition, (2) CPZ-produced TRBs imported prior to the acquisition and sold, post-acquisition, by the SKF-affiliated Peer Bearing Company, and (3) TRBs that SKF produced post-acquisition that were then sold by the SKF-affiliated Peer Bearing Company. *Remand Redetermination* 22.

It appears from the Remand Redetermination that Commerce used actual COP data for the Thai operations but, contrastingly, used surrogate values to value the factors of production for operations that occurred in China, modified according to the changes it made on remand to the bearing-quality steel surrogate value and to the factors of production for CPZ-produced TRBs that were sold post-acquisition. *Id.* at 22–23. With respect to the ratios, Commerce stated that it did not find that the percentages it calculated were "representative of a significant value added by the Thai further processing."[3] *Id.* at 23. With respect to "qualitative" (as opposed to quantitative) value-added information, Commerce found that "the grinding and assembly processes (whether they take place in the PRC or Thailand) are relatively minor compared with the totality of the upstream processes." *Id.* at 25. Commerce further found that "the value of energy and labor consumed by the Thai processor in the grinding and assembly of TRB components is insignificant when compared to the total value of the finished merchandise." *Id.* at 26.

Pursuant to its fifth criterion, "level of investment in the third country and the potential for circumvention," the Remand Redeter-

[3] The actual ratios appear in the confidential version of the Remand Redetermination but are not presented in this Opinion and Order due to a claim for proprietary treatment.

mination "considered the production equipment used in each stage of production in the PRC and in Thailand in order to make a finding concerning the level of investment." *Remand Redetermination* 30. Commerce "determined that the equipment/production line requirements for the processes performed in Thailand are not significant in comparison to those required for the production stages completed in the PRC." *Id.*

Under its sixth criterion, which pertained to "ultimate end use," the Remand Redetermination altered the analysis presented in the Final Results to change the focus from "unfinished" TRBs to the unfinished and finished parts. As Commerce stated in the Remand Redetermination, "once the issue is reframed to focus on the parts (rather than the 'unfinished TRB'), the criterion becomes relevant to the analysis because the ground and un-ground (but unassembled) component TRB parts are intended for the same ultimate end use as the finished and assembled TRB: as a finished TRB that can be used in a downstream product." *Id.* at 35.

PBCD continues to oppose the Department's country-of-origin determination. PBCD's Comments 3–19. PBCD argues, *inter alia*, that the Department's "substantial transformation" analysis on remand "raises many of the same concerns in the Court's Remand Order," *id.* at 4, and that the Department's conclusions therein "remain unsupported by a persuasive rationale," *id.* at 7. PBCD further contends that the Department's analysis on the country-of-origin question should have reflected "industry practice and the twenty years of country of origin practice by U.S. Customs and Border Protection." PBCD's Comments 7. Timken supports the Department's determination but offers no specific comments on the issue. *See* Timken's Comments.

1. Commerce is Authorized to Interpret, But Not Enlarge, the Scope of an Antidumping Duty Order, Unless it Invokes its Anticircumvention Authority

The general rule is that Commerce, when determining whether merchandise falls within the scope of an existing antidumping duty order, may interpret the scope language of the order but may not modify it. *Duferco Steel, Inc. v. United States*, 296 F.3d 1087, 1097 (Fed. Cir. 2002) ("*Duferco*"). Under this general rule, Commerce may not place merchandise within the scope of an order if the scope language may not reasonably be interpreted to include that merchandise. *Id.*, 296 F.3d at 1089 ("Scope orders may be interpreted as including subject merchandise only if they contain language that specifically includes the subject merchandise or may be reasonably

interpreted to include it."). The question posed by this case is whether the term from the scope language, "imports of tapered roller bearings *from the PRC*," reasonably can be interpreted to include the TRBs in question.[4] *Notice of Antidumping Duty Order; Tapered Roller Bearings & Parts Thereof, Finished or Unfinished, From the People's Republic of China*, 52 Fed. Reg. 22,667 (June 15, 1987) (emphasis added) ("*Antidumping Duty Order*").

The general rule that Commerce may construe but not modify the scope of an existing order is subject to a statutory exception, for in certain specified situations, Commerce may enlarge the scope of an order by invoking the "prevention of circumvention" provisions contained in section 781 of the Tariff Act, 19 U.S.C. § 1677j. *See AMS Assoc. v. United States*, 737 F.3d 1338, 1343 (Fed. Cir. 2013) ("In order to prevent circumvention, 19 U.S.C. §§ 1677j(a)-(d) authorize Commerce to expand the scope of existing antidumping and countervailing duty orders to reach products that are not covered by the existing scope . . ."); *Duferco*, 296 F.3d at 1098 ("So too the very existence of section 1677j of Title 19 emphasizes the general requirement of defining the scope of antidumping and countervailing duty orders by the actual language of the orders.").

The antidumping duty statute does not speak generally to the question of how Commerce is to interpret the scope language of an order when the question is whether a good should be considered to be a good or "from" the country named in that order. But in paragraphs (A) and (B) of § 1677j(b)(1), the statute specifically addresses the

[4] In the Final Results, the International Trade Administration, U.S. Department of Commerce ("Commerce" or the "Department") stated that the relevant antidumping duty order applies to "shipments of tapered roller bearings and parts thereof, finished and unfinished, from the [People's Republic of China ("PRC")]; flange, take up cartridge, and hanger units incorporating tapered roller bearings; and tapered roller housings (except pillow blocks) incorporating tapered rollers, with or without spindles, whether or not for automotive use." *Tapered Roller Bearings & Parts Thereof, Finished & Unfinished, From the People's Republic of China: Final Results of the 2008–2009 Antidumping Duty Admin. Review*, 76 Fed. Reg. 3,086, 3,087 (Jan. 19, 2011) ("*Final Results*"). The actual text of the original order varies slightly from the Department's characterization in the Final Results. Referring to "imports of tapered roller bearings from the PRC," the order in its original form contains the following scope language:

> The products covered by this investigation are tapered roller bearings and parts thereof, currently classified in Tariff Schedules of the United States (TSUS) item numbers 680.30 and 680.39; flange, take up cartridge, and hanger units incorporating tapered roller bearings, currently classified in TSUS item 681.10; and tapered roller housings (except pillow blocks) incorporating tapered rollers, with or without spindles, whether or not automotive use, currently classified in TSUS item number 692.32 or elsewhere in the TSUS.

Notice of Antidumping Duty Order; Tapered Roller Bearings & Parts Thereof, Finished or Unfinished, From the People's Republic of China, 52 Fed. Reg. 22,667 (June 15, 1987). The text of the original order mentions "unfinished" tapered roller bearings and parts only in the title. *Id.*

situation in which a good imported into the United States is completed or assembled in a "third country," i.e., a country other than the country named in the order. These provisions describe merchandise "imported into the United States" that "is of the same class or kind" as merchandise named in an antidumping duty order and is, before such importation, "completed or assembled" in a third country from merchandise that is "subject to such order" or "produced in the foreign country with respect to which such order . . . applies."[5] 19 U.S.C. § 1677j(b)(1)(A), (B).

In the situation described by paragraphs (A) and (B) of § 1677j(b)(1), Commerce is empowered to "include such imported merchandise within the scope of such order . . . at any time such order . . . is in effect," *id.* § 1677j(b)(1), provided three conditions are met.[6] Those conditions, set forth in paragraphs (C)-(E), are that "the process of assembly or completion in the foreign country . . . is minor or insignificant," *id.* § 1677j(b)(1)(C), "the value of the merchandise produced in the foreign country to which the antidumping duty order applies is a significant portion of the total value of the merchandise

[5] 19 U.S.C. § 1677j(b)(1) provides, in pertinent part, as follows:

(b) Merchandise completed or assembled in other foreign countries

(1) In general

If—

(A) merchandise imported into the United States is of the same class or kind as any merchandise produced in a foreign country that is the subject of—

(i) an antidumping duty order issued under section 1673e of this title, . . .

(B) before importation into the United States, such imported merchandise is completed or assembled in another foreign country from merchandise which—

(i) is subject to such order . . . , or

(ii) is produced in the foreign country with respect to which such order . . . applies,

(C) the process of assembly or completion in the foreign country . . . is minor or insignificant,

(D) the value of the merchandise produced in the foreign country to which the antidumping duty order applies is a significant portion of the total value of the merchandise exported to the United States, and

(E) the administering authority determines that action is appropriate under this paragraph to prevent evasion of such order . . . ,

the administering authority, after taking into account any advice provided by the [International Trade] Commission under subsection (e) of this section, may include such imported merchandise within the scope of such order . . . at any time such order . . . is in effect.

19 U.S.C. § 1677j(b)(1) (emphasis in original).

[6] The statute imposes as a fourth condition that Commerce, before including the merchandise within the scope of the antidumping duty order, "take into account" any advice the International Trade Commission provides after Commerce provides the Commission with notice of the intended action. 19 U.S.C. § 1677j(b)(1). Nonetheless, the Department's decision on whether the merchandise is within a category for which notice is required is not subject to judicial review. *Id.* § 1677j(e)(1). Additionally, in deciding whether to expand an order to include the merchandise in question, Commerce is to "take into account such factors as—the pattern of trade, including sourcing patterns," whether the two producers are affiliated, and whether imports of the merchandise increased after the investigation resulting in the order. *Id.* § 1677j(b)(3).

exported to the United States," *id.* § 1677j(b)(1)(D), and Commerce "determines that action is appropriate under this paragraph to prevent evasion of such order . . . ," *id.* § 1677j(b)(1)(E).

Paragraphs (A) and (B) of 19 U.S.C. § 1677j(b)(1) describe precisely the factual situation presented by this case. The TRBs at issue were assembled in the third country (here, Thailand), if not also "completed" there.[7] *Id.* § 1677j(b)(1)(B). The unfinished cups and cones and the finished cages and rollers were, in the words of § 1677j(b)(1)(B), "merchandise which . . . is subject to such order" as well as merchandise "produced in the foreign country with respect to which such order . . . applies." *Id*.

In the Final Results, Commerce "found no potential for evasion" of the Order and "avoided any reliance on its anticircumvention authority . . . ." *Peer Bearing-Changshan*, 36 CIT at __, 884 F. Supp. 2d. at 1321. In the Remand Redetermination, Commerce again indicated that it was not performing an anticircumvention analysis under 19 U.S.C. § 1677j(b). *Remand Redetermination* 34 ("we clarify that we do not reach a determination as to whether circumvention had occurred or may occur . . . .").[8] Accordingly, Commerce lacked authority to expand the scope of the Order in deciding the question of whether the TRBs assembled and completed in Thailand were within that scope. Any "substantial transformation criteria" or "totality of the circumstances test" Commerce used to decide that question was required to be consistent with the limitations on the Department's authority. To summarize, those limitations stem from two sources: the scope language of the Order itself ("imports of tapered roller bearings from the PRC"), which Commerce must interpret reasonably and not expansively, and 19 U.S.C. § 1677j(b). Both sources cast doubt on the Department's decision.

2. The Plain Meaning of the Scope Language Contained in the Order Does Not Support the Department's Decision

The imported bearings at issue were not, in any literal or ordinary sense, "imports of tapered roller bearings from the PRC" as described in the scope language of the Order. *Antidumping Duty Order*, 52 Fed. Reg. 22,667. It was in Thailand, not China, that the imported mer-

[7] The TRBs were "completed" in Thailand only in the sense that they required no further processing before exportation to the United States. Describing them as "completed" in Thailand implies that the operations in Thailand were performed on incomplete bearings from another country (here, China), which was not the case.

[8] In response to an inquiry by defendant, the court clarified that *Peer Bearing Co.-Changshan v. United States*, 36 CIT __, 884 F. Supp. 2d 1313 (2012) ("*Peer Bearing-Changshan*") was not intended to, and does not, order Commerce to conduct an analysis under 19 U.S.C. § 1677j(b). Order Granting Extension of Time for Filing of Remand Results and Clarifying Scope of Remand Order (Mar. 28, 2013), ECF No. 99.

chandise became "tapered roller bearings," for, as discussed in *Peer Bearing-Changshan*, no part that was exported from China to Thailand plausibly could be described as an unfinished TRB. *Id.* at __, 884 F. Supp. 2d. at 1324. The uncontested facts are that the TRBs at issue entered the United States as finished bearings that were processed, assembled, and exported by a CPZ affiliate in Thailand. As Commerce stated in the Remand Redetermination, the CPZ affiliate in Thailand performed machining processes on the cups and cones through "a series of steps wherein the width, the outside diameter, and bore of the rings (cup and cone) are ground and the inside diameter of the outer ring and the outside diameter of the inner ring are polished." *Remand Redetermination* 14 (footnote omitted). The ground cups and cones "are then sent through a further series of machining processes that demagnetize the rings and then assemble them into finished TRBs with the inclusion of the PRC-finished cages and rollers (which are themselves demagnetized and laser-etched with logos and product codes as part of the assembly process)." *Id.* at 14–15.

3. In Enacting 19 U.S.C. § 1677j(b), Congress Implicitly Recognized Limits on the Department's Authority to Place within an Order Merchandise Assembled in a Third Country

Section 781 of the Tariff Act, 19 U.S.C. § 1677j, "Prevention of circumvention of antidumping and countervailing duty orders," was added to the antidumping statute by the Omnibus Trade and Competitiveness Act of 1988, Pub. L. No. 100–418, 102 Stat. 1107, 1192. The Conference Report for this legislation specifies that the antidumping and countervailing duty law prior to enactment of section 781 contained no specific provisions to address the problem of circumvention of antidumping and countervailing duty orders. H.R. Rep. No. 100–576, at 599–600 (1988) (Conf. Rep.), *reprinted in* 1988 U.S.C.C.A.N. 1547, 1632–33. With respect to subsection (b), which was similar to the current subsection (b), the Conference Report described pre-enactment law as follows:

> No specific provision. Under certain circumstances, Commerce considers merchandise completed or assembled in a third country to be subject to an anti-dumping or countervailing duty order or finding.

Id. According to the Conference Report, both the House bill and a Senate amendment contained a provision addressing goods assembled in third countries, the two versions were similar, and the

House acceded to the Senate amendment. *Id*. The Conference Report further explains that by means of the Senate amendment "it is made explicit that the provision applies both in cases where the order is on the merchandise shipped to the third country for completion or assembly (diversion) and where the order is on a final product, parts or components of which are sent from the country subject to the order to the third country for assembly or completion (circumvention)." H.R. Rep. No. 100–576, at 600, *reprinted in* 1988 U.S.C.C.A.N. at 1633.

The Conference Report did not describe the "certain circumstances" in which Commerce, under the law as it existed at the time, would consider merchandise completed or assembled in a third country to be within the scope of an order. Nevertheless, both the House bill and the Senate amendment included restrictions on the Department's authority to invoke the anticircumvention provision directed to third country assembly or finishing operations. It is apparent from enactment of 19 U.S.C. § 1677j(b), as well as from the legislative history, that Congress considered it necessary to provide Commerce authority to apply an order to merchandise completed or assembled in a third country but also deemed it appropriate to place restrictions on that authority. In the version of § 1677j(b) enacted in 1988, those restrictions were that the difference between the value of the merchandise on which the third country processing occurred and the merchandise imported into the United States be small, § 1677j(b)(1)(C), and that Commerce specifically determine that applying the order to the third country merchandise is appropriate to prevent evasion of the order, § 1677j(b)(1)(D) (1988) (amended 1994). In addition, before taking such action, Commerce was to take into account whether the foreign manufacturers are related, the pattern of trade, and whether imports of the merchandise from the third country increased after issuance of the order. *Id.* § 1677j(b)(1) (1988).

In amending the antidumping and countervailing duty laws, the Uruguay Round Agreements Implementation Act of 1994 established § 1677j(b) in its current form. *See* Uruguay Round Agreements Act, Pub. L. No. 103–465, 108 Stat. 4809 (1994). According to the legislative history accompanying the Uruguay Round Agreements Act, the anticircumvention provisions enacted in 1988, being "based on the experience Commerce had had with circumvention up to that time," were in need of revision because "Commerce subsequently encountered new circumvention scenarios that revealed serious shortcomings in the 1988 Act." H.R. Rep. No. 103–826, pt. 1, at 102 (1994), *reprinted in* 1994 U.S.C.C.A.N. 3773, 3874 ("House Report 826"). Regarding § 1677j(b), Congress specifically identified as in need of revision the "requirement that the difference between the value of the

parts imported into the United States (or into a third country) from the country subject to the order and the value of the finished product be 'small.'" *Id.* According to House Report 826, "[t]his mechanical, quantitative approach fails to address adequately circumvention scenarios in which only minor assembly is done in the United States (or in a third country), but for various reasons the difference in value is not 'small.'" *Id.*

Under § 1677j(b) as amended in 1994, the "mechanical, quantitative" approach was replaced by one in which Commerce could consider applying an order to merchandise completed or assembled in a third country where "the process of assembly or completion in the foreign country . . . is minor or insignificant," § 1677j(b)(1)(C), and "the value of the merchandise produced in the foreign country to which the antidumping duty order applies is a significant portion of the total value of the merchandise exported to the United States," § 1677j(b)(1)(D). The 1994 amendment inserted a new provision, now codified as § 1677j(b)(2), requiring Commerce to take into account five factors in determining whether the process of assembly or completion in the third country is "minor or insignificant": "(A) the level of investment in the foreign country, (B) the level of research and development in the foreign country, (C) the nature of the production process in the foreign country, (D) the extent of production facilities in the foreign country, and (E) whether the value of the processing performed in the foreign country represents a small proportion of the value of the merchandise imported into the United States." *Id.* § 1677j(b)(2).

The legislative histories of the 1988 and 1994 versions of § 1677j(b) do not state explicitly that Congress intended by enacting these provisions to limit the authority of Commerce in construing the scope of an existing order in any situation in which third country completion or assembly is at issue. Nevertheless, both versions of § 1677j(b) and the accompanying legislative histories make clear that Congress considered it necessary to grant Commerce additional authority so that Commerce could address these situations by expanding, rather than merely interpreting, the scope of an existing antidumping or countervailing duty order. Congress could not have done so without possessing a general understanding that a good emerging from a third country completion or assembly operation such as that described in 19 U.S.C. § 1677j(b)(1)(A) and (B) ordinarily would not be considered to be within the scope of the order in question, at least where, as here, the commercial identity of the finished good was

acquired in the third country.[9] Absent such an understanding, it is doubtful that Congress would have considered it necessary to provide Commerce the authority that it did in enacting § 1677j(b), for the Department's existing authority to interpret an antidumping duty order would have been seen to suffice. It therefore can be inferred from the legislative purpose underlying § 1677j(b) that Congress took a narrower view of the Department's authority to interpret, without expanding, the scope of an antidumping duty order than Commerce has taken in this case.

Moreover, Congress did not consider it appropriate to allow Commerce to expand the scope of an antidumping duty order pursuant to § 1677j(b) without placing on that authority the restrictions that are set forth in § 1677j(b)(1)(C)-(E). Those restrictions would be rendered ineffective in this case were Commerce free to avoid them by the simple expedient of ruling that the order at issue already includes a TRB that not only was assembled, but also machined, in a third country from individual parts, none of which was an unfinished TRB.

The court concludes that the way in which Congress provided anticircumvention authority in 19 U.S.C. § 1677j(b) is an indication that Commerce exceeded the limitations on its authority to interpret, without enlarging, the scope of the Order when it placed within that scope the TRBs exported from Thailand. Here, Commerce placed within the Order a product of a type Congress contemplated would be the subject of an anticircumvention inquiry, without actually conducting such an inquiry.

4. The Record Evidence, and the Department's Own Findings, Might Have Precluded Commerce from Lawfully Expanding the Scope of the Order by Resort to 19 U.S.C. § 1677j(b) Had Commerce Invoked Its Authority under that Provision

Had Commerce chosen to conduct an anticircumvention inquiry under 19 U.S.C. § 1677j(b), it could not have placed the TRBs in question within the order without meeting all three of the criteria Congress set forth in § 1677j(b)(1)(C)-(E). The criterion in paragraph (C) is that "the process of assembly or completion in the foreign

[9] In this regard, the Remand Redetermination does not dispute the contention of PBCD, LLC ("PBCD") that the TRBs at issue would be considered by U.S. Customs and Border Protection ("CBP") to be products of Thailand, not China, for general tariff purposes (for example, tariff treatment and country-of-origin marking purposes). *Remand Redetermination* 45–46 ("With respect to PBCD's complaint that our country-of-origin determination is not consistent with CBP rulings, we again note that, although the Department may consider country-of-origin determinations made by other agencies of the U.S. government, we are not bound by such rulings.").

country . . . is *minor* or *insignificant*." 19 U.S.C. § 1677j(b)(1)(C) (emphasis added). On the record of the twenty-second review, it is far from certain that this criterion could have been met.[10]

One obstacle to satisfying the paragraph (C) criterion is that the "process of assembly or completion" conducted in Thailand was more than mere assembly or completion. As Commerce itself found, the cup and cone machining process in Thailand involved "a series of steps wherein the width, the outside diameter, and bore of the rings (cup and cone) are ground and the inside diameter of the outer ring and the outside diameter of the inner ring are polished." *Remand Redetermination* 14 (footnote omitted). Commerce further found that "[t]he ground cups and cones are then sent through a further series of machining processes that demagnetize the rings and then assemble them into finished TRBs with the inclusion of the PRC-finished cages and rollers (which are themselves demagnetized and laser-etched with logos and product codes as part of the assembly process)." *Id.* at 14–15. The machining processes extend beyond "assembly," and because they are critical intermediate processes conducted on the two major parts of a TRB, they cannot correctly be described as mere "finishing" operations.

Other Commerce findings further indicate that satisfying the § 1677j(b)(1)(C) criterion might have been difficult. Although Commerce found in the Remand Redetermination that "the processes in the PRC, involving forging, annealing, turning, grinding green-machining, and heat treating, impart the essential character to the TRB," *Remand Redetermination* 20, this finding is qualified by others of the Department's findings that bear directly on the § 1677j(b)(1)(C) inquiry.[11] Commerce considered the grinding and finishing processes conducted on the cups and cones in Thailand to be "minor" compared to the manufacturing steps conducted in China, *id.* at 17, but in that same context it stated a finding as follows: "[w]e acknowledge, however, that this small change to the shape and surface of the cups and

[10] Had Commerce attempted to reach such a finding, it would have been required in doing so to consider the factors of 19 U.S.C. § 1677j(b)(2) ("Determination of whether process is minor or insignificant") and (3) ("Factors to consider"). As the court discussed previously in this Opinion and Order, Commerce conducted no inquiry under § 1677j(b).

[11] This "essential character" finding is open to question in that the cups and cones left China in an unfinished state and that only after the further machining of the cups and cones in Thailand occurred, and the assembly operations occurred, did actual bearings exist that could be said even to have possessed an "essential character." Moreover, the cups and cones were not functional as cups and cones in the unfinished state in which these two major components left China. But even were the court to accept the Department's "essential character" finding as supported by substantial evidence, the court still could not overlook the significance for the 19 U.S.C. § 1677j(b)(1)(C) criterion of the other findings Commerce made.

cones (and assembly thereof) is a *critical step* in imparting the very specific physical properties of each TRB that allow for the product to function as a TRB," *id.* (emphasis added). Commerce further found that the cup and cone grinding and finishing processes conducted in Thailand "along with the assembly process that allows for the bearing to be sold as a functional final product, certainly plays [an] *important role in the production of a bearing*." *Id.* at 18 (emphasis added). There is no doubt that the record evidence supported the latter two findings, as the cups and cones were not functional components upon exportation from China, and "bearings," finished or unfinished, did not exist prior to the Thai assembly process. Commerce also found that the "grinding and assembly process" is "substantial," saying of the grinding process that "[f]ar from applying a 'simple' surface polish or thread, the grinding process utilizes technically sophisticated machinery to finish various surfaces of different components to precise technical specifications." *Remand Redetermination* 26. Commerce did not consider the assembly process in Thailand to be "technically sophisticated," *id.* at 15, but also found that this process "requires a combination of machinery and manpower atypical of a 'simple' assembly process," *id.* at 26. It is difficult to reconcile various of the Department's findings with a potential finding under § 1677j(b)(1)(C) that the "process of assembly or completion" conducted in Thailand (which plainly was more than that) was "minor or insignificant." Nevertheless, the record contained other evidence that would lend support to such a finding; in particular, the record included the evidence from which Commerce calculated the aforementioned weighted-average per-unit cost of production ("COP") ratios. As the court discussed previously, Commerce derived the ratios by dividing the reported manufacturing labor and overhead costs incurred in Thailand by the sum of those costs and the COP incurred in China (albeit determined according to surrogate values), which included materials costs as well as manufacturing labor and overhead.

To reach an affirmative finding under § 1677j(b), Commerce also would have been required to find, according to paragraph (D) of § 1677j(b)(1), that the value added in China "is a significant portion of the total value of the merchandise exported to the United States." 19 U.S.C. § 1677j(b)(1)(D). The record evidence from which Commerce calculated the COP ratios demonstrates that this criterion would be met. *Remand Redetermination* 20–26. The same cannot be said with certainty regarding the statutory criterion that follows in paragraph (E), which is that Commerce determine "that action is appropriate under this paragraph to prevent evasion of such order . . . ." 19 U.S.C. § 1677j(b)(1)(E). The Remand Redetermination states that "[i]n the

underlying proceeding, as in the prior review, Petitioner did not raise particular concerns with respect to circumvention potential and we similarly did not find that the circumstances warranted the initiation of a separate circumvention inquiry (believing our substantial transformation analysis sufficient to determine country of origin)." *Remand Redetermination* 33. If the circumstances do *not* warrant an anticircumvention inquiry under § 1677j(b), the criterion in § 1677j(b)(1)(E) could not be satisfied.

Some of the factors Commerce is required by 19 U.S.C. § 1677j(b)(2) to consider would raise further questions. Congress directed Commerce, in § 1677j(b)(2)(A), to consider "the level of investment in the foreign country." *Id.* The Remand Redetermination found that "the level of investment in Thailand is not significant when compared to the level of investment in the PRC" but conceded that "we do not have the actual values for the level of investment," insisting that "we are able to reach this conclusion based on a reasoned analysis focusing on the types of production equipment utilized for the grinding and assembly stages of production in Thailand in comparison to the types of production equipment utilized for the production stages taking place in the PRC." *Remand Redetermination* 32. Although the record contains qualitative (but not quantitative) evidence supporting a finding that the investment in China was more significant than that in Thailand, it also contains evidence, cited in the Remand Redetermination, that the machining, etching, and assembly processes performed in Thailand involved different types of machinery and multiple stages. *See id.* at 15, 31–32. That the processes performed in Thailand extended beyond the mere "assembly or finishing" that the statute identifies in § 1677j(b)(1)(C) is also significant for the criterion in § 1677j(b)(2)(C), under which Commerce must consider "the nature of the production process in the foreign country," § 1677j(b)(2)(C). In that regard, Commerce found, as the court mentioned above, that the machining conducted in Thailand was a "critical step," *Remand Redetermination* 17, and that the processes performed in Thailand "play[ed] [an] important role in the production of a bearing," *id.* at 18.

5. Commerce Exceeded Its Authority to Interpret the Scope Language when it Placed under the Order the TRBs Resulting from Operations Conducted in Thailand

For the reasons the court discussed previously, the court must conclude that the issue posed by the TRBs emerging from the Thai processing was of a type Congress intended would be addressed under § 1677j(b) in the context of a possible enlargement of the scope of the

Order. The court is not ruling that Commerce *could not* have satisfied the requirements Congress imposed in § 1677j(b) for expansion of the Order, for the court need not resolve this issue in ruling on PBCD's claim. It is sufficient to conclude, instead, that the result of any inquiry Commerce could have conducted under § 1677j(b) would have been far from certain. On this administrative record, the court cannot at the same time conclude that Commerce had the discretion to place these TRBs under the Order by relying solely on its interpretive authority, which necessarily is narrower than the anticircumvention authority provided by § 1677j(b). *See Duferco*, 296 F.3d at 1098.

The record evidence, considered as a whole, does not support a finding that the relevant scope language of the Order, "imports of tapered roller bearings from the PRC," when interpreted so as not to expand the Order, describes the finished TRBs that were exported to the United States from Thailand. As the court emphasized in the foregoing discussion, the uncontested record facts demonstrate that no part exported to Thailand from China was an unfinished or incomplete TRB, and Commerce did not reach a factual finding to the contrary. There can be no dispute over the fact that the goods at issue became tapered roller bearings in Thailand, not China. While it is apparent from the record evidence that the question posed by this case was of a type Congress intended Commerce to address under paragraphs (A) and (B) of § 1677j(b)(1), the same record evidence demonstrates that the processing in Thailand extended beyond a process of "assembly or completion," the term the statute applies in paragraph (C) of § 1677j(b)(1). The processing included, prior to any assembly operations, the grinding and honing of cups and cones that, upon exportation from China, were not functional cups and cones ready for assembly. Because no unfinished or incomplete bearings were exported to Thailand, the Thai operations cannot fairly be characterized as merely a "completion" process. As the court also discussed above, Commerce may have found itself unable to satisfy all the criteria of § 1677j(b) yet still insisted that, according to its "totality of the circumstances" method, it could place the TRBs within the Order by relying solely on its interpretive authority, i.e., without attempting to augment that authority by conducting an inquiry under § 1677j(b). Doing so avoided the issues that would have resulted from the restrictions Congress placed on the Department's authority to expand the scope of the Order and, on the record evidence of this case, would render those restrictions meaningless. Commerce construed its authority to interpret, without expanding, the scope of the Order to be broader than it actually is.

Commerce reasoned that it "did not find that the circumstances warranted the initiation of a separate circumvention inquiry (believing our substantial transformation analysis sufficient to determine country of origin)." *Remand Redetermination* 33. As Commerce explained in the Issues and Decision Memorandum for the Final Results, the "substantial transformation analysis" Commerce used is an adaptation of the "established" criteria Commerce uses generally in making country-of-origin determinations. Issues & Decision Mem., A-570–601, at 11–12 (Jan. 11, 2011) (Admin.R.Doc. No. 6041), *available at* http://enforcement.trade.gov/frn/summary/PRC/2011–1026–1.pdf (last visited June 4, 2014) ("*Decision Mem.*"). Commerce may be called on in other cases to decide, for example, whether a product processed in the country named in an antidumping duty order using materials and components from a third country should be treated as subject merchandise. Here, Commerce used a "one-size-fits-all" approach when the issue called for an analysis directed to the question posed by this case, which involved merchandise that became TRBs only after machining and assembly processes conducted in a third country. As the enactment of 19 U.S.C. § 1677j(b) and the associated legislative history indicate, such merchandise, absent expansion of an order using the authority of § 1677j(b), ordinarily would be considered to be products of the third country. And as the court instructed in *Peer Bearing-Changshan*, "[a]ny determination Commerce reaches on remand must rely solely on criteria relevant to whether the parts exported to Thailand were substantially transformed and must be based on findings supported by substantial record evidence." *Id.* at __, 884 F. Supp. 2d. at 1325.

In summary, the method and criteria applied in the Remand Redetermination caused Commerce to ignore critical record evidence, as the court has described. Considered on the whole, the record lacked substantial evidence to support the ultimate finding Commerce reached in the Remand Redetermination. The court concludes that Commerce, when placing the TRBs in question within the scope of the Order, exceeded its authority to interpret, without expanding, the scope language contained in that Order.

D. The Court Sustains the Redetermined Surrogate Value for CPZ's Bearing-Quality Steel Bar

In determining the normal value of subject merchandise from a nonmarket economy country such as China, Commerce, under section 773(c)(1) of the Tariff Act, ordinarily values "the factors of production utilized in producing the merchandise." 19 U.S.C. § 1677b(c)(1). The statute requires generally that Commerce value factors of production

"based on the best available information regarding the values of such factors in a market economy country or countries" that Commerce considers appropriate. *Id*. The statute provides that Commerce, in valuing factors of production, "shall utilize, to the extent possible, the prices or costs of factors of production in one or more market economy countries that are . . . at a level of economic development comparable to that of the nonmarket economy country, and . . . significant producers of comparable merchandise." 19 U.S.C. § 1677b(c)(4).

In the Remand Redetermination, Commerce used record price data pertaining to SKF's actual market economy purchases of bearing-quality steel to value the steel input for the SKF-produced bearings sold by SKF's affiliate during the POR. *Remand Redetermination* 65. To value the bearing-quality steel input in the subject merchandise produced by CPZ, including CPZ-produced merchandise sold by an SKF-related entity after the acquisition, Commerce used a "surrogate" value, i.e., a value derived from data pertaining to a market economy country (in this instance, Thailand) that Commerce considered economically comparable to China. *Id.* at 39.

In the Final Results, Commerce determined the surrogate value using publicly-available information on the average unit value ("AUV") of imports in India made during the POR, as reported by Global Trade Atlas ("GTA"). *Remand Redetermination* 7 & n.28. From the GTA import data pertaining to Indian Harmonized Tariff Schedule ("HTS") subheading 7228.30.29,[12] Commerce calculated an AUV of approximately $1.956 per kilogram.[13] *Analysis of the Final Results Margin Calculation for Peer Bearing Company-Changshan* 4 n.7, Attach. 1 (Jan. 11, 2011) (Admin.R.Doc. No. 6039) ("*PBCD Final Results Analysis Mem.*"). Because the Indian subheading is not specific to bearing-quality steel goods, Commerce used only the GTA import data thereunder that pertained to Indian imports from the United States, Japan, and Singapore, determining from record evidence that the other countries of origin shown in the Indian GTA data "could not be shown definitively to have exported bearing quality steel to India during the POR." *Decision Mem.* 34 (footnote omitted);

[12] Commerce describes this tariff subheading as applicable to "Other Bars And Rods Of Other Alloy Steel (Not Elsewhere Specified or Indicated); Angles, Shapes And Sections Of Other Alloy Steel; Hollow Drill Bars And Rods Of Alloy Or Nonalloy Steel {7228}; Other bars and rods, not further worked than hot-rolled, hot-drawn or extruded; Bright bars {.30}; Other {.29}." *Remand Redetermination* 7 n.28.

[13] The actual surrogate value varied slightly from this amount because Commerce combined the public import data with proprietary data pertaining to certain market economy purchases of steel bar by CPZ. *Analysis of the Final Results Margin Calculation for Peer Bearing Company-Changshan* 4, Attach. 1 (Jan. 11, 2011) (Admin.R.Doc. No. 6039).

see also PBCD Final Results Analysis Mem. 4. That record evidence consisted of Indian import data compiled by Infodrive India ("Infodrive"), which CPZ had placed on the administrative record during the review.[14] *Decision Mem.* at 33–34.

In its previous opinion, the court held that record evidence did not support a finding that the subset of Indian import data of HTS subheading 7228.30.29, a "basket" category not specific to bearing-quality steel, represented the best available information to value the steel bar inputs. *Peer Bearing-Changshan*, 36 CIT at __, 884 F. Supp. 2d at 1332. The court noted that these data, even when limited to data pertaining to countries shown by Infodrive India to have exported bearing-quality steel to India, still included "substantial quantities of non-bearing-quality steel goods within the dataset." *Id.* The court directed Commerce to reconsider its surrogate value, consider available alternatives, including the use of the Infodrive data, and reach a surrogate value shown by substantial evidence to be based on the best available information. *Id.* at __, 884 F. Supp. 2d at 1333, 1339. In the Remand Redetermination, Commerce decided that certain GTA import data pertaining to Thailand, specifically, data for Thai HTS subheading 7228.30.90, were the best information on the record with which to value the steel bar input. *See Remand Redetermination* 39. These data showed an AUV of $1.43 per kilogram. *Id.* at 38. Commerce also considered the record Infodrive data that is specific to bearing-quality steel imports in India, which showed an AUV of $1.60 per kilogram. *Id*. at 37–38. Commerce decided against using the Infodrive data as a surrogate value but found these data suitable for use as a benchmark to show that the Indian import data may be aberrational when used to value bearing-quality steel. *Id*. at 37.

PBCD commented in favor of the revised surrogate value. PBCD's Comments 3. SKF objected on the ground that Commerce, when determining the normal value of all merchandise SKF sold during the POR, including the subject merchandise produced by CPZ, should have valued the steel bar input according to the price data in SKF's market economy purchases of bearing-quality steel bar. SKF's Comments 12–16. SKF argues that using the market prices exclusively would be consistent with the Department's policy and practice, that SKF "demonstrated that it could obtain a substantial portion of its steel bar inputs at a given market economy price during the POR," and that, "[t]herefore, the Department should apply this market

[14] Infodrive India ("Infodrive") is a private entity that compiles data from commercial documentation. *See Remand Redetermination* 37.

economy price to all the products SKF sold during the POR, even those products for which the market economy price may not be representative, such as the products acquired from PBCD's inventory." *Id.* at 14.

SKF adds that, as a matter of fairness, it should not be penalized because of the past purchasing of another party (i.e., CPZ), which is a matter over which it had no control. *Id*. Referring to the Department's policy of using market economy purchase data when market economy purchases are 33% or more of a respondent's total purchases of an input, SKF argues that "[i]n the present case, SKF could not control how much market economy steel [CPZ] purchased before the acquisition" and that "[a]ll SKF could do was ensure that it purchased more than 33 percent of its steel from market economy sources after the acquisition." *Id.* According to SKF, "[i]t would be fundamentally unfair to penalize SKF for [CPZ]'s failure to purchase more steel from market economy sources, particularly when [CPZ] produced merchandise for only three months of the period of review." *Id*. SKF adds that "the Department has not explained why it is reasonable to apply a respondent's current market economy price to products from a respondent's inventory that it produced in the past but not to apply a respondent's current market economy price to products sold by the respondent that were acquired from the inventory of another company that has ceased to exist." *Id*. at 16.

A regulation of the Department provides that "[t]he Secretary normally will use publicly available information to value factors [of production]." 19 C.F.R. § 351.408(c)(1). In a second sentence, the regulation includes an exception to the general preference for the use of publicly available information in valuing factors of production of nonmarket economy ("NME") producers, providing that "[h]owever, where a factor is purchased from a market economy supplier and paid for in a market economy currency, the Secretary normally will use the price paid to the market economy supplier." *Id*. The Department's use of SKF's market economy purchase prices in valuing all steel bar input SKF used in producing subject merchandise sold during the POR, as described in the Remand Redetermination, appears to have conformed to the practice identified in the second sentence. The regulation contains a third, concluding sentence that reads as follows: "In those instances where a portion of the factor is purchased from a market economy supplier and the remainder from a nonmarket economy supplier, the Secretary normally will value the factor using the price paid to the market economy supplier." *Id*.

A threshold question presented is whether the third sentence applies to the issue presented here such that Commerce, if following its

"normal" practice, should have valued CPZ's use of the steel bar input according to SKF's market economy purchases where SKF made the sale. On its face, the regulation can be read to apply to a situation in which a respondent NME producer has U.S. sales of merchandise within a period of review that were manufactured by another NME producer. A contrary reading would hold that the term "factor," i.e., "factor of production," should be read to be unique to a single producer and that, therefore, the third sentence in the regulation does not address the issue posed by this case. Commerce gave indications of intending the latter when it promulgated § 351.408(c)(1). In the preamble accompanying promulgation of the regulation ("Preamble"), Commerce explained that it did not intend to apply the "normal" method described in the third sentence of the regulation unless the amounts purchased from a market economy supplier were "meaningful." *See Antidumping Duties; Countervailing Duties*, 62 Fed. Reg. 27,296, 27,366 (May 19, 1997) ("*Preamble*"). The Preamble also suggested, without clearly stating, that Commerce intended to apply the method described in the third sentence only if the NME producer itself made the significant-quantity market economy purchases. *Id.* ("Moreover, as noted in the AD Proposed Regulations, 61 FR at 7345, we would not rely on the price paid *by an NME producer* to a market economy supplier if the quantity of the input purchased was insignificant.") (emphasis added). Referring to a comment it had received on the proposed version of the regulation, the Preamble adds that "[b]ecause the amounts purchased from the market economy supplier must be meaningful, this requirement goes some way in addressing the commenter's concern that *the NME producer* may not be able to fulfill all its needs at that price." *Id.* (emphasis added).

In a Federal Register notice issued in 2006 (the "Methodologies Notice"), Commerce established "clearer guidance as to the circumstances in which it will accept market economy purchase prices to value an entire input" and in so doing explained how it normally would decide whether amounts purchased from a market economy supplier are "meaningful." *Antidumping Methodologies: Market Economy Inputs, Expected Non-Market Economy Wages, Duty Drawback; and Request for Comments*, 71 Fed. Reg. 61,716, 61,717 (Oct. 19, 2006) ("*Methodologies Notice*"). Commerce stated in the Methodologies Notice that "[t]he Department is now instituting a rebuttable presumption that market economy input prices are the best available information for valuing an entire input when the total volume of the input purchased from all market economy sources during the period of investigation or review exceeds 33 percent of the total volume of the

input purchased from all sources during the period." *Id*., 71 Fed. Reg. at 61,717–18. This formulation of the rebuttable presumption can be read to mean that Commerce will apply its 33% test to the total amount of an input purchased during a POR even in a situation in which two producers were involved. Nevertheless, the Methodologies Notice, like the Preamble, suggests that the discussion refers to a context involving a single producer that purchases a factor of production. *See id.*, 71 Fed. Reg. at 61,718 ("In determining whether market economy purchases meet this 33 percent threshold, the Department will compare the volume that the producer purchased from market economy sources during the period of investigation or review with the respondent's total purchases during the period."). In view of the guidance provided by the Preamble (which is consistent with some of the guidance provided in the Methodologies Notice), the court concludes that Commerce interprets the third sentence of § 351.408(c)(1) to apply in the context of a single producer. The court defers to this interpretation.

The court does not hold or imply that Commerce would have lacked authority under § 351.408(c)(1), which describes the Department's "normal" method, to use SKF's market economy purchase data as a surrogate for the valuation of CPZ's steel bar input in the SKF sales on the record facts of this case, had Commerce chosen to do so.[15] Rather, the court concludes that such a course of action would have been a departure from the Department's "normal" method as set forth in the regulation as interpreted by Commerce itself.

The Remand Redetermination justifies the Department's decision to value the steel bar input in the merchandise sold by SKF, but produced by CPZ, according to the Thai import surrogate value rather than SKF's market economy purchase data, on the ground that it is consistent with the Department's practice to do so. *Remand Redetermination* 63–64. SKF impliedly disagrees, but the Department's own construction of § 351.408(c)(1), discussed above, convinces the court that Commerce followed its normal practice in this case, both in using SKF's market economy purchases to value the steel bar input in all

[15] Nor would the statute bar such an approach. Commerce is directed to value factors of production according to the "best available information regarding the values of such factors in a market economy country or countries considered to be appropriate by the administering authority." 19 U.S.C. § 1677b(c)(1). The statute provides that Commerce, in valuing factors of production, "shall utilize, to the extent possible, the prices or costs of factors of production in one or more market economy countries that are . . . at a level of economic development comparable to that of the nonmarket economy country, and . . . significant producers of comparable merchandise," *id*. § 1677b(c)(4), but Commerce, in selecting the best available information with which to determine a surrogate value, is not necessarily precluded from using market economy purchase data even if those data do not pertain to a country satisfying the criteria of § 1677b(c)(4).

subject merchandise produced by SKF and in using the surrogate value for the steel bar input in the CPZ-produced merchandise that SKF sold. SKF does not make a convincing argument that the Department should make an exception to its normal practice. SKF's argument that the Remand Redetermination did not provide a reasonable explanation for the Department's decision is a more convincing argument, for the Remand Redetermination does not offer a rationale beyond that of achieving consistency with the Department's practice. The reasoning underlying the decision would have been clarified and augmented had Commerce also indicated why it might consider the Thai-import-based surrogate value to be the best available record information, and to result in a more accurate margin, when viewed in comparison to the price data pertaining to SKF's market economy purchases.

Nevertheless, the court declines to remand the matter for additional explanation. The rationale in the Remand Redetermination that Commerce followed its practice is properly viewed in the context of the reasoning supporting the practice that is set forth in the Preamble. In limiting its normal use of market economy purchase data in the way that it did in adopting the practice, Commerce balanced competing considerations. Commerce expressly recognized that market economy purchase data would not be publicly available information, for which a preference is expressed in the first sentence of § 351.408(c)(1). *Preamble*, 62 Fed. Reg. at 27,366. Commerce recognized a general interest in the accuracy furthered by the use of market economy purchase data, but in doing so Commerce also placed significance on the question of whether an NME producer would be able to fulfill all its needs at the market economy price. *Id*. Nothing in the subsequent Methodologies Notice is inconsistent with the balancing of these competing considerations that Commerce undertook in the Preamble. Owing a degree of deference to the methodological choice Commerce made in adopting its practice, and considering the rationale for that choice as explained in both the Preamble and the Methodologies Notice, the court must affirm the Department's decision to use the Thai import surrogate data rather than SKF's market economy purchases when valuing the steel bar input in merchandise sold by SKF but produced by CPZ.

E. The Court Orders a Second Remand on the Department's Choice of Factor-of-Production Data Used to Determine the Normal Value of the Pre-Acquisition Inventory Sold by SKF

In contesting the Final Results, Timken claimed that Commerce erred in using SKF's factor-of-production data in determining the

normal value of the pre-acquisition inventory sold by SKF and thereby "contravened the statutory requirements of l677b(c)(1)" because these data did not correspond to the actual producer of the merchandise in question.[16] Timken Co.'s Mem. of P. & A. in Supp. of its Mot. for J. on the Agency R. 23 (Aug. 19, 2011), ECF No. 36. In *Peer Bearing-Changshan*, the court ordered Commerce to "reconsider its decision to value pre-acquisition-produced subject merchandise using factors of production pertaining to the post-acquisition producer" and redetermine normal value in accordance with § 1677b(c)(1). *Id.* at __, 884 F. Supp. 2d at 1339–40.

The administrative record of the twenty-second administrative review contained three sets of FOP data concerning the pre-acquisition inventory of TRBs. SKF submitted FOP data based on its production of subject merchandise following the acquisition, i.e., data relating to SKF's production of subject merchandise from September 12, 2008 through May 31, 2009.[17] *SKF Section C & D Response*, Exs. D-l to D-4, D-42 (Nov. 12, 2009) (Admin.R.Doc. No. 5663); *Joint SKF & PBCD Section C & D Supplemental Resp.* 11–12, Ex. SD-4 (May 28, 2010) (Admin.R.Doc. No. 5761). PBCD submitted FOP data concerning the TRBs produced by CPZ during the first three months of the POR, i.e., June 1, 2008 through August 31, 2008.[18] *PBCD Section D Resp.* 1, 5, Ex. 1 (Nov. 13, 2009) (Admin.R.Doc. No. 5672). Finally, petitioner Timken submitted data on CPZ's factors of production that pertained to the prior (twenty-first) administrative review period, i.e.,

[16] In reply, defendant argued that the claim brought by the Timken Company ("Timken") was barred by the exhaustion doctrine. *Peer Bearing-Changshan*, 36 CIT at __, 884 F. Supp. 2d at 1338. The court subsequently held that, although Timken failed to raise the issue before Commerce and thus failed to exhaust its administrative remedies, the "pure legal question" exception to exhaustion applied. *Id*. The court noted that the instant factors of production issue "presents no question of fact" because Commerce had determined "that SKF was not the successor in interest to CPZ," and subsequently "treated the companies as separate respondents in the review." *Id.* (citing *Final Results*, 76 Fed. Reg. at 3,087). The court, therefore, concluded that "[t]he only question to be resolved is whether, on these uncontested facts, Commerce acted inconsistently with 19 U.S.C. § 1677b(c)(1) in using the FOP data it obtained from SKF to value subject merchandise produced by CPZ." *Id*.

[17] SKF refers to its initial factor-of-production data submission as the "FOPPER2" database. *Letter from Herbert C. Shelley to the Sec'y (SKF Section C & D Resp.)* 2 (Nov. 12, 2009) (Admin.R.Doc. No. 5663). SKF refers to its supplemental factor-of-production data submission as the "FOPPER2SUP" database. *Joint SKF & PBCD Section C & D Supplemental Resp.* 11–12 (May 28, 2010) (Admin.R.Doc. No. 5761) ("*Joint Sec. C & D Supplemental Resp.*").

[18] PBCD refers to its submitted factor-of-production data as the "PBCDFPOl" database. *PBCD Section D Resp.* 1, 5, Ex. 1 (Nov. 13, 2009) (Admin.R.Doc. No. 5672). In a subsequent supplemental submission, PBCD explained that, due to its recordkeeping system, it was unable to determine factors for the period of September 1, 2008 through September 11, 2008. *Joint Sec. C & D Supplemental Resp.* 11–12.

June 1, 2007 through May 31, 2008. *Factual Submission of the Timken Co.* 1, Ex. 3 (Nov. 17, 2009) (Admin.Rec.Doc. No. 5677).

In the Remand Redetermination, Commerce recalculated the normal value ("NV") of SKF's sales of pre-acquisition inventory using factor-of-production data submitted by PBCD for merchandise that CPZ produced during the first three months of the POR. *Remand Redetermination* 39. In explaining its decision to deviate from the course it chose in the Final Results, Commerce stated that while it "prefers to calculate NV based on the FOP data corresponding to production of subject merchandise during the POR, and not the FOP data corresponding to the production of the merchandise actually sold during the POR," *id.*, it also prefers to "calculate NV using the FOPs of the actual producer(s) of the merchandise," *id.* at 40. Based on this rationale, Commerce concluded that the FOP data submitted by PBCD yielded the "accurate normal value to use in the dumping calculation" because the data related to the producer of the merchandise at issue. *Id.* at 62. Timken does not oppose the Department's resolution of this issue; SKF, however, raises several objections.

The statute directs Commerce to "determine the normal value of the subject merchandise on the basis of the value of the factors of production *utilized in producing the merchandise* . . . ."[19] 19 U.S.C. § 1677b(c)(l) (emphasis added). According to the plain meaning of this directive, the FOPs used by the Department should, as Commerce concluded upon remand, pertain to the actual party that produced the merchandise, but they also should correspond to the time period in which the merchandise was produced (which is not necessarily when the merchandise was sold). The statute contemplates that FOP data meeting these two conditions ordinarily would be used to calculate normal value. If no such data are on the record, or if there is a valid reason why the data on the record may not properly be used, Commerce would have resort to the "facts otherwise available" pursuant to authority conferred by 19 U.S.C. § 1677e(a).

In the Remand Redetermination, Commerce provided adequate reasoning for rejecting SKF's post-acquisition FOP data, which correspond with neither the correct producer nor the time period during

[19] Section 1677b(c)(1) states, in pertinent part, as follows:

> If—
>
> (A) the subject merchandise is exported from a nonmarket economy country, and
> (B) the administering authority finds that available information does not permit the normal value of the subject merchandise to be determined under subsection (a) of this section,
>
> the administering authority shall determine the normal value of the subject merchandise *on the basis of the value of the factors of production utilized in producing the merchandise* . . . .

19 U.S.C. § 1677b(c)(1) (emphasis added).

which the merchandise was produced. Commerce did not address the question of why it chose not to use the FOP data submitted by Timken. On remand, Commerce must reconsider its selection of the data submitted by PBCD over the data submitted by Timken and provide a rationale grounded in the requirements of the statute for the data set it chooses.

SKF opposes the Department's FOP redetermination on several grounds.[20] First, SKF argues that its own FOP data yield a more accurate normal value calculation. SKF's Comments 6–8. SKF raises several points in support of this argument, which it summarizes as follows:

> Given that (1) such a large portion of the [CPZ-produced] products sold by SKF were not produced during the three month period corresponding to [CPZ's] FOPS; (2) SKF's average factor usage is likely to be very similar to [CPZ's] average factor usage; and (3) [CPZ's] FOPs are based on such a short period of time, one cannot reasonably conclude[] that [CPZ's] FOPs provide a more accurate basis for calculating normal value of the [CPZ]-produced products sold by SKF.

Id. at 8. Second, SKF argues that, "[e]ven if there were evidence to suggest that [CPZ's] FOPs more accurately represent the production of the [CPZ]-produced merchandise sold by SKF, . . . the Department's use of these FOPs would still be arbitrary and capricious," because Commerce deviated from its policy of using "the FOPs that correspond to a respondent's production during the POR" without providing "a reasonable justification for doing so." *Id.* at 9 (citing *Motor Vehicle Mfrs. Ass'n. of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.,* 463 U.S. 29, 57 (1983)). Finally, SKF adds that, as a matter of fairness, Commerce should not use CPZ's factor-of-production data to value SKF's post-acquisition sales of CPZ-produced merchandise as CPZ "had ceased to exist and SKF had no control over the production process and the associated costs." *Id.* at 10.

The court does not find SKF's arguments persuasive. As discussed,

[20] As a preliminary argument, SKF reasserts that Timken failed to exhaust its administrative remedies on this issue and argues, further, that no "pure question of law" exception applies. Pls.' Comments on Final Results of Redetermination Pursuant to Remand 3–6 (June 12, 2013), ECF No. 103 ("SKF's Comments"). The court addressed this issue in *Peer Bearing-Changshan*, 36 CIT at __, 884 F. Supp. 2d at 1338. Because the issue before the court in *Peer Bearing-Changshan* was one of statutory construction, the court believes it was correct in ruling that Timken's failure to exhaust administrative remedies was excusable under the "pure legal question" exception. On remand, Commerce reached a new determination in response to the court's order but did not do so under protest. The Remand Redetermination raises a new question that the court now must consider (which, incidentally, also involves the plain meaning of the statute, 19 U.S.C. § 1677b(c)(1)).

supra, the statute instructs Commerce to "determine the normal value of the subject merchandise on the basis of the value of the factors of production *utilized in producing the merchandise*" when the subject merchandise is exported from an NME country. 19 U.S.C. § 1677b(c)(l) (emphasis added). SKF's factors of production could not possibly have been those actually utilized in producing the pre-acquisition merchandise, which was produced by CPZ. In the Remand Redetermination, Commerce correctly disregarded SKF's factor-of-production data in determining the normal value of pre-acquisition merchandise. The argument that CPZ had ceased to exist and that SKF therefore had no control over the production process and the associated costs is also unpersuasive. The two aspects of FOP data stemming from the directive contained in § 1677b(c)(l), i.e., the identity of the producer and time of production, must take precedence over the concern raised by SKF.

III. CONCLUSION AND ORDER

For the reasons discussed in the foregoing, the court affirms in part, and rejects in part, the Final Results of Redetermination Pursuant to Court Remand (May 13, 2013), ECF No. 100 (public version), ECF No. 101 (confidential version) ("Remand Redetermination"). Accordingly, upon consideration of the Remand Redetermination, the comments of the parties thereon, and all papers and proceedings herein, and upon due deliberation, it is hereby

ORDERED that the Remand Redetermination submitted by the International Trade Administration, U.S. Department of Commerce ("Commerce" or the "Department") on May 13, 2013, be, and hereby is, sustained in part and remanded to Commerce in part in accordance with this Opinion and Order; it is further

ORDERED that the Remand Redetermination be, and hereby is, sustained with respect to the Department's redetermination of the surrogate value for the consumption of bearing-quality steel bar by Peer Bearing Company-Changshan ("CPZ"); it is further

ORDERED that Commerce shall submit to the court a second Remand Redetermination in which it redetermines, in accordance with the requirements of this Opinion and Order, the country of origin of certain tapered roller bearings that underwent further processing in Thailand consisting of grinding and honing (finishing) of cups and cones, and assembly; it is further

ORDERED that Commerce, in its second Remand Redetermination, shall reconsider its use of the factor-of-production data submitted by PBCD, LLC ("PBCD") in calculating the normal value for merchandise that was imported prior to the acquisition and sold by post-acquisition Changshan Peer Bearing Company ("SKF"), shall also consider the possible use of the factor-of-production data submit-

ted by The Timken Company ("Timken") for this purpose, and shall explain the reasons for its choice; it is further

ORDERED that Commerce shall submit its second Remand Redetermination within sixty (60) days of the issuance of this Opinion and Order; it is further

ORDERED that PBCD, SKF, and Timken shall have thirty (30) days from the Department's filing of the second Remand Redetermination to file any comments thereon; and it is further

ORDERED that defendant shall have fifteen (15) days from the last filing of comments on the second Remand Redetermination in which to file any response to such comments.

Dated: June 10, 2014
New York, New York

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

Slip Op. 14–63

TIANJIN MAGNESIUM INTERNATIONAL CO., LTD., Plaintiff, v. UNITED STATES, Defendant, and US MAGNESIUM, LLC, Defendant-Intervenor.

Before: Richard K. Eaton, Judge
Consol. Court No. 11–00006

[Costs imposed; attorney's fees denied.]

Dated: June 11, 2014

David J. Craven, Riggle & Craven, of Chicago, IL, argued for plaintiff. With him on the brief was *David A. Riggle*.

Claudia Burke, Trial Attorney, Civil Division, U.S. Department of Justice, of Washington, D.C., argued for the defendant. With her on the brief were *Stuart F. Delery*, Acting Assistant Attorney General, *Jeanne E. Davidson*, Director, *Patricia McCarthy*, Assistant Director, *Renee Gerber*, Trial Attorney. Of counsel on the brief was *Melissa Brewer*, Senior Attorney, Office of the Chief Counsel for Import Administration, United States Department of Commerce, of Washington, D.C.

Stephen A. Jones and *Jeffrey B. Denning,* King & Spalding, LLP, of Washington, D.C., argued for defendant-intervenor. With them on the brief was *Jeffery M. Telep*.

OPINION AND ORDER

Eaton, Judge:

On March 12, 2014 the court granted plaintiff Tianjin Magnesium International Co., Ltd.'s ("Tianjin," "TMI", or "plaintiff") Motion for Reconsideration of Slip Op. 13–53. Order (ECF Dkt. No. 143); *Tianjin Magnesium Int'l Co. v. United States*, 37 CIT __, __, 922 F. Supp. 2d

1345 (2013) ("*Tianjin III*"). *Tianjin III* followed the *Tianjin* Court's orders of November 21, 2012 and December 20, 2012 imposing costs and awarding attorney's fees, respectively. *Tianjin Magnesium Int'l Co. v. United States*, 36 CIT __, __, 878 F. Supp. 2d 1351, 1352–53 (2012) ("*Tianjin I*") (awarding costs); *Tianjin Magnesium Int'l Co. v. United States*, 36 CIT __, __, 883 F. Supp. 2d 1330, 1332 (2012) ("*Tianjin II*") (awarding attorney's fees). The court now addresses the questions of whether the imposition of costs and award of attorney's fees was warranted.

For the reasons set forth below the court finds that the award of attorney's fees is not warranted, but affirms the imposition of costs.

I. *BACKGROUND*

On January 7, 2011 plaintiff commenced its action, challenging the final results of the administrative review of the antidumping order on pure magnesium from the People's Republic of China ("PRC"). Pure Magnesium From the PRC, 75 Fed. Reg. 80791 (Dep't of Commerce Dec. 23, 2010) (final results of the antidumping administrative review of the antidumping duty drder). During the proceedings before the defendant United States Department of Commerce ("Commerce" or "the Department"), plaintiff submitted certain "voucher books" that were found to be unreliable during the previous administrative review. *Tianjin Magnesium Int'l v. United States*, 36 CIT __, __, 844 F. Supp. 2d 1342, 1346 (2012) ("*Remand Order*"). Despite this submission, and although fully aware of its previous findings with respect to the reliability of the voucher books, in the Final Results the Department did not use adverse inferences with regard to any facts. *Id.*; 19 U.S.C. § 1677e(b) ("If the [Department] find[s] that an interested party has failed to cooperate by not acting to the best of its ability to comply with a request for information[, . . . the Department], in reaching the applicable determination[,] . . . may use an inference that is adverse to the interest of that party in selecting from among the facts otherwise available.")

On May 13, 2011, plaintiff moved to amend its original complaint, seeking to "include a new claim that the Department of Commerce unlawfully applied zeroing in the calculation of" plaintiff's rate. Mem. of Law in Supp. of Pl.'s Mot. for Leave to Amend its Compl. 1 (ECF Dkt. No. 29–1). In its motion, plaintiff argued that the Federal Circuit's decision in *Dongbu Steel* represented a change in the law applied by the Department during the review. *Id*. at 2 (citing *Dongbu Steel Co. v. United States*, 635 F.3d 1363 (Fed. Cir. 2011)).

On May 18, 2011, the *Tianjin* Court granted the motion to amend. May 18, 2011 Order (ECF Dkt. No. 30). The Department, however,

moved for reconsideration of that order on June 17, 2011. There, it argued that Tianjin should not be permitted to amend its complaint because it failed to raise the issue of zeroing before the Department. Def.'s Mot. for Reconsideration of the Ct. Order Granting Pl. Leave to Amend Compl. 2, 7–9 (ECF Dkt. No. 32). Five days later, the *Tianjin* Court granted defendant's motion for reconsideration, vacated the order permitting amendment of the complaint, and ordered the Department to file a responsive pleading to plaintiff's May 13, 2011 motion. June 22, 2011 Order (ECF Dkt. No. 33). On July 13, 2011, after the Department and defendant-intervenor U.S. Magnesium, L.L.C. ("USM" or "defendant-intervenor") had filed responses, the *Tianjin* Court denied plaintiff's motion to amend because Tianjin had failed to exhaust its administrative remedies. July 13, 2011 Order (ECF Dkt. No. 38).

In August, 2011, plaintiff moved for judgment on the agency record, briefing was completed by December, 2011, and oral argument was held on May 2, 2012. On May 16, 2012, based on plaintiff's submission of the unreliable voucher books, the Final Results were remanded upon the *Tianjin* Court's finding that the Department's decision was unsupported by substantial evidence and contrary to law. *Remand Order* at __, 844 F. Supp. 2d at 1348.

Commerce filed the remand results on August 30, 2012 which for the first time used adverse inferences against plaintiff. Remand Results (ECF Dkt. No. 88). Although given additional time to do so, Tianjin filed no comments on the Remand Results. Oct. 2, 2012 Order (ECF Dkt. No. 93). On November 21, 2012, the *Tianjin* Court issued *Tianjin I*, in which it sustained the remand results and awarded costs. *Tianjin I*, 36 CIT at __, 878 F. Supp. 2d at 1352–53.

On December 20, 2012, plaintiff filed a motion for reconsideration of *Tianjin I*. Pl.'s Mot. Dec. 20, 2012 at 3 (ECF Dkt. No. 103). The *Tianjin* Court denied that motion the following day on the grounds that plaintiff failed to file comments within the time frame permitted, and because Tianjin's substantive arguments "fail[ed] to present any new factual or legal authority that was unavailable at the time its objections were due." *Tianjin II*, 36 CIT at __, 883 F. Supp. 2d at 1332. In addition, attorney's fees were awarded *sua sponte*. *Id.*

On February 18, 2013, plaintiff's Notice of Appeal of the *Remand Order*, *Tianjin I* and *Tianjin II* was docketed. Notice of Appeal (ECF Dkt. No. 109). Thereafter, the appeal was docketed by the Federal Circuit. Notice of Docketing (ECF Dkt. No. 110). The Federal Circuit affirmed the *Remand Order*, *Tianjin I*, and *Tianjin II* on February 5, 2014, in a judgment without opinion. Notice of Entry of Judgment Without Opinion 3 (ECF Dkt. No. 139).

After the parties submitted their Bills of Costs and Attorney's fees and plaintiff had the opportunity to comment thereon, *Tianjin III* was issued. *Tianjin III* found plaintiff and its counsel jointly and severally liable to Commerce for $8,302.20 in combined fees and costs, and jointly and severally liable to USM for fees and costs in the amount of $34,042.72. *Tianjin III*, 37 CIT at __, 922 F. Supp. 2d 13 1352–1353.

On May 22, 2013, plaintiff filed its Motion for Reconsideration of *Tianjin III*. Motion for Reconsideration (ECF Dkt. No. 119). The parties briefed their respective positions, and oral argument was held on November 19, 2013. As noted, on March 12, 2014, the court ordered reconsideration of *Tianjin III*.

II. *STANDARD OF REVIEW*

Federal courts have inherent authority "to award expenses, including attorney's fees, to a litigant whose opponent acts in bad faith in instituting or conducting litigation." *Chambers v. NASCO, Inc.*, 501 U.S. 32, 48 (1991). Nevertheless, the Federal Circuit has refused to uphold sanctions, issued under a Court's inherent authority, for raising an argument that "lacks merit" where the Court did not also find that the sanctioned party was engaging in "'vexatious or unjustified litigation,' 'frivolous suit,' or other type of 'bad faith.'" *Depuy Spine, Inc. v. Medtronic Sofamor Danek, Inc.*, 567 F.3d 1314, 1339 (Fed. Cir. 2009) (discussing the improper application of sanctions in a patent case (citations omitted)).

III. *DISCUSSION*

A. Attorney's Fees

Tianjin III gave four primary reasons which, taken cumulatively, justified the award of attorney's fees.

First, the *Tianjin* Court found that "TMI frivolously attempted to amend its complaint to include a challenge to Commerce's use of 'zeroing' despite its failure to exhaust administrative remedies." Def.'s Resp. to Pl.'s Mot. for Reconsideration of the Ct.'s Order Awarding Costs 3 (ECF Dkt. No. 124) ("Def.'s Br."); *Tianjin III*, 37 CIT at __, 922 F. Supp. 2d at 1347.

While somewhat out of the ordinary, it is evident that, at the time plaintiff made its motion to amend, its behavior did not support an award of attorney's fees. Prior to the issuance of the Federal Circuit's opinion in *Dongbu Steel*, it was widely assumed that the questions concerning Commerce's use of "zeroing"[1] in administrative reviews

[1] Zeroing is a method for calculating an exporter's weighted average dumping margin "where negative dumping margins (i.e., margins of sales of merchandise sold at nondumped prices) are given a value of zero and only positive dumping margins (i.e., margins for sales

had been settled by that Court's opinion in *U.S. Steel Corp. v. United States*, 621 F.3d 1351 (Fed. Cir. 2010) (finding that Commerce was not required to use zeroing in investigations but affirming it as a permissible interpretation of the statute). There, the Federal Circuit remarked that "[w]e are bound by our previous decisions . . . which held that § 1677(35)(A)[2] does not unambiguously preclude—or require—Commerce to use zeroing methodology." *Id.* at 1361 (citation omitted). Thus, *U.S. Steel* appeared to hold that the Department was permitted to use zeroing in administrative reviews even though it had abandoned that practice in investigations.

Dongbu Steel called this assumption into question. *Dongbu Steel*, 635 F.3d at 1373 ("[O]ur prior case law does not address the situation at hand where Commerce has decided to interpret 19 U.S.C. § 1677(35) differently based on the nature of the antidumping proceeding at issue. . . . It may be that Commerce cannot justify using opposite interpretations of 19 U.S.C. § 1677(35) in investigations and in administrative reviews."). The issue was not finally decided until the Federal Circuit issued *Union Steel*, where it held that the practice of using zeroing in administrative reviews was permissible. *Union Steel v. United States*, 713 F.3d 1101 (Fed. Cir. 2013). During the period that plaintiff sought to amend its complaint, however, *Dongbu Steel* had put the issue of zeroing back into play. *Union Steel v. United States*, 36 CIT __, __, 823 F. Supp. 2d 1346, 1348 (2012) ("Both *Dongbu* and *JTKET* came as a surprise to many because a long-line of cases seemed to allow Commerce great discretion in making the calculation at issue.").

During this time, judges of this Court considered the amendment of complaints to include zeroing claims, reconsidered prior decisions affirming the use of zeroing in administrative reviews, and excused parties' failure to argue zeroing claims before the Department. *E.g. Union Steel v. United States*, 36 CIT __, __, 836 F. Supp. 2d 1382, 1395 (2012) ("The court concludes that reconsideration of its prior decision affirming the use of zeroing is warranted. In two decisions issued in 2011, *JTEKT Corp. v. United States*, 642 F.3d 1378, 1383–85 (Fed. Cir. 2011) and *Dongbu*, the Court of Appeals held that the final results of administrative reviews in which zeroing was used must be remanded."); *Home Meridian Int'l Inc. v. United States*, 35 CIT __, __, 865 F. Supp. 2d 1311, 1330 (2011) (excusing a party's failure to exhaust its administrative remedies on a zeroing claim as a result of

of merchandise sold at dumped prices) are aggregated." *Union Steel v. United States*, 713 F.3d 1101, 1104 (Fed. Cir. 2013).

[2] 19 U.S.C. § 1677(35)(A) (2006) defines the term "dumping margin" as "the amount by which the normal value exceeds the export price or constructed export price of the subject merchandise."

the issuance of *Dongbu Steel*); *Fuwei Films (Shandong) Co. v. United States*, 35 CIT __, __, 791 F. Supp. 2d 1381, 1385 (2011) (denying a plaintiff's motion to amend its complaint to add a zeroing claim in the wake of *Dongbu Steel* without sanctioning plaintiff for the attempt). Thus, because the state of the law was made uncertain by *Dongbu Steel*, plaintiff's motion to amend its complaint was not frivolous and could not reasonably provide support for the award of attorney's fees.

Second, *Tianjin III* held that plaintiff acted wrongfully "[i]n its motion for judgment on the agency record, [because it] argued that Commerce erred in calculating the surrogate financial ratio without being candid about its own failure to exhaust the claim below." Def.'s Br. 3; *Tianjin III*, 37 CIT at __, 922 F. Supp. 2d at 1347–48.

Here, plaintiff was faulted for continuing to make the argument, in its Reply Brief, that the Department erred in its selection of a surrogate for Tianjin's financial ratio. Seemingly, the *Tianjin* Court found persuasive the Department and USM's arguments, in their responsive briefs, that Tianjin had failed to raise the issue in the underlying administrative proceeding.

As an initial matter, it is worth noting that the exhaustion of remedies is not required in every case. *See Blue Field (Sichuan) Food Indus. Co., Ltd. v. United States*, 37 CIT __, __, 949 F. Supp. 2d 1311, 1321 (2013) ("This court has discretion to determine when it will require the exhaustion of administrative remedies."). Moreover, a party is not prohibited from continuing to make an argument in its reply brief merely because its opponents have made the claim in their responses that the argument is barred by the exhaustion doctrine. That is, a party need not surrender merely because its opponent argues that the exhaustion doctrine will bar its claim. Therefore, while a plaintiff's decision to persist with its argument might ultimately prove unavailing, such persistence does not justify the award of attorney's fees.

Third, the *Tianjin* Court found that Tianjin "significantly misrepresent[ed] undisputed portions of the record" when it argued, prior to remand, that it "cooperated fully in the review" and that there was "no information of record showing that the primary information relied on in calculating a margin was misleading or unverifiable in the review." *Tianjin III*, 37 CIT at __, 922 F. Supp. 2d at 1348. The *Tianjin* Court based this conclusion on its finding that plaintiff's submission of "supporting documents during the underlying review knowing that [those documents] had been falsified so as to obtain a lower dumping margin." *Id.* The documents referred to by the *Tianjin* Court were the unreliable voucher books. In reaching its finding, *Tianjin III* specifically cites to plaintiff's response to USM's motion for judgment on the

agency record as the source of the alleged misrepresentation. *Id.* ("Nevertheless, in its response to USM's motion for judgment on the agency record, TMI insisted that it 'cooperated fully in the review by submitting responses to all questions . . . and being subject to a lengthy verification,' and that '[t]here is no information of record showing that the primary information relied on in calculating a margin was misleading or unverifiable in the review.' Pl.'s Resp. USM's Mot. J. Agency R. at 2–6." (alterations in original)).

Here, in fact, in its Final Results Commerce described the voucher books as "unreliable." Issues and Decision Memorandum for the Final Results of the 2008–2009 Administrative Review at 5, PD 132 (Dec. 15, 2010), ECF No. 46–3 (Sept. 6, 2011) ("Issues & Dec. Mem."). The Department, nonetheless, expressly determined that Tianjin "*did cooperate* to the best of its ability" despite the submission of the discredited voucher books. Issues & Dec. Mem. at 5 (emphasis added). Importantly, in the Final Results, the Department denied plaintiff the offset that the discredited documents were submitted to support. Thus, Commerce did not rely on the information contained in the voucher books when reaching its determinations in the Final Results. Issues & Dec. Mem. at 7.

Thus, plaintiff's arguments in its response brief in opposition to USM's motion for judgment on the agency record were similar to those that the Department was making at the time. For plaintiff to argue, prior to remand, that Commerce did not err by failing to apply adverse inferences for largely the same reasons expressed by Commerce itself was not improper. Thus, plaintiff's claims with respect to its cooperation during the administrative proceeding do not support the award of attorney's fees.

Finally, the *Tianjin* Court found that "'TMI requested an extension to respond to the remand results, but it did not file any comments within that time frame. After the court issued an order accepting the remand results, TMI filed a motion for reconsideration in which it argued, incredibly, that it did not have an opportunity to respond." *Tianjin III*, 37 CIT at __, 922 F. Supp. 2d at 1347–48 (citation omitted).

Although the *Tianjin* Court found otherwise, it is not clear that plaintiff seriously argued that it had no opportunity to respond to the remand results. The only mention in its brief of the issue is contained in the "Legal Standard" section. There, after pointing to USCIT R. 59 as the basis for a motion for reconsideration, it added "[s]imilarly, Rule 46 of the Rules of the Ct. Int'l Trade permits parties to object to a ruling or order, explaining that parties need not make formal objections. The rule specifically states that '[f]ailing to object does not

prejudice a party who had no opportunity to do so when the ruling or order was made.'" Pl.'s Mot. for Reconsideration of the Ct.'s Order in Slip Op. 12–143 at 2 (ECF Dkt. 103) (quoting USCIT R. 46). USCIT R. 46 governs the form and content of objections to judicial rulings or orders during the course of a trial. Neither any reference to USCIT R. 46 nor any argument that plaintiff was denied an opportunity to respond can be found elsewhere in plaintiff's brief in support of its motion.

Because antidumping proceedings do not involve trials, the reference and quotation of USCIT R. 46 was both not pertinent and somewhat perplexing. Nevertheless, it does not appear that plaintiff ever actually argued that it did not have the opportunity to respond to the Remand Results. While it may be that plaintiff passed up a valuable opportunity to comment on the Remand Results, and its motion for reconsideration was without merit, it is difficult to *see* how its reference to an inapplicable rule could provide a basis for awarding attorney's fees.

Here, no party moved for attorney's fees and the *Tianjin* Court awarded attorney's fees *sua sponte* based on an assessment of plaintiff's cumulative behavior. The invocation of the court's inherent power to award attorney's fees "must be done with 'restraint and discretion.'" *Pickholtz v. Rainbow Tech., Inc.*, 284 F.3d 1365, 1378 (Fed. Cir. 2002) (quoting *Chambers*, 501 U.S. at 44)). On reconsideration, the court finds plaintiff's behavior, taken as a whole, did not warrant the imposition of attorney's fees *sua sponte*.

B. Costs

Pursuant to USCIT Rule 54(d)(1), "[u]nless a federal statute, these rules, or a court order provides otherwise, costs—other than attorney's fees—should be allowed to the prevailing party." This Court's rule parallels Federal Rule of Civil Procedure 54(d)(1), under which "the prevailing party is presumed to be entitled to costs." *Fox v. Good Samaritan Hosp. LP*, 467 Fed. App'x 731, 735 (9th Cir. 2012); *Neal & Co. v. United States*, 121 F.3d 683, 686 (Fed. Cir. 1997) ("Courts following [Federal Rule of Civil Procedure] 54(d)(1) have acknowledged in its language a presumption in favor of costs to the prevailing party."). Here, it is clear that defendant and defendant-intervenor are the prevailing parties in this litigation and the court sees no equitable reason to depart from the *Tianjin* Court's award. *Cf. Tung Mung Dev. Co. v. United States*, 354 F.3d 1371, 1382 (Fed. Cir. 2004). This being the case, the imposition of costs is allowed.

IV. *CONCLUSION*

For the reasons previously stated, the court finds, in the exercise of its discretion, that the awarding of attorney's fees is not warranted in this case. Costs are allowed and a separate order will issue with respect to the imposition of costs.

Dated: June 11, 2014
New York, New York

/*s*/ *Richard K. Eaton*
RICHARD K. EATON

Slip Op. 14–64

JTEKT CORPORATION, et al., Plaintiffs, v. UNITED STATES, Defendant, and THE TIMKEN COMPANY, Defendant-Intervenor.

Before: Timothy C. Stanceu, Judge
Consol. Court No. 08–00324

[Denying as moot plaintiffs' motion to stay and affirming the final determination issued by the U.S. Department of Commerce in the eighteenth administrative reviews of antidumping duty orders on ball bearings and parts thereof from France, Germany, Italy, Japan, and the United Kingdom]

Dated: June 11, 2014

Neil R. Ellis, Sidley Austin LLP, of Washington, DC, argued for plaintiffs JTEKT Corp. and Koyo Corp. of U.S.A. With him on the brief was *Dave M. Wharwood*.

Diane A. MacDonald, Baker & McKenzie, LLP, of Chicago, IL, argued for plaintiffs American NTN Bearing Manufacturing Corp., NTN Bearing Corp. of America, NTN-Bower Corp., NTN Corp., NTN Driveshaft, Inc., and NTN-BCA Corp. With her on the brief was *Kevin M. O'Brien*.

Daniel J. Cannistra, Crowell & Moring, LLP, of Washington, DC, for plaintiffs Aisin Seiki Co., Ltd. and Aisin Holdings America, Inc.

Loren Misha Preheim, Trial Attorney, Commercial Litigation Branch, Civil Division, U.S. Department of Justice, of Washington, DC, argued for defendant United States. With her on the brief were *Stuart F. Delery*, Assistant Attorney General, *Jeanne E. Davidson*, Director, and *Claudia Burke*, Assistant Director. Of counsel on the brief were *Shana Hofstetter* and *Daniel J. Calhoun*, Attorneys, Office of the Chief Counsel for Import Administration, U.S. Department of Commerce.

Geert M. De Prest, Stewart and Stewart, of Washington, DC, argued for defendant-intervenor the Timken Company. With him on the brief were *Terence P. Stewart* and *Lane S. Hurewitz*.

OPINION

Stanceu, Judge:

In this consolidated action, plaintiffs challenged various aspects of the final determination ("Final Results") issued by the U.S. Department of Commerce ("Commerce" or the "Department") to conclude the

eighteenth administrative reviews of antidumping duty orders (the "Orders") on ball bearings and parts thereof ("subject merchandise") from France, Germany, Italy, Japan, and the United Kingdom. Am. Compl. ¶ 2 (Jan. 14, 2009), ECF No. 30; *Ball Bearings & Parts Thereof From France, Germany, Italy, Japan, & the United Kingdom: Final Results of Antidumping Duty Admin. Reviews & Rescission of Reviews in Part*, 73 Fed. Reg. 52,823 (Sept. 11, 2008) ("*Final Results*").

Before the court is the determination on remand ("Remand Redetermination") that Commerce submitted in response to the court's opinion and order in *JTEKT Corp. v. United States*, 35 CIT __, Slip. Op. 11–158 (Dec. 15, 2011) ("*JTEKT III*"). Final Results of Determination Pursuant to Remand (Feb. 27, 2012), ECF No. 90 ("Remand Redetermination"). Also before the court is plaintiffs' motion to stay this case. Pls.' Mot. to Extend Stay (Aug. 9, 2013), ECF No. 104 ("Stay Mot."). The court denies as moot the motion to stay and for the reasons discussed herein enters a judgment affirming the Remand Redetermination.

I. BACKGROUND

JTEKT Corporation and Koyo Corporation of U.S.A. (collectively, "JTEKT") brought an action pursuant to Section 516A of the Tariff Act of 1930, 19 U.S.C. § 1516a, to contest certain determinations made by Commerce in the Final Results of the eighteenth administrative reviews. Am. Compl. ¶ 2. These reviews cover entries of subject merchandise made from May 1, 2006 through April 30, 2007 ("period of review" or "POR").[1] *Final Results*, 73 Fed. Reg. at 52,823. The court consolidated JTEKT's challenge with other cases contesting the Final Results brought by plaintiffs American NTN Bearing Manufacturing Corp., NTN Bearing Corp. of America, NTN-Bower Corp., NTN Corp., NTN Driveshaft, Inc., and NTN-BCA Corp. (collectively, "NTN") and Aisin Seiki Company, Ltd. and Aisin Holdings America, Inc. (collectively, "Aisin").[2] Order (Feb. 18, 2009), ECF No. 32 (consolidating cases). The Timken Company ("Timken") is the defendant-intervenor in the consolidated case. Order (Oct. 10, 2008), ECF No. 20.

In *JTEKT Corp. v. United States*, 34 CIT __, 717 F. Supp. 2d 1322 (2010) ("*JTEKT I*"), the court affirmed the Final Results. In *JTEKT*

[1] All statutory citations herein are to the 2006 edition of the United States Code.

[2] The court consolidated court numbers 08–00329 and 08–00370 under court number 08–00324. Order (Feb. 18, 2009), ECF No. 32 (consolidating cases).

Corp. v. United States, 642 F.3d 1378 (Fed. Cir. 2011) ("*JTEKT II*"), the U.S. Court of Appeals for the Federal Circuit ("Court of Appeals") affirmed in part, and vacated and remanded in part, the judgment issued in *JTEKT I*. The Court of Appeals vacated and remanded the judgment concerning one issue, the court's affirmance of the Department's decision to apply the "zeroing" methodology, described herein, in the Final Results. *Id.* at 1385. In *JTEKT III*, 35 CIT at __, Slip. Op. 11–158 at 2, 7–8, the court, in compliance with the mandate issued by the Court of Appeals, issued an opinion and order remanding the Final Results to Commerce. The background of this litigation is summarized in these prior opinions.

On February 27, 2012, Commerce submitted the Remand Redetermination, and Timken and NTN each submitted comments on January 24, 2012 and March 28, 2012, respectively. Timken's Comments on the Remand Determination, ECF No. 92–4; Plaintiffs' Comments on the Dep't of Commerce's Remand Determination, ECF No. 94. In response to a consent motion brought by NTN, the court, before reviewing the Remand Redetermination, stayed this case until thirty days after the final resolution of all appellate review proceedings in *Union Steel v. United States*, CAFC Case No. 2012–1248. Order (Apr. 17, 2012) (staying case). On April 16, 2013, the Court of Appeals issued an opinion in *Union Steel v. United States*, 713 F.3d 1101, 1109 (Fed. Cir. 2013) ("*Union Steel*"), affirming a decision of the U.S. Court of International Trade that held that Commerce had provided a reasonable explanation for its simultaneous use of the zeroing methodology in administrative reviews while eliminating the methodology in antidumping investigations. *See Union Steel v. United States*, 36 CIT __, 823 F. Supp. 2d 1346 (2012), *aff'd*, 713 F.3d 1101 (Fed. Cir. 2013). The Court of Appeals issued its mandate on June 10, 2013, and the time for filing a petition for writ of certiorari with the U.S. Supreme Court expired on July 15, 2013. Sup. Ct. R. 13.

On August 9, 2013, plaintiffs filed a motion to extend the stay of further proceedings in this case pending the resolution of all appeals in *NSK Corp. v. U.S. Int'l Trade Comm'n*, 716 F.3d 1352 (Fed. Cir. 2013) ("*NSK*"), a case involving the second sunset reviews of the Orders underlying the administrative reviews at issue in this litigation. Stay Mot. 1–3. Defendant United States opposes a stay, Def.'s Opp'n to Pls.' Mot. to Extend Stay (Aug. 27, 2013), ECF No. 106, and defendant-intervenor Timken takes no position, Timken Co. Does Not Take a Position on JTEKT, NTN, NSK, & AISIN's Joint Mot. to Stay Proceedings (Aug. 28, 2013), ECF No. 107.

II. DISCUSSION

Section 201 of the Customs Courts Act of 1980 grants this court subject matter jurisdiction over this action. 28 U.S.C. § 1581(c). The court is directed to "hold unlawful any determination, finding, or conclusion found . . . to be unsupported by substantial evidence on the record, or otherwise not in accordance with law." *See* Tariff Act of 1930 ("Tariff Act") § 516A, 19 U.S.C. § 1516a(b)(1).

A. The Department's Application of Zeroing in the Remand Redetermination is Sustained

In an administrative review, Commerce determines both the normal value and the export price ("EP"), or, if the EP cannot be determined, the constructed export price ("CEP"), for the subject merchandise under review. Tariff Act § 751, 19 U.S.C. § 1675(a)(2)(A)(i). Commerce then determines an antidumping duty margin by calculating the amount by which the normal value exceeds the EP or CEP. *Id.* §§ 1675(a)(2)(A)(ii), 1677(35)(A). When Commerce determined an antidumping duty margin according to the zeroing methodology, as it did in the eighteenth administrative reviews, it assigned a value of zero, rather than a negative margin, where the normal value is less than the EP or CEP. *Union Steel*, 713 F.3d at 1104. Commerce then aggregated these margins to calculate a weighted-average dumping margin. 19 U.S.C. § 1677(35)(B).

In *JTEKT III*, the court instructed Commerce to either reconsider its use of zeroing in calculating the weighted-average dumping margins or "explain how the language of 19 U.S.C. § 1677(35) permissibly may be construed in one way with respect to the use of the zeroing methodology in antidumping investigations and the opposite way with respect to the use of that methodology in antidumping administrative reviews." *JTEKT III*, 35 CIT at __, Slip. Op. 11–158 at 8. The court also directed Commerce to redetermine NTN's antidumping duty margin if Commerce chose on remand to modify the decision to apply zeroing.[3] *Id.* In the Remand Redetermination, Commerce did not modify its decision to apply zeroing and did not recalculate NTN's margin. Remand Redetermination 2, 5. Commerce, however, provided an explanation for its continuing to apply zeroing in administrative reviews even though it had ceased using zeroing in antidumping

[3] Only American NTN Bearing Manufacturing Corp., NTN Bearing Corp. of America, NTN-Bower Corp., NTN Corp., NTN Driveshaft, Inc., and NTN-BCA Corp. appealed the court's determination in *JTEKT Corp. v. United States*, 34 CIT __, 717 F. Supp. 2d 1322 (2010) ("*JTEKT I*") concerning zeroing. *See JTEKT Corp. v. United States*, 642 F.3d 1378, 1383–1385 (Fed. Cir. 2011) ("*JTEKT II*").

investigations. *Id.* at 5–17. In *Union Steel*, the Court of Appeals affirmed the Department's use of zeroing in circumstances analogous to those presented by this case. *Union Steel*, 713 F.3d at 1103. Upon considering the Department's explanation for its use of zeroing and the opinion of the Court of Appeals in *Union Steel*, the court concludes that *Union Steel* is dispositive of the zeroing claim remaining at issue in this action and sustains the Department's use of zeroing in the Remand Redetermination.

B. The Court Denies as Moot Plaintiffs' Motion to Stay this Case

Plaintiffs seek a stay pending the resolutions of both a petition for rehearing by the Court of Appeals and any later petition for a writ of certiorari to the U.S. Supreme Court in *NSK Corp. v. U.S. Int'l Trade Comm'n*, 716 F.3d 1352 (Fed. Cir. 2013) ("*NSK*"). Stay Mot. 1–2. On October 25, 2013, the Court of Appeals issued a decision denying the *NSK* plaintiffs' combined petition for panel rehearing and rehearing en banc, *NSK Corp. v. U.S. Int'l Trade Comm'n*, 542 F. App'x 950 (Fed. Cir. 2013), and on November 6, 2013, the Court of Appeals issued its mandate. On February 21, 2014, the *NSK* plaintiffs filed a petition for a writ of certiorari, which the U.S. Supreme Court denied on June 2, 2014. *See* Pet. for Writ of Certiorari, U.S. Sup. Ct. Docket No. 13–1014. Based on these developments, the court denies as moot plaintiff's request for a stay of these proceedings.

III. CONCLUSION

For the reasons discussed herein, the court will deny plaintiffs' request for relief on the claim challenging the use of zeroing in the Remand Redetermination and the motion for a stay. The court will enter a judgment affirming the Remand Redetermination.

Dated: June 11, 2014
New York, New York

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