U.S. Court of International Trade

Slip Op. 18–28

THE DIAMOND SAWBLADES MANUFACTURERS' COALITION, et alia, Plaintiffs, v. UNITED STATES, Defendant.

Before: R. Kenton Musgrave, Senior Judge
Consol. Court No. 16–00124

[Remanding 2013–14 administrative review of antidumping duty order on diamond sawblades and parts thereof from the People's Republic of China.]

Dated: March 22, 2018

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OPINION AND ORDER

Musgrave, Senior Judge:

This opinion concerns the November 1, 2013, through October 31, 2014 period of review ("POR") of the antidumping duty order on diamond sawblades ("DSBs") and parts thereof from the People's Republic of China ("PRC"). *DSBs and Parts Thereof From the PRC*, 81 Fed. Reg. 38673 (June 14, 2016) ("*Final Results*"), Public Record Document ("PDoc") 408, and accompanying issues and decision memorandum, PDoc 389 (June 9, 2016) ("*IDM*"); *see also DSBs and Parts Thereof From the PRC*, 80 Fed. Reg. 75854 (Dec. 4, 2014) ("*Preliminary Results*"), PDoc 352, and accompanying decision memorandum thereto ("*PDM*"), PDoc 333. The following instituted separate lawsuits, subsequently consolidated, to contest aspects of those results as determined by the International Trade Administration, U.S. Department of Commerce ("Department" or "Commerce"): (1) plaintiff Diamond Sawblades Manufacturers' Coalition ("DSMC"); (2) consolidated plaintiffs consisting of Weihai Xiangguang Mechanical Industrial Co., Ltd. ("WXMI", an exporter and producer of subject merchandise from the PRC), Ehwa Diamond Industrial Co., Ltd. (WXMI's Korean affiliate), and General Tool, Inc. (collectively "Weihai"); (3) consolidated plaintiffs Jiangsu Fengtai Diamond Tool Manufacture Co., Ltd. and Jiangsu Fengtai Tools Co., Ltd. (collectively[1] "Jiangsu Fengtai" or "JF", exporters and/or producers of subject merchandise); and (4) consolidated plaintiffs Bosun Tools Co., Ltd., an exporter and/or producer of subject merchandise, and Bosun Tools Inc. (collectively "Bosun").

Jurisdiction over the case is pursuant to 28 U.S.C. §1581(c), and the standard of review thereon is to decide whether a final administrative determination is "unsupported by substantial evidence on the record, or otherwise not in accordance with law". 19 U.S.C. §1516a(b)(1)(B)(i). The parties' separate motions for judgment, pursuant to the court's Rule 56.2, challenge these administrative determinations on the record: (1) deduction of irrecoverable value-added tax ("VAT") from Jiangsu Fengtai and Weihai's export prices, (2) surrogate valuation of nitrogen and oxygen, (3) surrogate valuation of labor, (4) calculation of surrogate truck freight, (5) treatment of graphite plates as direct material rather than factory overhead, (6) selection of financial statements for financial ratios, (7) denial of a

[1] *I.e.*, with the support of the remaining-named PRC companies counseled above. During the review, Jiangsu Fengtai Diamond Tool Manufacture Co., Ltd., Jiangsu Fengtai Tools Co., Ltd., and Jiangsu Sawging Co., Ltd. were determined to be affiliated and consequently considered as a single entity. *See* 80 Fed. Reg. at 75854.

request to rescind the review as to Weihai, (8) valuation of self-produced and purchased DSB cores in the calculation of Weihai's normal value, and (9) the margin for the separate rate respondents, as impacted by the foregoing.[2] The case is being remanded voluntarily, by request, and also in accordance with the following.

Discussion

I. Voluntary Remand

Commerce voluntarily requests remand of the last two issues in light of the intervening remand order issued in *Diamond Sawblades Manufacturers' Coalition v. United States*, 41 CIT ___, 219 F. Supp. 3d 1368 (2017). That case, which concerns the previous administrative review of DSBs from the PRC, remanded the issue of Weihai's cores' valuation methodology. *See id.; see also Diamond Sawblades Manufacturers' Coalition v. United States*, 42 CIT ___, ___ WL ___ Slip Op. 18–26 (Mar. 22, 2018). The case of *SKF USA, Inc. v. United States*, 254 F.3d 1022, 1029 (Fed. Cir. 2001) ("*SKF*") holds that the reviewing court has the discretion to grant a remand, if an agency requests it, without confessing error, in order to reconsider its previous position. DSMC supports Commerce's request for remand and "agrees that Weihai's normal value calculation and, as necessary, the margin for the non-selected separate rate companies, should be reconsidered in light of the issues raised in DSMC's opening brief and reviewed herein." DSMC Reply at 4. Weihai's response brief targets the DSMC's arguments raised in the latter's 56.2 brief, but Weihai's reply brief is silent on the remand request. Because the agency's request appears legitimate and substantial, issues (8) and (9) will therefore be, and hereby are, remanded to harmonize with Court No. 15–00164 (but, *nota bene* section IX *infra*).

II. Deduction of Irrecoverable VAT

Jiangsu Fengtai, Weihai and Bosun challenge Commerce's determination with respect to Commerce's methodology for the deduction of "irrecoverable" VAT from the reported U.S. prices. *See IDM* at 14. They also challenge Commerce's specific deduction in this case.

By way of background, an antidumping duty represents the amount by which the "normal value" ("NV") of subject merchandise exceeds

[2] Initially, Bosun also challenged Commerce's application of its differential pricing analysis, arguing that that analysis and its application were contrary to the statute, improperly disclosed, and reliant upon an allegedly improper statistical method, the Cohen's *d* test, *see* Bosun Br.at 13–21, but as its reply brief does not address the defendant's response thereto, that count of Bosun's complaint is therefore deemed abandoned. *See, e.g., United States v. Great American Insurance Co. of New York*, 738 F.3d 1320, 1328 (Fed. Cir. 2013) ("arguments that are not appropriately developed in a party's briefing may be deemed waived").

its United States price ("USP"), which is typically either an export price ("EP") or a constructed export price ("CEP"). 19 U.S.C. §1673. In a market economy situation, NV is typically the price at which the foreign like product is sold or offered for sale for consumption in the exporting country. 19 U.S.C. §1677b(a)(1)(B). When Commerce calculates USP, regardless of whether the proceeding concerns a market economy or non-market economy ("NME") situation the statute calls for deduction of "the amount, if included in such price, of any export tax, duty, or other charge imposed by the exporting country on the exportation of the subject merchandise to the United States". 19 U.S.C. §1677a(c)(2)(B).

In applying these provisions, Commerce has sought tax neutrality when comparing NV with USP. *See, e.g., IDM* at 15. It has also sought to avoid the "multiplier effect" in the determination of the margin. Explaining what "multiplier effect" means by way of example concerning a market economy, the Court of Appeals for the Federal Circuit had this to say:

> Assume product A is sold in Japan for $100. The identical product is exported and sold in the U.S. for $90. The difference is $10, the amount by which the product is being dumped. Further assume a 10% VAT is imposed on the sale in Japan, but not on the export sale to the U.S. With the tax included, FMV[3] is $100 + 10% = $110. The similar calculation of USP, using the tax rate, is $90 + 10% = $99. The dumping margin, FMV-USP, is $11 ($110 - 99), rather than the $10 which is the actual amount of dumping. This mathematical peculiarity is known as the "multiplier effect."

Federal-Mogul Corp. v. United States, 63 F.3d 1572, 1576 (Fed. Cir. 1995).

The case clarified that while Congress had specifically rejected a proposed tax neutral approach to the problem, the most that can be inferred from the statute as it came into being at that time is that Congress neither mandated nor precluded a tax-neutral approach to the administration of section 1677a. *See id.* at 1579–80. The Federal Circuit also noted that the easiest way to achieve tax neutrality would be to subtract the VAT from the price actually paid in the home market, which had been Commerce's approach to the problem in a number of cases prior to implementation of the URAA. *See id*. at 1576, referencing *Zenith Electronics Corp. v. United States*, 10 CIT 268, 273 and n.8, 633 F. Supp. 1382, 1386 and n.8 (1986).

[3] "FMV", *i.e.*, "foreign market value," became NV with passage of the Uruguay Round Agreements Act ("URAA"). *See* Pub L. 103–465 §224 (Dec. 8, 1994).

Two points are noteable. For one, the problem Commerce had considered in *Federal-Mogul*, to repeat, was in the context of a market economy's VAT. But in a non-market economy ("NME") situation, Commerce must normally resort to determining NV on the basis of the factors of production ("FOPs") for subject merchandise. 19 U.S.C. §1677b(c). Stated differently, the NV price in the NME home market is suspect. Weihai also emphasizes here that Commerce's historical position had been that 19 U.S.C. §1677a(c)(2)(B) does not apply in NME cases because no reliable way existed to determine whether or not an export tax had been included in the price of a product from an NME. Either consideration leads to the second point: when comparing NV to USP, avoidance of the multiplier effect, assuming that is desirable, is distinct from a tax-neutral comparison. The latter, obviously, is not the same as "tax-free."

Recent cases have sustained Commerce's theoretical interpretation of the statute as permitting the deduction from USP of irrecoverable VAT. *See generally Aristocraft of America, LLC, v. United States*, 41 CIT ___, 269 F. Supp. 3d 1316 (2017) ("*Aristocraft*"). The apparent reason such cases have been instituted is that Commerce reconsidered how it would apply the NME aspect of the antidumping statute in light of how the PRC's so-called "socialist market economy" has been evolving. *See Methodological Change for Implementation of Section 772(c)(2)(B) of the Tariff Act of 1930, as Amended, in Certain NME Antidumping Proceedings*, 77 Fed. Reg. 36481 (June 19, 2012) ("*Methodological Change*").

A

The parties' challenges to Commerce's interpretation of 19 U.S.C. §1677a(c)(2)(B) and 19 U.S.C. §1677(18)(A) raise arguments similar to those considered in other cases and do not advance a different reason for invalidating Commerce's interpretation of the statute.

Jiangsu Fengtai begins by arguing that Commerce's interpretation is contrary to the "plain" meaning of the statute and *Magnesium Corporation of America v. United States*, 166 F.3d 1364, 1370–71 (Fed. Cir. 1999) ("*Magnesium Corp.*"), which "prohibits" deduction from U.S. price of not only export taxes duties and charges that may be imposed upon the exportation of merchandise by NME countries but also the unrebated portion of internal VAT taxes. Jiangsu Fengtai claims these are "by definition" not a form of "export tax, duty or other charge imposed" by the PRC upon export of the subject merchandise. Jiangsu Fengtai 56.2 Br. at 7–12. But, in upholding Commerce's interpretation of section 1677a(c)(2)(B) in the context of the Russian

Federation, *Magnesium Corp*. only upheld that section 1677a requires export taxes to be deducted from USP if the export tax is included in such price. The decision does not limit or preclude Commerce from determining the extent to which such taxes (or duties or other charges) are included in such price.

Nonetheless, Jiangsu Fengtai quotes *Magnesium Corp.*'s observations with respect to USP to the effect that in a market economy Commerce can "presume" any tax imposed on merchandise to be exported will be included in the USP of that merchandise and also that such a presumption is "not available" when the merchandise is produced in an NME, in that "the price of the merchandise does not reflect its fair value because the market does not operate on market principles" and "no reliable way exists to determine whether or not an export tax has been included in the price of a product from" an NME. *Magnesium Corp*., 166 F.3d at 1370. To the extent those observations reiterate Commerce's thinking with respect to NV (or rather, at the time, FMV), the decision predates *Methodological Change*, which Commerce announced after notice and comment, and which is entitled to *Chevron* deference.[4] *E.g., Aristocraft*, 41 CIT at ___, 269 F.

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[4] The observations also seem to conflate an NME's internal NV price with its USP, because if the latter is an agreed-upon, arm's length price, it is therefore a "market" price by definition, apart from the question of whether it is a "fair" price. *Cf.* 19 U.S.C. §1677a. In order to assist any post-decisional scrutiny of this opinion, the defendant provides further background as follows:

> Pursuant to 19 U.S.C. §1677a(c)(2)(B), when Commerce calculates export price, it deducts from its calculation any "export tax, duty or other charge imposed by the exporting country on the exportation of the subject merchandise to the United States." Historically, Commerce did not apply section 1677a(c)(2)(B) to proceedings for non-market economies because "pervasive government intervention . . . precluded proper valuation" of those charges. *Methodological Change* . . .. Thus, previously, for non-market economy countries, Commerce did not deduct export expenses from export price, because "the actual amounts paid are an internal expense within an NME country." *Pure Magnesium and Alloy Magnesium from the Russian Federation*, 60 Fed. Reg. 16,440 (Dep't of Commerce Mar. 30, 1995) (final results admin. review) ("*Russian Magnesium*").
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> The Federal Circuit sustained Commerce's practice in *Magnesium Corp.* . . .. Specifically, the Federal Circuit sustained Commerce's interpretation of 19 U.S.C. § 1677a(c)(2)(B) as not requiring Commerce, in the non-market economy context, to deduct export duties and costs in an non-market economy, given that "[b]y definition, in a non-market economy, the price of merchandise does not reflect its fair value because the market does not operate on market principles," and "no reliable way exists to determine whether or not an export tax has been included in the price of a product from a non-market economy." *Id*. at 1370. It further explained that "the *nature* of the Russian economy *does not permit Commerce to determine* whether the export taxes imposed on the exported magnesium were actually included in the price of the magnesium as required by subsection 1677a(d)(2)(B)[,]" and thus it was reasonable for Commerce to determine that "[e]xport taxes must be treated as an intra-non-market economy expense *under these circumstances*, making it impossible to determine whether the actual cost of the export tax was included in the price at which the magnesium was sold in the United States." *Id*. at 1371 (emphases added).
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> After *Russian Magnesium*, and given the nature of the [evolving PRC] economy, Commerce initially found that it could not determine whether [PRC] export duties and

Supp. 3d at 1322; *Jacobi Carbons AB v. United States*, 41 CIT ___, ___, 222 F.Supp.3d 1159, 1186–94 (2017) ("*Jacobi Carbons*").

Jiangsu Fengtai next argues that "[i]nstead of affirmatively imposing a tax, charge or other duty as required by the statute upon the export of the subject merchandise, the government of [the PRC] in this case is not refunding previously paid internal VAT when the subject merchandise is exported." JF Br. at 14. This argument, however, essentially concedes the fact of unrefunded (*i.e.*, irrecoverable) VAT, which Commerce's methodology purports to address, and the record shows that Jiangsu Fangtai declared receipt of "rebate" upon exportation. At least conceptually, the unrefunded or irrecoverable VAT represents what must, of necessity, have been a cost that must, in turn, be passed along to the ultimate purchaser in the export price. *See, e.g., Aristocraft*, 41 CIT at ___, 269 F. Supp 3d at 1324–25.

Bosun repeats that VAT is not "imposed" by the PRC "on the exportation of subject merchandise to the United States" as required by the statute, and that Commerce itself previously rejected the rationale of the new VAT adjustment methodology to compensate for a domestic tax imposed on the acquisition of inputs in the PRC and also to ensure the cost is captured in the calculation, which *Magnesium Corp.* had sustained. Bosun Br. at 10–12, referencing *Globe Metallurgical, Inc. v. United States*, 35 CIT ___, ___, 781 F. Supp. 2d 1340, 1346–47 (2011). But *Juancheng Kangtai Chemical Co., Ltd. v. United States*, 41 CIT ___, Slip Op. 17–3 at 27–28, (Jan. 19, 2017) ("*Juancheng Kangtai II*"), among others, has rejected this argument, and this court perceives no reason to reach a contrary conclusion here.

Weihai argues the statute's meaning is "plain", as is the meaning of "exportation" in international commerce and U.S. Customs and

costs were actually included in the price of the merchandise. In 2012, in recognition that the present-day [PRC] economy is sufficiently dissimilar from Soviet-style economies such that taxes paid by companies in [the PRC] can be identified and measured, Commerce changed its methodology for antidumping duty proceedings involving merchandise from [the PRC], and determined to deduct any such charges that were imposed, "including VAT that is not fully refunded upon exportation." *Id*. at 36,482. Commerce also determined that, "in many instances, the export tax, VAT, duty, or other charge will be a fixed percentage of the price. In such cases, the Department will adjust the export price or constructed export price downward by the same percentage." *Id*. at 36,483.

Commerce explained that "[a]lthough [Commerce does] not know how individual companies in [the PRC and Vietnam] set prices, we do know that the government taxes a portion of companies' sales receipts," and Commerce "can measure a transfer of funds between certain [non-market economies] and companies therein, regardless of the direction the money flows." *Id*. (citation omitted). "Given that, and given that we know how much respondent companies receive for the [United States] sale, we have determined it appropriate to take taxes into account, as directed by the statute." *Id*.

Def's Resp. at 31–33 (bracketing added in part; italics in original). *See also infra* note 5.

Border Protection ("Customs") regulations. Weihai Reply at 26. Elaborating, Weihai contends that the statutory phrase "other charge" is circumscribed, *ejusdem generis*, by "export tax" and "export duty", and that Commerce is only authorized to adjust USP only when there is an "amount" that is "imposed on the exportation of the subject merchandise" and is "included in the export price", *id*. at 27, and that "the statute specifically requires Commerce to make a finding that a 'tax, duty or other charge' equivalent to a fixed percentage of the FOB value of the exported merchandise was *'imposed by the exporting country'*", *id*. at 37 (Weihai's emphasis). Likewise, in its criticism of *Juancheng Kangtai Chemical Co., Ltd. v. United States*, 39 CIT ___, Slip Op. 15–93 (Aug. 21, 2015) ("*Juancheng Kangtai I*") , Weihei contends Commerce must make a specific finding consistent with *China Manufacturers Alliance v. United States*, 41 CIT ___, ___, 205 F. Supp. 3d 1325, 1346–49 (2017), that "irrecoverable VAT itself was actually imposed by [the PRC] on the export of subject merchandise as required by the statute." *Id.* at 35 (emphasis omitted).

Weihai's reading of 19 U.S.C. §1677a(c)(2)(B) and the record is too narrow. In the first place, the statute broadly asks whether there has been included in USP "any export tax, duty, or other charge imposed by the exporting country *on* the exportation of the subject merchandise to the United States". Commerce's reading of "on" is not "by reason of" exportation, it is essentially, and straightforwardly, whether there *is* ("exists") "any export tax, duty, or other charge imposed by the exporting country" included in USP at the time of exportation. *Cf. Magnesium Corp., supra.* To "impose" means "[t]o charge; impute"; "[t]o subject (one) *to* a charge, penalty or the like"; "[t]o lay as a charge, burden, tax, duty, obligation, command, penalty, etc." *Webster's New International Dictionary of the English Language, Unabridged*, p. 1251 (2nd ed. 1956) (italics in original). *See also, e.g.*, *Jacobi Carbons*, 41 CIT at ___ , 222 F. Supp. 3d at 1188 (lexicographical definition of "imposed"). The satisfaction of any such imposition is not necessarily concurrent with the act of imposition, which may occur at any time, and the vagueness of the statutory language neither precludes nor requires such interpretation. *See, e.g., Aristocraft*, 41 CIT at ___, 269 F. Supp. 3d at 1324–25; *Jacobi Carbons*, 41 CIT at ___, 222 F. Supp. 3d at 1187–88.

In the second place, it cannot reasonably be argued on this record, notwithstanding *China Manufacturers Alliance*, that VAT was not "imposed" in contravention not only of Weihai's own statements to that effect, *e.g.*, with respect to its purchases of inputs for subject merchandise or the subject merchandise itself, but in particular with respect to PRC law, which provides that at the time of export of

subject merchandise the VAT rebate is calculated based upon the full export value of the subject merchandise at the time of export.

Commerce interpreted Weihai's submissions of PRC law to the effect, not only, that exportation itself is what gives rise to the irrecoverable VAT "imposed" by the PRC on the process of manufacture and on the sale of subject merchandise, but also, that the "irrecoverable" amount of VAT is to be calculated by reference to the full FOB export value of subject merchandise. That interpretation is not inherently unreasonable, and Weihai's nuanced interpretation does not render it so, *i.e.*, the implicit argument being that the statute requires some form of explicit "imposition" that must simultaneously coincide with exportation, which, as discussed, is not the only reasonably possible interpretation of the statute. Accordingly, Commerce's interpretation of 19 U.S.C. § 1677a(c)(2)(B) and §1677(18)(A), in the context of this review, will be, and hereby is, sustained.

B

That does not, however, settle the methodological dispute. In the *Final Results*, Commerce described its methodology as involving two basic steps: "(1) determining the amount of irrecoverable VAT on subject merchandise, and (2) reducing U.S. price by the amount determined in step one." *IDM* at 15. Commerce further explained that the definition of irrecoverable VAT is "explicitly defined in [PRC] tax regulations" and amounts to the following: (1) the free-on-board value of the exported good, applied to the difference between; (2) the standard VAT levy rate; and (3) the VAT rebate rate applied to exported goods. *Id.* at 16. "The first variable, export value, is unique to each respondent[,] while the rates in (2) and (3), as well as the formula for determining irrecoverable VAT, are each explicitly set forth in [PRC] law and regulation." *Id*. Hence, because Jiangsu Fengtai and Weihai reported the standard VAT levy on the subject merchandise as 17% and the VAT rebate rate for the subject merchandise as 9%, the methodology called for removing from USP an amount calculated from the 8% difference between those rates as "applied to the export sales prices (*i.e.*, U.S. price net of international movement expenses), consistent with the definition of irrecoverable VAT under [PRC] tax law and regulation." *Id*. at 15–16.

Bosun argues the method for the deduction is unsupported by substantial evidence on the record. DSMC counters that the deduction was premised "on the information the Jiangsu Fengtai Single Entity and Weihai placed on the record of this review, which provides an independent basis demonstrating that the PRC government imposes taxes that can be identified and measured", echoing the *IDM*

and the defendant's response. DSMC Resp. at 33, quoting *IDM* at 17. Weihai responds it is "unclear" what that "independent basis" is, but it is not unclear to the court. *See supra*.

Weihai argues that under PRC regulations the rate of VAT on exported goods is 0%, and that 17% VAT was merely paid on the purchase of "inputs." It contends that a "formulaic rate-based computation resulting in an 8% VAT deduction from [USP]" is unlawful because the statute authorizes deduction for "the amount" of "any export tax, duty or other charge", *etc*., that is included in the export price and

> it is axiomatic that an adjustment based upon the difference between the VAT rates paid (on purchased inputs) and refunded (on export of finished goods) being applied to a common value base (FOB price of finished goods sold) is not the same as the actual amount paid when the applicable input VAT rate and refund rate are applied to two different value bases, *i.e.*, the value of inputs (17%) and the value of finished goods (9%), respectively.

Weihai Reply at 29 (emphasis removed). Weihai argues that in the instant case Commerce simply applied the irrecoverable VAT formula provided by PRC law as follows:

> Irrecoverable VAT = (FOB export value) multiplied by (standard VAT levy rate minus VAT rebate applicable to exported goods) = (FOB export value) * (17%-9%) = FOB * 8%.

Id. at 32.

But as the defendant's response points out, "Commerce reasonably determined, based on unambiguous record evidence, that Jiangsu Fengtai and Weihai paid the standard [PRC] VAT rate on [their] purchas[es] *of subject merchandise*, and then received a rebate of nine percent." Def's Resp. at 39 (italics added). Jiangsu Fengtai's and Weihai's replies do not dispute this point, although Jiangsu Fengtai contends, nonetheless, that the administrative record establishes that no part of the internal VAT, regardless of whether it is the refunded or unrefunded portion, is included in the price paid by the U.S. customer for the subject merchandise. JF Br. at 14, referencing JF's Section A Resp. at Ex. A-14, CDoc 70. *Methodological Change* indeed indicates that "included in the price" of subject merchandise from the PRC necessitates inquiry into whether the price is reported on a "gross (i.e. inclusive) or net (i.e. exclusive) of tax" basis, 77 Fed. Reg. at 36483, but Commerce implicitly concluded Jiangsu Fengtai's

prices were reported on a gross basis, *see IDM* at 14–17. The court perceives no reason, among the papers submitted, for interfering with that conclusion, as the burden is on the respondent to create clarity for the record. *See, e.g., QVD Food Co. v. United States*, 658 F.3d 1318, 1324 (Fed. Cir. 2011) ("*QVD Food*") (holding that "the burden of creating an adequate record lies with [interested parties] and not with Commerce"); *NTN Bearing Corp. of Am. v. United States*, 997 F.2d 1453, 1458–59 (Fed. Cir. 1993) (same).

The parties try to make further hay over whether Commerce's methodology was based on an "amount" or a "ratio", *see Federal Mogul, supra*, but the amount of any tax that is expressed by law as a fractional term will necessarily involve application of the relevant ratio (*i.e.*, by and through calculation) to determine the relevant "amount" of the tax. Indeed, it is difficult to conceive of how one could be expected to arrive at "the amount" of VAT applicable to a particular transaction otherwise than through application of "the formula" that a particular VAT tax would call for. *See, e.g., IDM* at 14 ("we continue to apply our preliminary formula to adjust the VAT to deduct from the reported U.S. prices *an amount* for irrecoverable VAT") (italics added). More to the point: the multiplier effect that would be of concern in a market economy situation, as expressed in *Federal-Mogul*, normally cannot be concluded relevant to an NME comparison of NV with USP, due to uncertainty over cost or pricing structures within the NME[5] (which uncertainty does not, of course, extend to certainty established by law, *e.g.*, the rate or amount of taxation on those transactions).

The above "formulaic" expression of PRC law, and its application by Commerce in the context of this proceeding, is in accordance with Weihai's reporting thereof and the PRC's regulation on the subject. It is also in accordance with the agency's methodology, as the defendant and DSMC contend. *See Methodological Change*. Commerce concluded that the unrefunded amount of VAT that must be, or have been, "imposed" on "the exportation of the subject merchandise to the United States" is the amount or value of VAT that the PRC itself has indicated to be the "irrecoverable" amount of its VAT program. And despite Weihai's argument, this is not a presumption, it is a factual inference from the record, and substantial evidence of record supports it. To conclude from the record that the amount of irrecoverable VAT

[5] *See Methodological Change*, 77 Fed. Reg. at 36483 ("when the Department evaluates whether a tax is included in the price of an NME export sale, it cannot take into consideration the same assumptions as those taken into account when performing a similar type of evaluation for a market economy sale, which does operate in accordance with market principles of cost or pricing structures[;] . . . it is not an issue of price formation (*i.e.*, whether the seller considers tax when forming price) because that is a market economy concept which is inapplicable by the very definition of an NME").

was "something less" and/or "capped" by reference to what had purportedly been paid on inputs earlier in production would be to ignore the actual evidence of record and the apparent manner in which the PRC itself operates its VAT program. *See, e.g.*, Def's Resp. at 39, *supra*.

Expanding on that point, several observations are worthwhile. First, as indicated, the PRC formula reveals that the VAT rate in that home market is 17% and for exports of subject merchandise the VAT rebate is 9% of the full export value thereof, an obvious difference of 8%, and Commerce found this "net" remainder to be, or to equate to, the amount of "irrecoverable" VAT that is defined in PRC law. "It is VAT paid on inputs and raw materials (used in the production of exports) that is non-refundable and, therefore, a cost." *IDM* at 15. Of course, the 8% amount of irrecoverable VAT may seem difficult to square with the "actual" amount of 17% VAT respondents claim as having been paid on "inputs," because the 9% VAT rebate amount is calculated by reference to the full FOB export value of the good, not only (or merely) by reference to the full amount of VAT that purportedly would have been paid on "inputs," but, as mentioned, the defendant has pointed out that in the context of this proceeding "inputs" can mean subject merchandise in any event.

Second, the formula reflects that in the context of export, the internal VAT credit that an exporter or producer paid on inputs, and uses to net[6] the amount owed on a sale of the merchandise, is a *separate* consideration from the VAT rebate amount that the PRC calculates by reference to the full FOB export price of subject merchandise due to the *implicit* amount of VAT attributable to that event. In other words, by tethering the rebate to the full export value of the merchandise, the PRC regulation essentially declares that the PRC is foregoing an 8% amount of VAT calculated by reference to the full export value of merchandise, notwithstanding the claim of 0% VAT "imposed" on subject merchandise upon its exportation. If the irrecoverable VAT of 8% of the full FOB export value of the subject merchandise is not the remainder of a 17% VAT that has been, or is, implicitly imposed on such merchandise, then it still bears little relationship, if any, to the 17% VAT imposed on the purchase of inputs used in production, because regardless of any "rolling" basis used to account for VAT paid and VAT rebated, the amount of both rebate and irrecoverable VAT must still be calculated based upon the full export value of the subject merchandise.[7] That irrecoverable VAT, thus,

[6] This being merely presumptive in an NME situation, since monetary units are fungible.

[7] *Cf., e.g.*, JF Br. at 14 (the PRC government "in this case is not refunding previously paid internal VAT when the subject merchandise is exported").

represents an amount that must necessarily be included in the export price, because, as mentioned, it is that differential, between the full amount that the PRC government would otherwise receive, and the amount of VAT that the exporter actually receives in rebate, that the PRC itself deems, as Commerce found, "irrecoverable," and which amount remains, at the time of export, an "imposition" on the value of the subject merchandise, and which therefore requires adjustment to USP. It is the functional equivalent of a cost.

Commerce's methodological resolution of these types of VAT problems has been held to require at least further clarity of late,[8] but as articulated here by the defendant, Commerce's methodological approach is based directly on the PRC's own law and regulation. In this matter, Commerce's application thereof appears reasonable and permissible, it has apparently been applied consistently,[9] it is not unreasonable *per se*, and it furthers the aim of the antidumping statute. In arguing for this court to conclude otherwise, the respondents are essentially asking for substitution of judgment on a conclusion or finding from the record that is within Commerce's domain, which is outside the standard of judicial review. Commerce requests deference to its reasonable interpretation of the statute and of the record and its methodology, and current law on the subject supports that request. *See, e.g., Jacobi Carbons*, 41 CIT at ___, 222 F. Supp. 3d at 1186. For the foregoing reasons, this court is unpersuaded by the respondents' challenges on this issue.

IV. Reliance Upon Contemporaneous Thai Import Data

Among the FOPs requiring surrogate values ("SVs") during the review were nitrogen and oxygen. For the *Final Results* Commerce calculated those SVs based on the Global Trade Atlas ("GTA") data for headings 2804.30, and 2804.40 of the Thai Harmonized Tariff Schedule ("HTS") upon determining that those data were contemporaneous with the POR, represented broad-market averages free of taxes and duties, came from the primary surrogate country, and were the best available information. *IDM* at 49–50. Jiangsu Fengtai agrees with use of GTA statistics for the Thai HTS headings 2804.30 and 2804.40 for valuing nitrogen and oxygen, respectively, but it argues Commerce should use the Thai import statistics from the fourth administrative review because the instant review data are aberrational in

[8] *Cf. e.g., Aristocraft, supra, Jacobi Carbons, supra, with, e.g., U.S. Steel Group v. United States* , 225 F.3d 1284 (Fed. Cir. 2000) (judicial disagreement over "total expenses" in 19 U.S.C. §1677a(f)(2)(C) resolved by *Chevron* deference to agency's reasonable interpretation and computation thereof).

[9] *See, e.g., Multilayered Wood Flooring from the PRC*, 79 Fed. Reg. 26712 (May 9, 2014) and accompanying I&D Memo at cmt. 3.

comparison therewith insofar as the total quantity of imports in the Thai GTA data are "commercially and statistically insignificant" in comparison with its own consumption of nitrogen and oxygen. Jiangsu Fengtai Br. at 27–28.

The defendant contends that in order to exclude an SV, interested parties must provide specific evidence showing it to be aberrational.[10] Commerce explained in the *Final Results* that such a determination does not involve comparing the volume of imports in the import data to the volume of the input a respondent purchased or of non-identical inputs but rather comparing the total import volumes of potential surrogate countries to one another. *See IDM* at 50. The defendant also emphasizes that Commerce need not replicate the respondent's actual experience. Def's Resp. at 43, referencing *Nation Ford Chem. Co. v. United States*, 166 F.3d 1373, 1378 (Fed. Cir. 1999).

"This court's duty is 'not to evaluate whether the information Commerce used was the best available, but rather whether a reasonable mind could conclude that Commerce chose the best available information.'" *Zhejiang DunAn Hetian Metal Co., Ltd. v. United States*, 652 F.3d 1333, 1341 (Fed. Cir. 2011), quoting *Goldlink Indus. Co. v. United States*, 30 CIT 616, 619, 431 F. Supp. 2d 1323, 1327 (2006). The appropriate comparison to make would have been to compare the GTA import data with Thai or other surrogate country data in general. *See Trust Chemical Co. Ltd. v. United States*, 35 CIT ___, ___, 791 F. Supp. 2d 1257, 1265 (2011) (argument that total import data were too small held unavailing in absence of evidence that WTA volume data were only a small fraction of India's domestic consumption); *see also Shakeproof Assembly Components Div. of Illinois Tool Works, Inc. v. United States*, 23 CIT 479, 485, 59 F. Supp. 2d 1354, 1360 (1999) (Commerce's "administrative practice with respect to aberrational data is 'to disregard small-quantity import data when the per-unit value is substantially different from the per-unit values of the larger quantity imports of that product *from other countries*'") (citation omitted; italics added). Jiangsu Fengtai did not provide such specific evidence for the record, and, as mentioned, the burden of creating an adequate record, including surrogate value information,

[10] Def's Resp. at 42, referencing: *Carbazole Violet Pigment 23 from the PRC*, 75 Fed. Reg. 36630 (June 28, 2010) (final results) and accompanying issues and decision memorandum (all such memoranda except for *IDM* hereinafter "I&D Memo") cmt. 4; *Certain Hot-Rolled Carbon Steel Flat Products From Romania*, 70 Fed. Reg. 34448 (June 14, 2005) (final results) and accompanying I&D Memo cmt. 2 ("we reviewed the allegations regarding surrogate values as presented by the interested parties and decided whether the parties had provided sufficient evidence to merit further consideration"); *Polyethylene Retail Carrier Bags from the PRC*, 73 Fed. Reg. 14216 (Mar. 17, 2008) (final results) and accompanying I&D Memo cmt. 6 ("[w]e find that the burden is on the respondents to demonstrate that the Indian import statistics are in fact aberrational").

lies with the interested parties. *See, e.g., QVD Food, supra*; *NTN Bearing Corp., supra*.

Jiangsu Fengtai's reliance on *Xinjiamei Furniture* and *Juancheng Kangtai I* is similarly unavailing. *See Xinjiamei Furniture (Zhangzhou) Co., Ltd. v. United States*, 37 CIT ___, Slip Op. 13–30 (Mar. 11, 2013); *Juancheng Kangtai I, supra.* In *Xinjiamei Furniture*, the respondent, arguing that the Indian import data were aberrational, placed non-Indian data on the record including Brazilian, Northern European data and world export market "benchmark" prices. The court ordered Commerce to take the Brazilian, Northern European and world export market data into account on remand. 37 CIT at ___, Slip Op. 13–30 at 16. Similarly, in *Juancheng Kangtai I*, the respondent argued that the Philippine import data was aberrational compared with other surrogate country data, 39 CIT at ___, Slip Op. 15–93 at 51–52. Here, however, Jiangsu Fengtai provided no such comparative data.

Jiangsu Fengtai fights an uphill battle in its reply. It condemns the *Final Results* as providing no valid reasons for Commerce's current policy and argues that *Juancheng Kangtai I* found unreasonable the assumption that the small amount of Thai import data in that case could possibly reflect the "commercial reality" of that respondent. Jiangsu Fengtai Reply at 15, quoting Slip Op. 15–93 at 54. *Accord, Baoding Mantong Fine Chemistry Co. v. United States*, 41 CIT ___, Slip Op. 17–44 at 37 (Apr. 19, 2017) (noting 604 metric tons of Indonesian import data for steam coal "was far less than even Baoding Mantong's own consumption of 1,037 metric tons" and remanding for reconsideration). However, the Federal Circuit in *Nan Ya Plastics* reviewed the legal requirements of "commercial reality" and "accurate" and concluded that "[w]hen Congress directs the agency to measure pricing behavior and otherwise execute its duties in a particular manner, Commerce need not examine the economic or commercial reality of the parties generally, or of the industry more generally, in some broader sense." *Nan Ya Plastics Corp. v. United States*, 810 F.3d 1333, 1344 (Fed. Cir. 2016), referencing *United States v. Eurodif S.A.*, 555 U.S. 305, 317–18 (2009).

"Our case law and the statute thus teach that a Commerce determination (1) is 'accurate' if it is correct as a mathematical and factual matter, thus supported by substantial evidence; and (2) reflects 'commercial reality' if it is consistent with the method provided in the statute, thus in accordance with law." *Id*. (citations omitted). For its *Final Results*, Commerce could not determine aberrance with respect to the Thai GTA data for headings 2804.30, and 2804.40 in the absence of other surrogate country data of record against which those

data could be examined in relief. Its explanation, that it does not compare the volume of imports in the import data to the volume of the input a respondent purchased or non-identical inputs, and that it need not replicate the respondent's actual experience, comports with *Nan Ya*'s summation, and is thus in accordance with law. Jiangsu Fengtai's arguments do not persuade otherwise.

V. Valuation of Labor Using NSO 2014 Labor Force Survey

Weihai and Bosun also challenge Commerce's surrogate valuation of labor. Commerce's preferred method of valuing the labor FOPs is to use industry-specific data from the primary surrogate country published in Chapter 6A of the International Labor Organization ("ILO") Yearbook of Labor Statistics when available, and otherwise to use industry-specific labor wage rate data from the primary surrogate country. *See, e.g., Ad Hoc Shrimp Trade Action Committee v. United States*, 41 CIT ___, ___, 219 F. Supp. 3d 1286, 1291 (2017); *see also IDM* at 47; *Antidumping Methodologies in Proceedings Involving Non Market Economies*: *Valuing the Factor of Production: Labor*, 76 Fed. Reg. 36092, 36093 (June 21, 2011) ("*Labor Methodologies*"). For this administrative review, ILO Chapter 6A data for Thailand were not on the record. *IDM* at 47.

For valuing labor, Weihai proposed industry-specific labor cost data published in the Industrial Census report (2011) of the National Statistical Office ("NSO") of the Thai government. *See* Weihai Prelim SVs (July 16, 2015), PDoc 202, at Ex. 6. The petitioners proposed reliance upon general manufacturing labor cost data published quarterly in the NSO Labor Force Survey report (2014). *See* Pets' 2nd SVs (Nov. 2, 2015), PDoc 307. Commerce preliminarily valued labor using the latter as it is manufacturing-specific data contemporaneous with the POR. *PDM* at 22–23.

In their administrative case briefs, Weihai and Bosun argued that those NSO data were not specific enough, and that Commerce should instead rely on data from the 2011 Industrial Census of the NSO, as those data were specific to the manufacture of tools/hardware, including circular sawblades, and could be adjusted to reflect inflation. Weihai's Case Br. at 24–38; Bosun's Case Br. at 20–21. Specifically, Weihai argued that the faster-than-inflation rate of increase in Thai wages in general from 2011 to the POR was irrelevant to the DSB industry and accordingly presented no bar to the use of the less-contemporaneous 2011 Industrial Census data, as the agency could simply inflate those data using the Consumer Price Index ("CPI"). Weihai's Case Br. at 30–32, 36–38. Weihai also argued that contrary

to the agency's conclusion in a prior review the Industrial Census data comprehensively accounted for indirect labor costs. *Id*. at 32–36.

In the final determination, Commerce continued to rely on the 2014 Labor Force Survey data. *IDM* at 46–48. Commerce found those data to satisfy its requirements of being industry specific, publicly available, representative of a broad market average, tax- and duty-exclusive, contemporaneous with the POR, and therefore more compelling than the 2011 data. *See id*. at 46. Its choice of the 2014 Labor Force Survey data was also the result of comparing the direct and indirect labor cost[11] elements in both the 2011 Industrial Census and the 2014 Labor Force Survey data sets with the same elements described in the ILO Chapter 6A definitions thereof, which led Commerce to determine that the 2011 Industrial Census data were not more detailed than the 2014 Labor Force Survey data in terms of matching categories of labor costs specified in the ILO Chapter 6A labor data. *Id*. at 47–48.

Commerce explained that the ILO Chapter 6A data were comprised of: (1) compensation of employees, (2) employers' expenditure for vocational training and welfare services (*e.g.*, training), (3) the cost of recruitment and other miscellaneous items (*e.g.*, work clothes, food, housing), and (4) taxes. *IDM* at 47. Commerce found that the 2014 data included cash for average wage, bonus, overtime, and other income, as well as in-kind compensation for food, clothes, housing, and others, and thus included both direct compensation and bonuses as well as indirect compensation (employee pension, benefits, and work training). *Id.* By contrast, Commerce found that while the 2011 data included wages, salaries, overtime bonus, fringe benefits (medical care, others), and employer's contribution to social security (and thus facially included both direct compensation and indirect compensation, *i.e.*, fringe benefits), it also determined there was "uncertainty" over the 2011 data concerning whether work clothes, food, and housing were included in fringe benefits because the 2011 data only categorized fringe benefits as "Medical care" and "Others." *Id.* at 47.[12]

[11] Indirect labor costs are items such as employee pension, benefits, and worker training, as opposed to direct compensation and bonuses. *See Labor Methodologies*, 76 Fed. Reg. at 36093.

[12] More precisely, Commerce explained that although the Appendix B of the 2011 Industrial Census data stated that fringe benefits included "food, beverages, lodgings, rent, medical care, transportation recreational and entertainment services, etc.," the 2011 Industrial Census data categorized fringe benefits only as "Medical care" and "Others," and that the data did not specify whether work clothes, food, and housing were included in the "Others" category of fringe benefits. *IDM* at 47. Therefore, the defendant elaborates, Commerce could not discern whether these specific types of fringe benefits were in fact included in the "Others" category of fringe benefits, whereas the 2014 Labor Force Survey data better reflected the full spectrum of labor (*i.e.*, fully loaded, direct and indirect) costs expressed within the ILO Chapter 6A data. Def's Resp at 48, referencing *id*. at 47.

Commerce also concluded that even if the 2011 data were more specific, they were not susceptible to accurate inflation using the standard CPI inflator, because wages in Thailand increased by a far greater percentage from 2011 to the POR than did the CPI. *Id*. at 48. Commerce thus reiterated that the standard CPI inflator would not lead to accurate results and that the 2011 data were unreliable even if they were arguably more specific. *See id.* at 46.

A

Here, Bosun and Weihai both contend that Commerce's choice of using the 2014 data is not supported by substantial evidence and that Commerce should have chosen the 2011 data due to its greater specificity. Bosun Br. at 6–9; Weihai Br. at 32–37. Weihai, echoed by Bosun, argues Commerce's "uncertainty" finding concerning the 2011 data was "self-created." *E.g.*, Weihai Br. at 35. Bosun also contends Commerce persists in "misunderstand[ing]" a material difference in the terms of scope of the 2011 data and the 2014 data. *See* Def's Resp. at 46–49.

Both argue the 2014 NSO Labor Survey data are too broad in the sense that they cover the entire manufacturing sector, whereas the 2011 NSO Industrial Census data are specific to the manufacture of saws and saw blades, including circular saw blades and chainsaw blades. *E.g*, Bosun Reply at 2, referencing PDoc 202 at Ex. 6. Relying on cases that have emphasized the importance of product specificity in the determination of best available information, Bosun argues that such importance extends to specificity determinations on the labor FOP,[13] and that Commerce specifically found the same 2011 Industrial Census data superior to the general manufacturing labor rate in *Drawn Stainless Steel Sinks From the PRC*, 80 Fed. Reg. 69644 (Nov. 20, 2015) (final 2012–14 rev. results; *see* accompanying I&D Memo at cmt. 12), and *Drawn Stainless Steel Sinks from the PRC*, 81 Fed. Reg. 29528 (May 12, 2016) (*inter alia* prelim. 2014–15 rev. results).

Regarding Commerce's position that it could not ascertain whether the 2011 Industrial Census category for "fringe benefits" included clothes, food, and housing, *see IDM* at 48, Bosun emphasizes that the source documentation states that "*all payments* in addition to wages and salaries" are included in fringe benefits and elaborates "fringe benefits" as "all payments in addition to wages or salaries paid to employees such as food, beverages, lodgings, rent, medical care, transportation recreational and entertainment services, *etc*." and also

[13] Bosun Reply at 2–3, referencing *Qingdao Sea-Line Trading Co. v. United States*, 766 F.3d 1378, 1386 (Fed. Cir. 2014), *Ad Hoc Shrimp Trade Action Comm. v. United States*, 618 F.3d 1316, 1320 (Fed. Cir. 2010), and *Taian Ziyang Food Co. v. United States*, 35 CIT ___, ___, 783 F. Supp. 2d 1292, 1330 (2011).

that "[p]ayment might be in cash or in kind." *See* Weihai Initial SVs (July 16, 2015) at Ex. 6 (Bosun's italics); PDocs 202–03. *Id*. Bosun points out that the source documentation specifically lists examples of fringe benefits to include food and lodging but also covers all additional payments; therefore, if workers received clothing, food, and housing benefits, then it is included in the 2011 Industrial Census rate and it is "wholly unreasonable" for Commerce to question whether clothing, food, and housing are missing from the 2011 labor rate. Bosun thus argues that Commerce could not reasonably determine the 2011 Industrial Census data did not fully cover all labor expenses as do the 2014 data.

For its part, Weihai contends that it "debunked" Commerce's implication that the 2011 Industrial Census data contained only direct labor costs, and also that it established that the 2014 data contained both direct and indirect costs by demonstrating, *viz*., that while the 2011 Industrial Census data encompass all of the elements of direct and indirect labor cost, the 2014 Labor Survey report indisputably does not include the critical indirect labor cost element "employer's contribution to social security." Weihai Br. at 34–35. Weihai argues both the defendant and DSMC implicitly concede that the 2014 data is incomplete and not representative of a fully loaded labor cost even of the generalized manufacturing sector, because given the omission "employer's contribution to social security" they failed to argue or show how the 2014 Labor Force Survey data were "comprehensive." Weihai Reply at 16.

Furthermore, Weihai contends, Commerce erred because a certain letter Weihai obtain from NSO for the record clarified that the 2011 Industrial Census[14] and the 2014 Quarterly Labor Force Survey data were materially different in terms of scope and data collection methodology and, citing to its 2011 Labor Survey report data, NSO "affirmed that the 2011 NSO Industrial Census data, notwithstanding [their] lack of contemporaneity, w[ere] more reliable and accurate for valuing labor cost in the Thai manufacturing sector." Weihai Reply at 18. *See* Weihai Br. at 46. Weihai and Bosun thus both argue that Commerce's "sole" rationale for preferring the 2014 Labor Survey data is on the basis of contemporaneity. *See* Bosun Br. at 9; Weihai Br. at 37.

Even if that were the case, the court has previously upheld Commerce's preference for utilizing surrogate values that are contemporaneous with the period of review. *See Shakeproof*, 30 CIT 1173,

[14] Weihai's letter sought clarification with respect to the 2011 Labor Force surveys and the "2012" Industrial Census data. *See* Weihai Second SV Submission (Nov. 2, 2015) at Ex. 4B, PDoc 298. The latter are here presumed to equate to references herein to "2011 Industrial Census data".

1177–78 (2006), *aff'd*, 228 Fed Appx. 1001 (Fed. Cir. 2007) ("Commerce's reliance on valuation information from within that specific time period is clearly an appropriate means of fulfilling [its] statutory directive."). In any event, Commerce's determination did not rest upon contemporaneity alone, and the defendant agrees as to the "material differences" between the two data sets that Weihai concedes: Commerce "was unable to rely on the NSO clarification letter" because, "although the letter explained the difference between the 2011 Labor Force Survey and the 2011 Industrial Census data, it did not provide an explanation for the difference between the two sets of data that Commerce had on its record -- that is, the difference in methodology between the 2011 Industrial Census data and the 2014 Labor Force Survey data." Def's Resp. at 49. The defendant thus contends Weihai's argument is directly contradicted by record evidence.

Weihai's reply, contending that the differences between the two NSO labor cost databases described in the NSO clarification letter are not limited to the 2011 data but are with regard to "all" of the Labor Survey reports including those issued during the POR, does not address the entirety of the defendant's (and Commerce's) point. Be that as it may, the NSO letter is mere opinion, albeit an official one, and it is not dispositive as to which of the two sets of data Commerce could choose as the best information available on the record. Commerce's position is that although the letter explained the difference between the 2011 Labor Force Survey and the 2011 Industrial Census data, it did not provide an explanation for the difference between the two sets of data that Commerce had on its record, *i.e.*, the difference in methodology between the 2011 Industrial Census data and the 2014 Labor Force Survey data. *IDM* at 48. Commerce's explanation is not inherently unreasonable.

B

Nonetheless, Weihai argues Commerce's finding that the 2011 Industrial Census data "cannot reasonably reflect the labor cost, even after the adjustment for inflation" is erroneous because Commerce has impermissibly conflated two very different databases. Weihai Br. at 36. DSMC's response is that "the 2011 data could not be accurately inflated using the CPI, because Thai labor costs rose between 2011 and the POR by a far greater rate than the CPI", "[n]or could the agency reasonably have simply assumed that the 2011 data could be accurately inflated using the CPI, particularly given that, as Weihai itself concedes, Thai labor costs grew hugely between 2011–2014." DSMC Br. at 36–37, referencing Weihai's Br. at 36 (stating that the

Thai minimum wage grew by 45% between 2011–2014). Weihai contends that it "debunked" these arguments in its opening brief and that DSMC is misconstruing its position, which is that while there was a substantial increase in the average labor cost for manufacturing labor between 2011 and 2014, this was attributable to a 45% enhancement in the Thai minimum wages during this period, and "the enhanced Thai wage of 300 Baht/day (*i.e.* 37.5 Baht/hr) does not affect the substantially higher labor cost of 61.39 Baht/Hr for the industry-specific Code 25939 in the NSO Industrial Census report." Weihai Reply at 13–14, referencing Weihai Br. at 36.

In other words, Weihai contends, the effect of enhancement in the minimum Thai wage rate was limited to those manufacturing sectors where the prevailing wage or labor rates were below 300 Baht/day or 37.5 Baht/hr. "Given that the average labor rate in the saw blade industry was already significantly higher — 61.39 Baht/hr — which is 64% higher than the enhanced minimum wage rate of 37.5 baht/hr., it is axiomatic that this particular manufacturing industry would have remained largely unaffected by this increase." *Id*. at 14. Weihai's fuller reply is as follows:

> . . . DSMC counters Weihai by raising two arguments. First, DSMC argues that given that "[t]he average labor cost for general manufacturing in 2011 was above the increased minimum wage rate . . . under Weihai's logic, the wage for the manufacturing sector generally could not have been affected by the minimum wage increase — a position that is entirely inconsistent with its assertion that the increase in the general manufacturing labor cost is due solely to the minimum wage increase." DSMC Br. at 37 n.8. However, DSMC misses the point that the average labor cost for the general manufacturing sector is based on aggregating the data for 464 distinct and disparate manufacturing sectors. Weihai Br. at 34. Some of these industrial sectors (like saw blades) have higher labor cost (and wage) rates while several others could potentially have had wage rates that were lower than the enhanced Thai minimum wage rate of 300 Baht/day. Consequently, the enhanced Thai minimum wage rate would have affected all those industries wherein the prevailing wage rates were lower than 300 Baht/day. As a result, even though the average labor cost for general manufacturing in 2011 was already above the increased minimum wage rate, it went up further on account of buoyancy experienced by all of those impoverished industrial sectors where the prevailing wage rates were less than 300 Baht/day.

> DSMC's second argument is unpersuasively presumptive and results oriented. Based on a hypothetical involving five hand tool workers where the daily wage of some of the workers was less than 300 Baht/day, DSMC conveniently argues that "even though the average rate had been above the post-increase minimum wage, the rise in the minimum wage rate still affected the average rate." DSMC Br., 37. As such, it should be rejected. DSMC also argues that since "the average wage rate under Code 25939, corresponding to hand tools/hardware manufacturing, was 384 Baht per day . . . [which] is only 84 Baht per day more than the minimum wage increase in 2014, it is highly unlikely that there were no workers under this code that were affected by the minimum wage increase." DSMC Br., 37 n.9. DSMC misconstrues Weihai's arguments. Weihai never argued that Commerce directly apply the industry specific labor cost rate from 2011; instead, Weihai has consistently argued that the labor cost surrogate value be determined after inflating the 2011 industry-specific labor cost by the applicable CPI index.

Weihai Reply at 14–15 (Weihai's bracketing and ellipses).

If the time-period over which Weihai argues for its preferred methodology were shorter, the argument might have more appeal, but the unevenness of wage rates between manufacturing sectors only serves to underscore the speculative nature of Weihai's argument. Whether it might otherwise be reasonable to infer that the rate of wage inflation over the four-year period from 2011 — in an industry sector which already had as its starting point purportedly higher average wages as compared with other sectors — must correspond to "the applicable CPI index" (as opposed to being significantly higher or lower during that period in reality[15]), Weihai's arguments are no less presumptive than DSMC's, as they do not sufficiently explain the 28.75 percent to 35.71 percent disparity in the cost of labor between the 2014 Labor Force Survey and the 2011 Industrial Census data even if the latter are adjusted for inflation. The arguments therefore do not undermine Commerce's conclusion on Weihai's inflation-adjustment methodology. *See IDM* at 48.

DSMC argues *Hangzhou Spring Washer Co.* v. *United States,* 29 CIT 657 387 F. Supp. 2d 1236 (2005), supports "use of more contemporaneous but less specific data, where Commerce explained why contemporaneity better advanced the goal of accuracy". DSMC Resp. at 37–38. Weihai contends that decision does not provide that sup-

[15] *Cf*., *e.g.*, Respondents' Administrative Case Br. (Aug. 16, 2016) in case no. A-570–898 (clorinated isocyanurates from the PRC), IA ACCESS doc# 3501482–01, at page 19 (arguing as to uneven labor inflation rates among different industrial sectors in Mexico).

port, because, while upholding Commerce's decision, the court cautioned that "Commerce has the statutory discretion to give greater weight to one over the other, provided it offers a reasoned explanation when such a decision deviates from past *practice*." *Hangzhou Spring*, 29 CIT at 672 (this court's italics). Weihai argues that it reminded the agency of its decision to apply 2006 NSO Industrial Census data to value labor costs in the prior review, covering the 2012–13 period, and that for the current review Commerce was presented the newer non-contemporaneous 2011 NSO Industrial Census data. "As such and given its own recent precedent, Commerce was required to provide a reasoned explanation for its reversal in this review." Weihai did not raise this argument in its motion brief and the court concludes it may not do so at this point. In any event, the argument does not satisfy the standard of an "agency practice" that would necessitate remand of this issue to Commerce. *See, e.g., Shandong Huarong Machinery Co., Ltd. v. United States*, 30 CIT 1269, 1293 n.23, 435 F.Supp.2d 1261, 1282 n.23 (2006); *Ranchers-Cattlemen Action Legal Foundation v. United States*, 23 CIT 861, 884–85, 74 F. Supp. 2d 1353, 1374 (1999).

Commerce considered and responded to all respondent arguments with the following: "While the 2011 Industrial Census data are specific to the relevant industry, they are neither contemporaneous with the POR nor as or more detailed than the 2014 Labor Force Survey in terms of matching categories of labor costs specified in the ILO Chapter 6A labor data." *IDM* at 47–48. In other words, even if the above plaintiff arguments are correct, and even if the court were able to "credit NSO's unambiguous opinion that 'Quarterly Labor Force Survey reports are only a rough estimate of the prevailing labor cost data' and that for valuing 'individual sub-sectors within the manufacturing sector', 'the 2012 Industrial Census report[16] is a far better source as compared to the Quarterly Labor Force Survey reports'" as argued by Wehai,[17] at best that would merely appear to put the 2011 Industrial Census data on "closer footing" with the 2014 data in a contest of which data set provided the specificity that Commerce required for purposes of this review when contemplating two imperfect sets of data.

In each proceeding, selection of surrogate values is *ad hoc*, and the contemporaneity of the 2014 data apparently tipped the scales for Commerce's selection for the *Final Results*. In the final analysis, Weihai and Bosun are essentially asking the court to supplant Com-

[16] *See id*.

[17] Weihai Br. at 37 (emphasis omitted).

merce's finding on the agency's interpretation of the record,[18] which is beyond the standard of "substantial evidence" review. In other words, even if a different result might be obtained were the court to examine the matter *de novo*, the current state of the law is such that Commerce's interpretations of and determinations on the record are entitled to deference. *See Universal Camera Corp. v. NLRB*, 340 U.S. 474, 488 (1951) ("as to matters . . . requiring expertise a court may [not] displace the [agency]'s choice between two fairly conflicting views, even though the court would justifiably have made a different choice had the matter been before it *de novo*").

VI. Calculation of Surrogate Truck Freight

To calculate the truck freight surrogate value to the port of export, Commerce relied on two factors for determining that distance: the "standardized" company's location from the Thai *Doing Business* report for 2015, and the destination port. The issue here is Commerce's determination of the "Port of Bangkok"[19] as the destination port, based on the *Doing Business* report, which provided the destination port *per* "Port Name: Bangkok". Commerce reasoned as follows:

> Unlike the previous versions of *Doing Business* in the past reviews, *Doing Business* explicitly identifies Bangkok as the name of the port and the name of the city where the standardized company is located.[ ] Therefore, we do not find that *Doing Business* made a general reference to ports that serve the Bangkok metropolitan area when it explicitly stated that the name of port used to compile these data is Bangkok. Therefore, even if cruise companies and other companies call both ports Bangkok ports as Weihai claims, they are irrelevant to the fact that the freight transportation data compiled in *Doing Business* are based on the transportation from Bangkok to the Port of Bangkok. Also, for the same reason, we find that the quantity of freight the Port of Laem Chabang handles compared to the quantity of freight the Port of Bangkok handles is irrelevant in our valuation of truck freight expense.

[18] Weihai also argues that Commerce failed to cite to any record evidence that there would have been a change in NSO's methodology between the issuance of the 2011 Industrial Census data and the 2014 Labor Survey report, but that seems to miss the point that these are not the same types of data sets, and the argument also seems to invert the burden on creating an adequate record, including SV information. *See, e.g., QVD Food, supra*; *NTN Bearing Corp., supra*.

[19] *I.e.*, Khlong Toei port.

IDM at 53–54, referencing, *inter alia, Tapered Roller Bearings and Parts Thereof, Finished and Unfinished, from the PRC*, 81 Fed. Reg. 1396 (Jan. 12, 2016) (final 2013–14 rev. results), and accompanying I&D Memo at cmt 2.

Weihai argues Commerce should have applied a distance factor based on the average of the distances to both the Port of Khlong Toei (*i.e.*, Bangkok) and the Port of Laem Chabang as it had in the preliminary results, because the *Doing Business* reference to "Bangkok" as the port is ambiguous and does not specify whether it is the Port of Bangkok or the Port of Laem Chabang, both of which are referred to as Bangkok exit ports in commercial vernacular. *See* Weihai Br. at 24. Commerce obviously concluded otherwise, and Weihai's "averaging" argument would appear to concede "Port of Bangkok" as proper in the calculation thereof.

Nonetheless, Weihai persuades that this determination requires remand at least for further explanation, or reconsideration if Commerce so chooses, which may involve further development of the record. The conclusion that "Port Name: Bangkok" is an explicit reference to "Port of Bangkok," of course, is the basis upon which Commerce held irrelevant the fact that cruise and other companies call both ports Bangkok as well as the respective quantities of freight handled by the Port of Laem Chabang compared to the Port of Bangkok, but it remains unclear to the court why "Port Name: Bangkok" should be regarded as substantial evidence of record to support the conclusion that this is an explicit reference to "Port of Bangkok" rather than a mere scintilla.

For example, in addition to its evidence that Khlong Toei and Laem Chabang are referred to as Bangkok ports in commercial parlance, Weihai argued that the "Trading Across Borders Survey" questionnaire that was used for the *Doing Business* report instructs survey participants to respond considering "[t]he *seaport most commonly used by traders*" and report the "Cost of inland transport (from warehouse in «Survey_City» to *seaport*) and handling (loading and unloading)" and also notes that "[t]he main method of transporting the containerized product specified above between the «Survey_City» and the chosen *seaport* is considered."[20] As such, Weihai argued, the underlying survey "unambiguously" indicates that the expression "Port Name: Bangkok" means a Bangkok *seaport*, record evidence shows that Laem Chabang is the most widely used commercial *seaport* servicing Bangkok, handles 4.4 times the volume of containerized cargo than Khlong Toei port (*i.e*, Port of Bangkok), and shows

[20] *E.g.*, Weihai Br. at 25–26, quoting Pets' 2nd SV Cmts (Nov. 2, 2015), Ex. 4B ("Trading Across Borders Case Study Assumptions"), PDoc 306 (Weihai's emphasis).

that the latter is a *riverport*, not a *seaport*.[21] Weihai claims that as this latter fact is undisputed, it suggests that the expression "Port Name: Bangkok" actually references the seaport of Laem Chabang, but at a minimum the expression must at least encompass the seaport of Laem Chabang — in other words, Weihai continues, on a conservative basis substantial evidence supports Commerce's preliminary decision to average the distance from Bangkok to Khlong Toei riverport and Laem Chabang seaport. Weihai additionally complains of Commerce's "cursory rejection" of the other corroborative published information that Weihai provided (in particular those relevant to the import/export community and trucking companies in its rebuttal brief, PDoc 384 at 37, which demonstrated that Laem Chabang port is also referred to as Bangkok port) as simply "irrelevant" fails to account for relevant evidence fairly detracting from Commerce's conclusion. Furthermore, Weihai argues, Commerce's decision is inconsistent with its then-recent "precedent" in which it has determined different distance factors when using the *Doing Business* (2015) Thailand report for valuing truck freight.

"Inconsistent" is the very word, all right, for Commerce's determinations regarding the Bangkok-to-port truck freight distance are, quite literally, all over the map. Notwithstanding the lack of specificity of the distance between a "model" surrogate commercial company in Bangkok and its "model" commercial port of export in the 2015 *Doing Business* report, one would suppose such a seemingly verifiable fact ought not be a bone of contention, but the parties' arguments reveal wide disparities in Commerce's determinations thereof from review to review. For one review, Commerce used that report to determine the distance from the city of Bangkok to the exit port to be between 93 km and 183 km. *Certain Activated Carbon From the PRC*, 80 Fed. Reg. 61172 (Oct.9, 2015) (final 2013–14 rev. results), accompanying I&D Memo at cmt. 13. For another, using the same report, it determined that distance to be 37.1 km. *Tapered Roller Bearings and Parts Thereof, Finished and Unfinished, from the PRC*, 81 Fed. Reg. 1396 (Jan. 12, 2016) (final 2013–14 rev. results), accompanying I&D Memo at cmt. 3. For yet another, it determined the distance to be 133 km, *Chlorinated Isocyanurates From the PRC*, 80 Fed. Reg. 39060 (July 8, 2015) (prelim. 2013–14 rev. results), accompanying Decision Memo at 18–19, *unchanged in Chlorinated Isocyanurates From the PRC*, 81 Fed. Reg. 1167 (Jan. 11, 2016) (final 2013–24 rev. results) and accompanying I&D Memo. Agency precedent also shows that

[21] *Id*., referencing Weihai's Redacted Rebuttal Case Brief at 34–42 (Apr. 13, 2006), PDoc 384, and Second SV Submission for Weihai-Ehwa (Nov. 2, 2015) at Ex. 5, PDocs 298–301.

reliance upon a distance factor that is an average distance to the two ports near Bangkok (the Bangkok Port and the Laem Chabang Port) when determining surrogate value for truck freight based on the *Doing Business: Thailand* report is not unusual. *E.g.*, *Multilayered Wood Flooring From the PRC*, 80 Fed. Reg. 41476 (July 15, 2015) (*inter alia*, final 2012–13 rev. results), accompanying I&D Memo at cmt. 9.

DSMC's and the government's attempted rebuttal(s) of Weihai's contention, by pointing out that the *Final Results* are consistent with *Tapered Roller Bearings* above and arguing that Weihai's contention relies on outdated precedent, only underscores the inconsistency among Commerce's various administrative determinations on the freight distance to the Bangkok port of commercial exit. The defendant contends that the *Doing Business* report for 2015 "explicitly" identified the Port of Bangkok as the destination port. However, Weihai's arguments, recitation of the evidence of record, and the administrative precedents discussed by the parties, persuade that the *IDM*'s reasoning does not evince complete consideration or address of Wehiai's arguments on the record by the agency. Those appear to be of cogent materiality, as more fully described in Weihai's briefing, and thus the determination on the meaning of "Port Name: Bangkok" as stated in the *Doing Business* report is unclear. *See United States v. Nova Scotia Food Prods. Corp.*, 568 F.2d 240, 252 (2d Cir. 1977) ("[i]t is not in keeping with the rational [agency] process to leave vital questions, raised by comments which are of cogent materiality, completely unanswered"). In the absence of full consideration and explanation, "Port Name: Bangkok" cannot be concluded to amount to more than a mere scintilla, and as that also appears to be the only buttress upholding the determination of truck freight distance, the derivative conclusions of irrelevancy expressed in the *IDM* appear to amount to circular reasoning. The defendant also contends the court should decline Weihai's argument for the agency to take administrative notice and for the court to take judicial notice of the *Doing Business* report for 2016, but that contention is mooted by the foregoing, upon which the issue of the agency's determination of truck freight distance must be, and hereby is, remanded in order to more fully address Weihai's arguments with respect thereto.

VII. Treatment of Graphite Plates as Direct Material

Jiangsu Fengtai also challenges Commerce's accounting of its graphite plates as indirect rather direct materials consumed in production.

Normal accounting practice treats direct materials as raw materials and indirect materials as part of factory overhead. *See, e.g., Polyvinyl Alcohol from the PRC*, 68 Fed. Reg. 47538 (Aug. 11, 2003) (final less than fair value ("LTFV") determination) and I&D Memo at cmt. 7. In administering NV in accordance with 19 U.S.C. §1677b(c)(1), Commerce distinguishes between direct and indirect material cost treatment on a case-by-case basis. *See, e.g., Magnesium Corp., supra*, 166 F.3d at 1372 (the statute "gives Commerce broad discretion in valuing the factors of production on which factory overhead is based").

The defendant explains that Commerce considers various criteria in determining whether to classify a material as direct or indirect, for example whether the material is physically incorporated into the final product, the material's contribution to the production process, the relative cost of the input material, and how the cost of the input is typically treated in the industry.[22] Where a process material must continually be replenished, Commerce has determined that the input should be treated as direct material rather than indirect material that is part of factory overhead. *See Silicomanganese from the PRC*, 65 Fed. Reg. 31514 (May 18, 2000) (final results admin. review), and accompanying I&D Memo at cmt. 1. Conversely, where process materials are not consumed in the production process but are reused and infrequently replaced, Commerce has determined that the input is an indirect input and classified it as part of factory overhead. *See Laminated Woven Sacks from the PRC*, 73 Fed. Reg. 35646 (June 24, 2008) (final deter.), and accompanying I&D Memo at cmt. 1; *see also Bridgestone Americas, Inc. v. United States*, 34 CIT 573, 576–77, 710 F. Supp. 2d 1359, 1363–64 (2010) (sustaining administrative discretion to consider some or all of these criteria in direct and indirect material analyses).

In the *Final Results*, Commerce determined that the graphite plates were direct materials because they were replaced "regularly" in the course of production of subject merchandise. *IDM* at 43–44. The record shows that Jiangsu Fengtai used graphite molds that were replaced every 258 production cycles. *See id.;* CDoc 297 at 2. Jiangsu Fengtai agrees with this observation. *See* Jiangsu Fengtai Br. at 20. Jiangsu Fengtai also agrees as to the certain amounts of graphite molds used each day and the certain amounts of DSBs produced each

[22] *See, e.g., Persulfates from the PRC*, 70 Fed. Reg. 6836 (Feb. 9, 2005) (final results of admin. review) and I&D Memo at cmt. 4; *Polyvinyl Alcohol from the PRC*, 68 Fed. Reg. 47538 (Aug. 11, 2003) (final LTFV determination) and I&D Memo at cmt. 7; *Certain New Pneumatic Off-The-Road Tires from the PRC*, 73 Fed. Reg. 40485 (July 15, 2008) (final LTFV determination) and I&D Memo at cmt. 27.

day. *Id.* at 22; CDoc 297 at 2. Jiangsu Fengtai argues, however, that Commerce's treatment of the graphite plates as direct rather than indirect materials is not supported by substantial evidence because Commerce's relied upon an incorrect arithmetic formula to calculate the number of day(s) in Jiangsu Fengtai's production process that a graphite plate with a useful life of 258 production cycles would have to have been employed before being replaced, and that Commerce's analysis was based on the false assumption that each graphite plate would be used consecutively in 258 production cycles. *See* JF Br. at 18–24.

Jiangsu Fengtai argues the record rather shows that graphite plates are, in fact, durable and replaced only infrequently in the production process. Jiangsu Fengtai argues the apparent mathematical analysis employed in the *Final Results* to substantiate that finding is marred, and "[i]f the final results were based upon an incorrect mathematical calculation, differing in results by a factor of three, by definition, such determination cannot be based upon substantial evidence". *See, e.g.*, JF Reply at 10. Jiangsu Fengtai further argues that "[s]ince all manufacturing overhead costs were fully accounted for in Commerce's application of surrogate financial ratios, inclusion of graphite plates as a raw material input resulted in a double-counting of the costs attributable to graphite plates." JF Br. at 18 (referencing its administrative case brief at 12–16).

Jiangsu Fengtai failed to raise this latter argument with precision before Commerce and therefore failed to exhaust its administrative remedies on the point. *See* 28 U.S.C. §2637(d); *see, e.g., Corus Staal BV v. United States*, 502 F.3d 1370, 1379 (Fed. Cir. 2007) (requiring, subject to certain exceptions not applicable here, the exhaustion of administrative remedies as a prerequisite to judicial review). *Cf.* JF Admin. Case Br. at 12–16. Even if exhaustion were inapplicable, Jiangsu Fengtai does not explain why indirect materials in the surrogate financial statement would necessarily include "overhead for graphite plates." The argument rather begs the question, *i.e.,* on whether its graphite plates are properly accounted for as direct or indirect materials costs.

Jiangsu Fengtai stresses that Commerce overestimated the number of graphite plates used because the administrative record allegedly shows that graphite plates were only used in the sintering process, which Jiangsu Fengtai alleges takes so much time that a graphite plate could realistically be used only once or twice per day. JF Br. at 22–23. Regardless, the *Final Results* do not employ particular "mathematical" analysis to determine whether the graphite plates are direct or indirect material but rather appeal to simple logic along

a sliding scale of durability. As the defendant argues, whether the proper estimate is lower or higher, Commerce's determination is consistent with past instances where Commerce has considered the frequency with which a part of the production process is replaced and with its practice of treating graphite plates as process materials if they are replaced "regularly" in the course of producing subject merchandise. *See* Def's Resp. at 61, referencing *Diamond Sawblades and Parts Thereof from the PRC*, 71 Fed. Reg. 29303 (May 22, 2006), I&D Memo at cmt. 2 (contrasting respondent's use of steel molds versus graphite molds, both of which are used in the production process, and finding that steel molds have a long usage life and are properly considered overhead, in contrast to graphite molds which are absorbed into the final product and replaced so regularly that they are valued as a direct input). The defendant contends Commerce simply found in this administrative review that the record did not demonstrate that the graphite plates have a sufficiently long usage life to be considered an overhead cost. *See IDM* at 44; CDoc 297 at 2.

At the end of the day, Jiangsu Fengtai's arguments on this issue do not persuade that its original reporting of its graphite plates as direct material[23] was incorrect. Jiangsu Fengtai is essentially asking for a ruling on the meanings of "durability" and "regularly" with regard to replacement in production, but those are matters properly within Commerce's reasonable domain.

VIII. Selection of Surrogate Financial Statement

Commerce derives financial ratios by selecting one or more surrogate financial statements. In both the preliminary and final results, Commerce selected the financial statements of a Thai company, K.M. & A.A. Co., Ltd. ("KM"), after finding that company's production comparable to the subject merchandise and a subject of the primary surrogate country during the POR and fiscal year 2014. *PDM* at 23; *IDM* at 42. Weihai challenges this selection on two grounds.

A

The first of Weihai's challenges on this issue concerns semantics. After issuance of the preliminary results, both Weihai and DSMC submitted comments and evidence concerning the translation of a

[23] The defendant also stresses that Jiangsu Fengtai reported graphite plates to Commerce as a direct material, calculated factors of production for them, and did not amend or otherwise update its reporting in subsequent supplemental responses. *See, e.g.*, JF Br. at 18. The court puts little stock in that contention, as parties, like Commerce, are not "wedded" to particular positions throughout the course of a proceeding but may evolve their thinking and interpretations as new data are placed on the record.

Thai term in KM's financial statements. *IDM* at 42 n.151, citing PDocs 331, 354, 355. The translation of the particular term[24] was relevant in determining whether KM was a producer of comparable merchandise. *IDM* at 42. Weihai argued that the Thai term meant "grinding *stone*," submitted a translation supporting its argument, and argued that KM was therefore not a producer of comparable merchandise. *IDM* at 41; PDoc 354 at Ex. 2. DSMC, in turn, submitted documents indicating that the word at issue translated to "grinding *wheel*" and thus would support the finding that KM was a producer of comparable merchandise. *IDM* at 41.

In response to these submissions, Commerce conducted its own research and placed several documents on the record. *IDM* at 42; PDoc 356. The first document demonstrated that the dictionary definition of the word was "grinding stone." PDoc 356 at 2. The three other documents demonstrated that in the abrasives industry, the same word translated to "grinding wheel." *Id.* at 3–5. Commerce invited comments from interested parties on the seeming polyseme, and the petitioner (only) submitted comments. *See IDM* at 42; PDoc 358. Based on such research and commentary, Commerce found KM a producer of comparable merchandise. *See* 19 U.S.C. §1677b(c)(1).

The issue here is whether, in order to support Commerce's finding that KM was a producer of comparable merchandise, substantial evidence on the record supports Commerce's determination that the translation of the Thai word at issue means "grinding wheel" as opposed to "grinding stone".

Weihai argues that Commerce erred in selecting KM's financial statement. Weihai's argument, that KM is not a producer of comparable merchandise because the record evidence "only" supports finding that the Thai word in dispute means "grinding stone" and not "grinding wheel," is insufficient to overcome Commerce's conclusion from the record that the Thai word at issue as used in the abrasives industry means "grinding wheel." Commerce found that a translation from a third-party translation agency, KM's own website, and websites of other companies in the abrasives industry, taken together, demonstrate that the Thai word at issue means "grinding wheel". *IDM* at 42. *See* PDocs 355, 356. Commerce explained that although the dictionary definition of the Thai word at issue means "grinding stone", in the Thai abrasives industry it is used as a hyponym, *i.e.*, "grinding wheel." *See id.* Commerce also relied on copies of KM's website, which were contemporaneous with the POR, which demonstrated that KM produced grinding wheels. *Id.;* CDoc 263 at Ex. 1C. Notwithstanding Weihai's arguments in this regard (*see* Weihai Reply

[24] *I.e.,* " หินเจียร ". *See*, *e.g.*, Weihai Br. at 9.

at 5–7, quoting, *inter alia, Yantai Xinke Steel Structure Co. v. United States*, 38 CIT ___, Slip Op. 14–38 at 30–31 (Apr. 9, 2014)), the inferences from that evidence constitute substantial evidence of record that KM did, in fact, produce grinding wheels during the POR. Websites of other companies in the same industry also, apparently, demonstrated that the word is employed to mean "grinding wheel." PDoc 356. In short, Weihai's arguments presented here to the contrary do not persuade that Commerce's conclusion thereon was unreasonable.[25]

B

Weihai argues nonetheless that it was unreasonable for Commerce to select KM's financial statements rather than those of Trigger Co. Philippines, Inc. ("Trigger"), a producer of DSBs and subject to a country not on Commerce's list of surrogate countries prepared for the review ("OP List").[26] *See* Weihai Br. at 10–21. On this point, Weihai first contends Commerce's determination in this administrative review differs from its determination in the previous administrative review. But, Commerce's determinations are made on the basis of the administrative record before it,[27] and the fact that Trigger's financial statements were used in the prior administrative reviews does not necessarily inform as to what is the best available information for a subsequent review. *See Downhole Pipe & Equipment LP v. United States*, 36 CIT ___, ____, 887 F. Supp. 2d 1311, 1321 (2012) ("Commerce has broad discretion to determine the best available information in a reasonable manner on a case-by-case basis") (internal quotation marks and citations omitted). In this review, Commerce explained that, unlike the prior administrative review, the record before it contained a usable financial statement from the primary surrogate country. *IDM* at 43. *See also Jacobi Carbons, supra*, 41 CIT at ___, 992 F. Supp. 2d at 1376 ("Commerce's single surrogate country preference is strong and must be given significant weight.").

[25] Weihai also raises reliability concerns over the translation provided by DSMC, arguing that the translation company's conclusion that the Thai word that was translated to grinding wheel "resulted from a discussion with the Petitioners", Weihai Br. at 13, but that argument is undermined by the apparent fact that the translation that Weihai provided was from the same translation company used by DSMC. *Compare* PDoc 354 *with* PDoc 355.

[26] Bosun also challenges Commerce's determination with respect this issue. *See* Bosun Br. at 2–6. In response, the defendant points out that Bosun did not raise this issue in its administrative case brief and therefore it failed to exhaust its administrative remedies. Def's Resp. at 62, referencing *Corus Staal* BV, 502 F.3d at 1379. By not addressing that point in its reply but arguing only further on the merits, Bosun has apparently conceded the point.

[27] *See, e.g., Yama Ribbons and Bows Co., Ltd. v. United States,* 36 CIT ___, ___, 865 F. Supp. 2d. 1294, 1299 (2012) ("Commerce must base its decisions on the record before it in each investigation.").

Weihai next contests Commerce's non-selection of Trigger's financial statements. Weihai Br. at 17–21. Commerce's decision was not only due to the fact that those statements predated the POR and were therefore not contemporaneous, they were not from the primary surrogate country. *IDM* at 43. Weihai does not dispute those observations, *see* Weihai Br. at 27–28, but it argues that the Trigger financial statements fell short of contemporaneity "by two months only" and that "contemporaneity alone is an insufficient justification for dismissing better surrogates." *Id*. at 17, quoting *Blue Field (Sichuan) Food Industry Co. v. United States,* 37 CIT ___, ___, 949 F. Supp. 2d 1311, 1332 (2013). As stated, however, Commerce did not rely upon contemporaneity alone for the *Final Results*, Commerce selected KM's financial statements because they pertained to a producer of comparable merchandise from the primary surrogate country in addition to being contemporaneous. *See Shakeproof Assembly Components, Div. of Ill. Tool Works, Inc. v. United States*, 268 F.3d 1376, 1382 (Fed. Cir. 2001) ("[i]n determining the valuation of the factors of production, the critical question is whether the methodology used by Commerce is based on the best available information and establishes antidumping margins as accurately as possible.").

Weihai argues, nonetheless, that the fact that Trigger's financial statements are from the Philippines should not be an impediment. *See* Weihai Br. at 18–20. It argues that KM's financial statements were not as detailed as Trigger's, for example with respect to inventories open and closed and has no specific line item for outward freight and handling, and that Commerce should conduct a "side by side" comparison of KM's and Trigger's financial statements in accordance with *CP Kelco US, Inc. v. United States*, 40 CIT ___, Slip Op. 16–36 (Apr. 8, 2016).

Responding, DSMC contends "neither Weihai nor any other party argued below that KM's statements were flawed by reason of a lack of detail" and therefore Weihai's argument suffers from a failure to exhaust its administrative remedies.[28] *See* DSMC Br. at 24. Weihai replies that it did exhaust, by alerting Commerce to the fact that "the 2013 Trigger financial is the most detailed statement available on record" and by discussing breakouts of certain specific line items in Trigger's financial statement in its administrative case brief.

That is a weak reed. Arguing in favor of particular financial statements for the purposes of an administrative review does not equate to

[28] The court has discretion to require exhaustion of administrative remedies "where appropriate", 28 U.S.C. §2637(d), *see, e.g., Cemex, S.A. v. United States*, 133 F.3d 897, 905 (Fed. Cir. 1998), but it tends towards a "strict" requirement of exhaustion in the international trade law context. *See, e.g., Ta Chen Stainless Steel Pipe, Ltd. v. United States*, 28 CIT 627, 644, 342 F. Supp. 2d 1191, 1205 (2004).

a reason for impugning the usability of others on the record. The requirement of exhaustion, generally speaking, imposes a more rigorous standard on the precision of argumentation at the administrative level,[29] but even if it could be stated that Weihai did exhaust, the arguments it advances do not suffice to overcome Commerce's regulatory preference to value all factors of production using data from a single surrogate country wherever possible. *See* 19 C.F.R. §351.408(c)(2). That approach has not been held, *per se*, unreasonable. *See, e.g., Jacobi Carbons*, 41 CIT at ___, 992 F. Supp. 2d at 1376; *Camau Frozen Seafood Processing Import Export Corp. v. United States*, 37 CIT ___, ___, 929 F. Supp. 2d 1352, 1355–56 (2013).

The problems Wehai attempts to overcome are not only that the contested financial statements concern companies from different countries, its preferred financial statements (for Trigger) pertain to a producer subject to a country that is not even on the OP List for this review, which remains the case notwithstanding its arguments that the Philippines should be regarded as economically comparable to the PRC. *See, e.g.*, Weihai Reply at 11–12. In the final analysis, even if those problems can be surmounted, Weihai's overall contention, once again, is effectively asking the court to supplant Commerce's decision from its consideration of KM's versus Trigger's financial statements. *See, e.g.*, Weihai Reply at 11 ("the less than ideal albeit reliable Trigger financial statement is preferable to [KM]'s financial statement, which is not only unreliable but is also beset with poor data quality") (court's bracketing). The court's role, however, is not to re-weigh the evidence of record, it is solely to determine whether the

[29] *See, e.g., Boomerang Tube LLC v. United States*, 856 F.3d 908 (Fed. Cir. 2017); *Stanley Works (Langfang) Fastening Systems Co. v. United States*, 41 CIT ___, ___, 279 F. Supp. 3d 1172, 1189 (2017) ("[b]road, generalized challenges to the differential pricing analysis do not incorporate any conceivable challenge to elements of that analysis"); *Icdas Celik Enerji Tersane ve Ulasim Sanayi, A.S. v. United States*, 41 CIT ___, Slip Op. 17–152 at 12–13 (Nov. 17, 2017) (mere notice fails to accomplish the twin purposes of the exhaustion requirement); *Weishan Hongda Aquatic Food Co. v. United States*, 41 CIT ___, 273 F. Supp. 3d 1279, 1286 (2017) ("exhaustion generally requires a party to present *all* arguments in its administrative case and rebuttal briefs before raising those issues before this court") (emphasis in original; citations omitted), *appeal filed sub nom. China Kingdom (Beijing) Import v. United States*, No. 18–1375 (Fed. Cir. Jan. 3, 2018); *Seah Steel Vina Corp. v. United States*, 41 CIT ___, ___, 269 F. Supp. 3d 1335, 1350 (2017) (failure to exhaust argument that selected financial statements did not represent producer of subject merchandise); *Union Steel Manufacturing Co. v. United States*, 36 CIT ___, ___, 837 F. Supp. 2d 1307, 1332 (2012) ("mere fact that relief was unlikely is insufficient as a ground to waive the exhaustion requirement"). *Cf. also, e.g., Great American Insurance, supra*, 738 F.3d at 1328 ("[i]t is well established that arguments that are not appropriately developed in a party's briefing may be deemed waived"); *MTZ Polyfilms, Ltd. v. United States*, 33 CIT 1575, 1578, 659 F. Supp. 2d 1303, 1308 (2009) ("issues adverted to in a perfunctory manner, unaccompanied by some effort at developed argumentation, are deemed waived[; i]t is not enough merely to mention a possible argument in the most skeletal way, leaving the court to do counsel's work, create the ossature for the argument, and put flesh on its bones") (citation omitted).

evidence of record to support Commerce's determination is "substantial," meaning "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion". *E.g., PAM, S.p.A. v. United States*, 582 F.3d 1336, 1339 (Fed. Cir. 2009).

Here, neither of the contested financial statements are "perfect" for the purpose of determining surrogate financial ratios for this administrative review, and while one might well conclude that KM's financial statements offer more detail and relate to a producer of DSBs (not merely "comparable" merchandise), the mere fact that the record may support a different choice of financial statement does not mean Commerce's choice is unsupported by substantial evidence. *See Universal Camera Corp., supra*, 340 U.S. at 488. *Cf., e.g., Catfish Farmers of America v. United States*, 33 CIT 1258, 1273 (2009) ("[w]here Commerce is faced with the choice of selecting from among imperfect alternatives, it has the discretion to select the best available information for a surrogate value so long as its decision is reasonable"). Given all the variables involved in Commerce's decision-making, the court cannot conclude that the KM and Trigger financial statements are not "fairly conflicting." The record contained detailed and contemporaneous financial statements from a producer of comparable merchandise in the primary surrogate country, and Commerce determined those statements to be the best available evidence on the record for purposes of the review. *IDM* at 43. Weihai does not persuade that a different result must be obtained.

IX. Inclusion of Weihai in the Administrative Review

Weihai also challenges Commerce's determination to reject the request from Robert Bosch Tool Corporation ("Bosch") to rescind its request for review of Weihai.

A. Background

Commerce issued its notice of opportunity to request an administrative review on the antidumping order for DSBs from the PRC in November 2014. *Antidumping or Countervailing Duty Order, Finding, or Suspended Investigation*, 79 Fed. Reg. 65176 (Nov. 3, 2014) (opp. to req. admin. review). DSMC, Weihai, and Bosch timely filed review requests for Weihai.[30] Commerce initiated the administrative review of the POR for DSBs from the PRC the following month. *Antidumping and Countervailing Duty Administrative Reviews*, 79 Fed. Reg. 76956 (Dec. 23, 2014).

[30] *See, e.g.*, PDocs 3 (DSMC request for review), 6 (Bosch request for review). DSMC also requested review of other DSB producers. *See* PDoc 3.

19 C.F.R. §351.213(d)(1) provides that if a party requesting administrative review withdraws that request within 90 days of publication of the review's initiation notice, Commerce will rescind the review. The regulation also states that the "Secretary may extend this time limit if the Secretary decides that it is reasonable to do so." Under that provision, the parties had until March 23, 2015 to rescind their request for review. DSMC and Weihai submitted timely requests to withdraw their review requests with respect to Weihai. *See* PDoc 108, 109. Bosch's request for review of Weihai, however, remained on the record. PDoc 133.

On April 7, 2015, Commerce selected Jiangsu Fengtai and Weihai as the mandatory respondents. PDoc 133. On the same day, Commerce issued its questionnaires. *Id.* On April 8, 2015, sixteen days after the deadline to rescind a request, Bosch attempted to rescind its request to review Weihai. PDoc 119. Bosch's request noted that Commerce has previously interpreted the regulation to allow rescission where it has not committed substantial resources to the review, the review has not progressed to a point where it would be unreasonable to allow withdrawal of requests for review, and withdrawal does not constitute "abuse" of departmental procedures. *Id*. Bosch argued that the circumstances of the case thus far were in accordance with such conditions. *Id*.

Weihai then filed its own submission in support of Bosch's request to Commerce to accept Bosch's belated request to withdraw its request for review of Wehai. Bosch's request argued that certain "unexpected events" should excuse its late filing in accordance with Commerce's then-current policy. PDoc 120. *See* Weihai 56.2 Br. at 46–47. DSMC also supported Weihai's and Bosch's request to accept the latter's withdrawal request. PDoc 121.

Commerce rejected Bosch's request to withdraw its review request of Weihai on May 12, 2015, stating that it did not find that the facts Bosch advanced to explain the late filing constituted "extraordinary circumstances" in accordance with *Extension of Time Limits; Final Rules*, 78 Fed. Reg. 57790, 57793 (Sep. 20, 2013) ("*Final Rules*"). PDoc 133.

B. Analysis

Weihai argues Commerce's decision was unlawful because the procedural background of this case resembles that of *Glycine & More, Inc. v. United States*, 39 CIT ___, 107 F. Supp. 3d 1356 (2015), *remand results sustained*, 40 CIT ____, 181 F. Supp. 3d 1360 (2016) ("*Glycine & More*"), *affirmed*, 880 F.3d 1335 (Fed. Cir. 2018). The defendant disagrees, arguing that Weihai did not raise the issue of the denial of

its request to rescind the review in its administrative case brief and therefore failed to exhaust its administrative remedies. In the alternative, the defendant argues Commerce acted lawfully by including Weihai in the administrative review, due to the outstanding request by Bosch for review of Weihai.

The defendant's alternative argument is undercut by *Glycine & More*'s holding that a certain 2011 published guidance document[31] ("*2011 Notice*), which is also implicated in the matter at bar, was an unlawful interpretation of 19 C.F.R. §351.213(d)(1). In that case, the sole U.S. petitioner submitted a timely request for rescission of the review. "Baoding," a respondent in the proceeding, also desired rescission, but its request therefor was not timely submitted. Baoding thereafter notified Commerce that it would no longer participate in the review. Proceeding nonetheless, Commerce's preliminary results assigned Baoding the PRC entity rate. Thereafter, Glycine & More appeared in the proceeding and filed a case brief objecting to Commerce's rejection of Baoding's request to withdraw the review request and also assignment of the PRC-wide rate. *See generally* 39 CIT at ___, 107 F. Supp. 3d at 1358–59. In the final results thereof, Commerce's refusal to rescind the review was grounded upon the *2011 Notice* that, as subsequently observed by the Court of Appeals for the Federal Circuit, "dramatically changed [the] meaning" of 19 C.F.R. §351.213(d)(1) to require a showing of "extraordinary circumstances" which "prevented" the ability to submit a timely request for rescission. 880 F.3d at 1340, quoting *2011 Notice*, 76 Fed. Reg. at 45773. The appellate court has decided the *2011 Notice* was unambiguous and an "incompatible departure from the clear meaning of the regulation[,] . . . not simply an interpretive statement regarding ambiguity in the regulation or a general statement of policy" *Id*. at 1345. Because the *2011 Notice* lacked "the necessary notice-and-comment rulemaking, it has no legal standing, and thus provides no basis upon which the Secretary could make his decision." *Id*.

Weihai argues in reply to the defendant's points regarding exhaustion that the doctrine should not bar its challenge, that applicable precedent compels rescission, and that it would be inappropriate to preclude judicial recourse because it had vigorously urged Commerce to rescind the review as to it at the very outset of the proceeding, a position with which petitioner itself agreed. At the end of the review, Weihai continues, rearguing for rescission in its case brief, a review during which it had been forced to expend substantial resources participating, would have been "futile." Weihai contends that once

[31] *Antidumping or Countervailing Duty Order, Finding, or Suspended Investigation; Opportunity To Request Administrative Review*, 76 Fed. Reg. 45773 (Aug. 1, 2011).

Commerce denied its rescission request in May 2016, Commerce rendered an "irreversible" decision to proceed with the review, and as a result Weihai was forced to proceed or suffer the penalty of incurring an adverse facts available result if it did not. Thus, Weihai submits, "the damage was done", and under these circumstances, Weihai complains, it should not have been obligated to brief agency reconsideration of the rescission that had already been denied unequivocally, because by doing so it would in effect be asking Commerce to ignore its participation in the administrative review — as if a subsequent reversal of the earlier rescission denial could undo the prejudicial impact of the initial denial. "Adherence to such an absurd formality would not be 'appropriate.'" Weihai Reply at 40, quoting 28 U.S.C. §2637(d).

However, the defendant's response correctly points out that the background of the matter at bar differs materially from that of *Glycine & More*, in which that plaintiff presented in its administrative case brief "all arguments that continue to be relevant to the Secretary's . . . final results".[32] 19 C.F.R §351.309(c)(2). Weihai did not do likewise. Rather, it argues the gesture would have been futile. To persuade on that argument, "a party must demonstrate that it would be required to go through obviously useless motions in order to preserve its rights." *Corus Staal BV v. United States*, 502 F.3d 1370, 1379 (Fed. Cir. 2007) (quoted decisions omitted). The inability of an agency to provide an adequate or appropriate remedy, for example, would trigger futility. *PPG Indus., Inc. v. United States*, 14 CIT 522, 542, 746 F. Supp. 119, 137 (1990) (futility applies where "the agency has no power to provide the remedy sought, or where the remedy would be manifestly inadequate" (citations omitted)). Futility may also be shown where "an agency has articulated a very clear position on the issue which it has demonstrated it would be unwilling to reconsider." *Pakfood Pub. Co. v. United States*, 34 CIT 1122, 1145, 724 F. Supp. 2d 1327, 1351 (2010) ("*Pakfood*"), quoting *Randolph-Sheppard Vendors of America v. Weinberger*, 795 F.2d 90, 105 (D.C. Cir. 1986). *Pakfood* observed that in the case of the latter, the agency's commitment to its position must be so strong as to render requiring a party to raise the issue with the agency "'inequitable and an insistence of a useless formality.'" 34 CIT at 1145–46, 724 F. Supp. 2d at 1145–46, quoting *Luoyang Bearing Factory v. United States*, 26 CIT 1156, 1186 n.26

[32] Regulatory exhaustion is "explicitly imposed by the agency as a prerequisite to judicial review." *Corus Staal BV v. United States*, 502 F.3d 1370, 1379 (Fed. Cir. 2007).

(2002) (internal quotation marks and citation omitted). *Cf. Itochu Building Prods. v. United States*, 733 F.3d 1140, 1147 (Fed. Cir. 2013) ("there was no reasonable prospect that Commerce would have changed its position").

The court is not persuaded that raising the issue in Weihai's administrative case brief would have been futile. "[T]he mere fact that Commerce rejected an argument at an earlier stage of an administrative proceeding does not, without more, suffice to render a party's continued adherence to such argument an exercise in futility." *Pakfood*, 34 CIT at 1146, 724 F. Supp. 2d at 1351 (citation omitted).[33] "Even where it is likely that Commerce would have rejected a party's arguments without changing course, 'it would still [be] preferable, for purposes of administrative regularity and judicial efficiency, for [the party] to make its arguments in its case brief and for Commerce to give its full and final administrative response in the final results.'" *Id*., quoting *Corus Staal*, 502 F.3d at 1380. Had the *Final Results* announced a rate that was more favorable to Weihai, it would hardly be here to complain; indeed, Weihai's claim at this point highlights part of the reason for the agency's adoption of the 90-day deadline for withdrawing requests for review in the first place. *See Antidumping Duties; Countervailing Duties*, 62 Fed. Reg. 27296, 27317 (May 19, 1997) ("we are concerned with the situation in which a party requests a review, the Department devotes considerable time and resources to the review, and then the party withdraws its request[ ] once it ascertains that the results of the review are not likely to be in its favor").

Nonetheless, it is apparent that *Glycine & More* has altered the legal *status* upon which rests the administrative decision not to accept Borsch's belated request to withdraw its request for review. That is a new and authoritative legal decision that appears to impact directly the legal underpinning of the underlying administrative decision, and the doctrine of intervening judicial interpretation applies here. *See Sucocitrico Cutrale Ltda. v. United States*, 36 CIT ___, ___, Slip Op. 12–71 at 5–7 (2012); *Corus Staal BV v. United States*, 30 CIT 1040, 1050 n.11 (2006). *Cf. SKF USA Inc. v. United States*, 254 F.3d 1022, 1028 (Fed. Cir. 2001), referencing, *inter alia, Nat'l Fuel Gas Supply Corp. v. Fed. Energy Regulatory Comm'n,* 899 F.2d 1244, 1249 (D.C. Cir. 1990) (granting Commission's request for remand following new legal decision). Remand of the administrative decision not to accept Bosch's 16-day late request to withdraw its review request, which decision was based on the "extraordinary circumstances" stan-

[33] *See also, e.g., PPG Industries*, 14 CIT at 543, 746 F. Supp. at 137 ("that a party to an administrative proceeding finds an argument may lack merit, or had failed to prevail in a prior proceeding based on different facts, does not, without more, rise to the level of futility").

dard of the invalidated *2011 Notice*, is also consistent with "[t]he general rule . . . that an appellate court must apply the law in effect at the time it renders its decision." *Thorpe v. Housing Authority of City of Durham*, 393 U.S. 268, 281 (1969).

Conclusion

For the above reasons, the case is hereby remanded to the International Trade Administration, U.S. Department of Commerce for further proceedings consistent with this opinion. The results of remand shall be due July 20, 2018, and by the fifth business day after the filing thereof with the court, the parties shall confer and file a joint status report as to a proposed scheduling of comments, if any, on those results.

So ordered.

Dated: March 22, 2018
New York, New York

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

Slip Op. 18–36

CP KELCO US, INC., Plaintiff, v. UNITED STATES, Defendant, and NEIMENGGU FUFENG BIOTECHNOLOGIES CO., LTD. and SHANDONG FUFENG FERMENTATION, CO., LTD., Defendant-Intervenors.

Before: Richard W. Goldberg, Senior Judge
Consol. Court No. 13–00288

[Remanding the Department of Commerce's remand redetermination.]

Dated: April 5, 2018

Matthew L. Kanna, Arent Fox LLP, of Washington, D.C., for plaintiff.

Alexander O. Canizares, Trial Attorney, Commercial Litigation Branch, Civil Division, U.S. Department of Justice, of Washington, D.C., for defendant. With him on the brief were *Chad A. Readler*, Principal Deputy Assistant Attorney General, *Jeanne E. Davidson*, Director, and *Patricia M. McCarthy*, Assistant Director. Of counsel on the brief was *Brandon J. Custard*, Office of the Chief Counsel for Trade Enforcement and Compliance, U.S. Department of Commerce, of Washington, D.C.

Andrew T. Schutz, Ned H. Marshak, Dharmendra Choudhary, and *Brandon Petelin*, Grunfeld, Desiderio, Lebowitz, Silverman & Klestadt LLP, of Washington, D.C., for defendant-intervenors.

OPINION

Goldberg, Senior Judge:

This matter returns to the court following a third remand of the final determination of the U.S. Department of Commerce ("Commerce" or "the Department") in its antidumping investigation of xanthan gum from the People's Republic of China. *Xanthan Gum from the People's Republic of China*, 78 Fed. Reg. 33,351 (Dep't Commerce June 4, 2013) (final determ.) ("*Final Determination*") and accompanying Issues & Decision Mem. ("I&D Mem."); *Xanthan Gum from the People's Republic of China*, 78 Fed. Reg. 43,143 (Dep't Commerce July 19, 2013) (am. final determ.). The three prior opinions of this court more thoroughly set forth the facts underlying this appeal. *CP Kelco US, Inc. v. United States*, Slip Op. 15–27, 2015 WL 1544714 (CIT Mar. 31, 2015) ("*CP Kelco I*"); *CP Kelco US, Inc. v. United States*, Slip Op. 16–36, 2016 WL 1403657 (CIT Apr. 8, 2016) ("*CP Kelco II*"); *CP Kelco US, Inc. v. United States*, 41 CIT __, 211 F. Supp. 3d 1338 (2017) ("*CP Kelco III*"). The court presumes familiarity with those opinions and repeats only the facts critical to the disposition of this case. For reasons discussed below, the court again remands to Commerce.

BACKGROUND

In its *Final Determination*, Commerce concluded that the Thai Ajinomoto financial statements constituted a better source for calculating surrogate financial ratios than the Thai Fermentation finan-

cial statements. I&D Mem. cmt. 2. Commerce first disregarded the Thai Fermentation statements on the basis that the record did not contain a full English translation, without making a finding that the untranslated portions were "vital" to Commerce's calculations. *Id.* Commerce then selected the only remaining statements, those of Thai Ajinomoto, despite the fact that the Thai Ajinomoto statements "show evidence of the receipt of countervailable subsidies." *Id.* Defendant-Intervenors Neimenggu Fufeng Biotechnologies, Co., Ltd. and Shandong Fufeng Fermentation Co., Ltd. (collectively, "Fufeng") challenged this determination, arguing that Commerce failed to properly justify its disregard of the Thai Fermentation statements. Def.-Intervenor Rule 56.2 Mot. for J. on the Agency R. 13–22, ECF No. 28 (Mar. 7, 2014). The court agreed, remanding for Commerce to provide a more robust explanation for its choice of financial statements. *CP Kelco I*, 2015 WL 1544714, at *7.

Commerce then submitted its Final Results of Redetermination Pursuant to Court Remand, ECF No. 83 (July 28, 2015) ("First Remand Results"). Commerce again chose the Thai Ajinomoto statements over the Thai Fermentation statements, justifying its selection by explaining the issues presented by the incompleteness of financial statements generally. *Id.* at 10–12. However, the court again remanded the issue, finding that Commerce still gave short shrift to the issues presented by the countervailable subsidies reflected in the Thai Ajinomoto statements. *CP Kelco II*, 2016 WL 1403657, at *5.

The court presented Commerce with three paths it could take in order to render a potentially reasoned and supported decision. Commerce could "compare the Thai Ajinomoto and Thai Fermentation financial statements side by side in an evenhanded manner, evaluating the relative strengths and weaknesses of each." *Id.*. As an alternative, in accordance with past practice, Commerce could "find that the Thai Fermentation statements are missing 'vital information,'" should the record support such a finding. *Id.* at *5 n.5. Finally, the court stated that "[a]nother prospective alternative would be for Commerce to put its resources towards explaining a change in its practice, from rejecting statements when they are missing vital information (and, outside of this practice, occasionally one-off rejecting statements that are incomplete) to invariably rejecting any incomplete statements." *Id.*

Commerce, as it did in its *Final Determination* and in its First Remand Results, again found that the Thai Ajinomoto statements are the better surrogate financial ratio source. Final Results of Redetermination Pursuant to Ct. Order 8, ECF No. 109 (Aug. 22, 2016) ("Second Remand Results"). Commerce based its determination on

what it described as a new practice of "rejecting from use financial statements that are incomplete . . . unless there are no other financial statements left on the record." *Id.* at 7.

The court again remanded, explaining that "the practice Commerce advance[d] [was] not reasonable and that it result[ed] in an unsupported determination." *CP Kelco III*, 41 CIT at __, 211 F. Supp. 3d at 1340. The court gave Commerce the option of doing a faithful comparison of the two statements or of making a "fact-sensitive finding" that the untranslated information in the Thai Fermentation statements was "vital," such that Commerce could not discern the reliability of those statements. *Id.*, 41 CIT at __, 211 F. Supp. 3d at 1345.

Commerce opted for the second alternative, explaining that "Thai Fermentation's financial statements are missing complete translations for two paragraphs of the property plant and equipment (*i.e.*, fixed asset) footnote" which are central to calculating depreciation expense. Final Results of Third Redetermination Pursuant to Ct. Order 7, ECF No. 157 (Sept. 18, 2017) ("Third Remand Results"). Commerce further explained that:

> in the instant proceeding, depreciation expense comprises . . . a majority of the overhead costs for Thai Fermentation. [And] by virtue of comprising all or most of a company's overhead costs, depreciation expense is an integral component of the denominator of the selling, general and administrative (SG&A) expense and profit ratios. Thus, depreciation can significantly impact the surrogate financial ratios . . . .

Third Remand Results at 8 (footnotes omitted). Commerce further provided that "the narrative portions of a company's footnotes can provide vital information regarding asset impairments, changes in useful lives of fixed assets, revaluations of fixed assets and the capitalization of production costs, among other things that are not shown on the numeric fixed asset schedule." *Id.* at 10. To illustrate the kind of "vital" information that could be lurking within the two untranslated paragraphs of a footnote in the Thai Fermentation financial statements, Commerce cited to prior proceedings in which the Department adjusted reported depreciation figures. *Id.* at 9 (citing *Certain Steel Concrete Reinforcing Bars from Turkey*, 71 Fed. Reg. 65,082 (Dep't Commerce Nov. 7, 2006) and accompanying Issues & Decision Mem. cmt. 4; *Certain Preserved Mushrooms from India*, 66 Fed. Reg. 42,507 (Dep't Commerce Aug. 13, 2001) (final results) and accompanying Issues & Decision Mem. cmt. 7; *Certain Cut-To-Length Carbon-Quality Steel Plate Products from Korea*, 64 Fed. Reg. 73,196, 73,205 (Dep't Commerce Dec. 29, 1999) (final determ.)).

JURISDICTION AND STANDARD OF REVIEW

The court has jurisdiction pursuant to 28 U.S.C. § 1581(c). The court must sustain Commerce's remand redetermination if it is supported by substantial record evidence, is otherwise in accordance with law, and is consistent with the court's remand order. *See Ad Hoc Shrimp Trade Action Comm. v. United States*, 38 CIT __, __, 992 F. Supp. 2d 1285, 1290 (2014); *see also* 19 U.S.C. § 1516a(b)(1)(B)(i). "The 'substantial evidence' standard of review can be roughly translated to mean 'is the determination unreasonable?'" *Thai Plastic Bags Indus. Co. v. United States*, 37 CIT __, __, 904 F. Supp. 2d 1326, 1329 (2013) (citing *Nippon Steel Corp. v. United States*, 458 F.3d 1345, 1351 (Fed. Cir. 2006).

DISCUSSION

Unlike the prior proceedings cited by Commerce, here the Department has not identified a particular depreciation methodology, class of fixed assets, or statement by the auditor in the Thai Fermentation statements that is questionable or unreliable.[1] The 28-page Thai Fermentation financial statements provided to Commerce have full English translations with the exception of two paragraphs in a footnote concerning fixed assets. App. to Fufeng's Rule 56.2 Mot. for J., ECF No. 35 at 80–102 (Mar. 13, 2014). There is no allegation that this minor oversight was intentional. Potentially mitigating the deficiency, there are full translations of notes explaining the methodology for depreciating fixed assets. *Id.* at 86–89 (Notes to Financial Statements 2.3, 2.5, and 3.6). Ultimately, while Commerce demonstrates that the Thai Fermentation statements might be *more* reliable with a complete translation of footnote 12, Commerce has not made the case that the statements are *un*reliable, warranting their wholesale rejection. By contrast, the Thai Ajinomoto financial statements selected by Commerce are in fact, as opposed to hypothetically, unreliable, due to evidence of countervailable subsidies. *See* I&D Mem. cmt. 2.

Commerce's general discussion about depreciation does not comply with the court's instruction to make "a fact-sensitive finding that the Thai Fermentation statements are missing 'vital' information." *See CP Kelco III*, 41 CIT at __, 211 F. Supp. 3d at 1345. Of course, the court understands that it is difficult for Commerce to explain the significance of information it does not have. Therefore, on a record containing reliable alternative data, Commerce might reasonably

[1] *See, e.g., Certain Cut-To-Length Carbon-Quality Steel Plate Products from Korea*, 64 Fed. Reg. at 73,206 (making adjustments to the reported depreciation expense because respondent had recently "departed from its historical useful life policy by aggressively extending asset lives, which resulted in a dramatic reduction in depreciation expenses.").

reject financial statements because those statements are missing narrative information concerning depreciation. But Commerce must use the "best available information" on *this* record. 19 U.S.C. § 1677b(c)(1).

To be sure, "[t]he Court's role . . . is not to evaluate whether the information Commerce used was the best available, but rather whether a reasonable mind could conclude that Commerce chose the best available information." *Catfish Farmers of Am. v. United States*, 33 CIT 1258, 1273, 641 F. Supp. 2d 1362, 1377 (2009) (citation and internal quotation marks omitted). Commerce has the discretion to choose from among reasonable alternative determinations and the court will not supplant the Department's discretion with its own. However, the court does not find that the record supports more than one reasonable result. As long as the Thai Fermentation statements remain untranslated, any deficiency in those statements is too speculative and insignificant, when compared to that of the Thai Ajinomoto statements. At bottom, the record does not contain substantial evidence supporting Commerce's decision to discard the Thai Fermentation statements from this particular record.[2]

Moreover, "the methodology used by Commerce" to select financial statements is not reasonably calculated to "establish[] the antidumping margins as accurately as possible." *See Shakeproof Assembly Components, Div. of Ill. Tool Works, Inc. v. United States*, 268 F.3d 1376, 1382 (Fed. Cir. 2001). Commerce admits that it has a "general practice [] to disregard financial statements that show that a company has received countervailable subsidies" when the record contains "other sufficiently reliable and representative data." I&D Mem. cmt. 2. Therefore, Commerce could have disregarded the Thai Ajinomoto financial statements because of the countervailable subsidies, leaving the Thai Fermentation statements as the only "sufficiently reliable" statements on the record.[3] Instead, the Department invoked

[2] Fufeng insists that Commerce's position is also inconsistent with its general practice to not "go behind the numbers" of financial statements prior to using those statements for surrogate values. Fufeng Comments on Third Redetermination 14, ECF No. 159 (citing *Multilayered Wood Flooring from China*, 76 Fed. Reg. 64,318 (Dep't Commerce Oct. 18, 2011) (final determ.)). However, Commerce is not seeking to go "behind," *i.e.* outside, the Thai Fermentation financial statements. Rather, consistent with practice, Commerce seeks information *within* the statements it insists may call into question the reliability of other information in those same statements. *Cf. Tapered Roller Bearings and Parts Thereof, Finished and Unfinished, from China*, 76 Fed. Reg. 3,086 (Dep't Commerce Jan. 19, 2011) (final results) and accompanying Issues & Decision Mem. cmt. 16 ("[T]he Department will only seek information from within the surrogate financial statements in determining the appropriateness of including an item in the financial ratio calculation, and will not go 'behind' the statement.").

[3] Indeed, the Department has previously found incomplete data to be sufficiently reliable. *See, e.g., Ass'n of Am. Sch. Paper Suppliers v. Unites States*, 35 CIT __, __, 791 F. Supp. 2d 1292, 1299 (2011).

the identical practice for incomplete statements. This leaves the court with the distinct impression that Commerce has created an arsenal of "practices" that allow it to the craft the record to fit a pre-determined outcome. The court will not sanction this.

Unlike proceedings where entire sections, pages, or auditors' reports are actually missing from financial statements,[4] any mystery surrounding the Thai Fermentation statements is essentially of the Department's own making. Here, Commerce is—and has always been—in possession of the "missing" information, a mere *ten lines* of text in a 28-page document. Moreover, Commerce has had many opportunities to solicit a translation of the paragraphs or to translate the paragraphs itself, as it has done before. *See, e.g., Diamond Sawblades and Parts Thereof from China*, 81 Fed. Reg. 38,673 (Dep't Commerce June 14, 2016) (final results) and accompanying Issues & Decision Mem. cmt 14. Instead, Commerce has inexplicably dedicated significant resources to avoid this common sense course of action, with disingenuous reference to deadlines and closed records.[5]

In light of the embarrassingly lengthy history of this case, the court will not provide the Department any further room to maneuver. Unfortunately, the court has no reasonable expectation that Commerce would provide an even-handed analysis of the available data on the record if given the opportunity, again, to exercise its discretion. Therefore, on remand, the Department is free to either translate the two paragraphs or leave them as is. Regardless, Commerce must use the Thai Fermentation statements to calculate surrogate financial ratios.

CONCLUSION AND ORDER

For the reasons discussed above, the court again remands Commerce's selection of the Thai Ajinomoto financial statements over the Thai Fermentation financial statements.

Upon consideration of all papers and proceedings herein, it is hereby:

ORDERED that the *Third Remand Results* are remanded to Commerce for redetermination in accordance with this Opinion and Order; it is further

[4] *See, e.g., Mid Continent Steel & Wire, Inc. v. United States*, 41 CIT __, __, 203 F. Supp. 3d 1295, 1313 (2017) (finding that substantial evidence supported Commerce's decision to summarily discard financial statements that left untranslated the audit report, several financial statements, and all but one footnote).

[5] The court suspects that the parties know the content of the untranslated text, so Commerce's unwillingness to place a translation on the record speaks volumes. If the translated text in fact rendered Thai Fermentation's reported depreciation figures unreliable, the Department likely would have exercised its broad discretion to re-open and supplement the record.

ORDERED that Commerce must issue a redetermination in accordance with this Opinion and Order that is in all respects supported by substantial evidence, in accordance with law, and supported by adequate reasoning; it is further

ORDERED that Commerce shall recalculate Fufeng's weighted-average dumping margins using surrogate financial ratios derived from the Thai Fermentation financial statements; it is further

ORDERED that Commerce shall have ninety (90) days from the date of this Opinion and Order in which to file its remand redetermination, which shall comply with all directives in this Opinion and Order; that the Plaintiff and Defendant-Intervenor shall have thirty (30) days from the filing of the Remand Redetermination in which to file comments thereon; and that the Defendant shall have thirty (30) days from the filing of Plaintiff and Defendant-Intervenor's comments to file comments.

Dated: April 5, 2018
New York, New York

/s/ Richard W. Goldberg
RICHARD W. GOLDBERG
SENIOR JUDGE

Slip Op. 18–37

SEVERSTAL EXPORT GMBH, and SEVERSTAL EXPORT MIAMI CORPORATION, Plaintiffs, v. UNITED STATES of AMERICA, UNITED STATES CUSTOMS and BORDER PROTECTION, ACTING COMMISSIONER KEVIN K. MCALEENAN, DEPARTMENT of COMMERCE, SECRETARY WILBUR ROSS, and PRESIDENT DONALD J. TRUMP, Defendants.

Before: Jane A. Restani, Judge
Court No. 18–00057
PUBLIC VERSION

[Motion for preliminary injunction denied]

Dated: April 5, 2018

Mark Lunn, Thompson Hine LLP, of Washington, DC, argued for Plaintiffs Severstal Export GmbH and Severstal Export Miami Corp. With him on the brief were *David Wilson* and *Sarah Hall*, Thompson Hine LLP, of Washington, DC.

Tara Hogan, Commerical Litigation Branch, Civil Division, U.S. Department of Justice, of Washington, DC, argued for defendants. With her on the brief were *Joshua Kurland* and *Stephen Tosini*, Commerical Litigation Branch, Civil Division, U.S. Department of Justice, of Washington, DC.

OPINION

Restani, Judge:

Severstal Export GMBH ("Severstal Export") and Severstal Export Miami Corporation ("Severstal Miami") (collectively, "plaintiffs") seek to enjoin the enforcement of Presidential Proclamation No. 9705, as subsequently amended. Proclamation No. 9705, 83 Fed. Reg. 11,625 (Mar. 8, 2018); Proclamation No. 9711, 83 Fed. Reg. 13,361 (Mar. 22, 2018) (collectively, the "Steel Tariff").

BACKGROUND

On April 19, 2017, the Secretary of Commerce opened an investigation into the impact of steel imports on U.S. national security. OFFICE OF TECH. EVALUATION, U.S. DEP'T OF COMMERCE, THE EFFECT OF IMPORTS OF STEEL ON THE NATIONAL SECURITY: AN INVESTIGATION CONDUCTED UNDER SECTION OF THE TRADE EXPANSION ACT OF 1962, AS AMENDED, at 18 (Jan. 11, 2018) ("Steel Report"). After notifying the Secretary of Defense, *id.* at App'x A, the investigation was conducted and the U.S. Department of Commerce ("Commerce") issued its report on January 11, 2018, *see generally id.*

The Steel Report stated that: (A) "Steel is Important to U.S. National Security," (B) "Imports in Such Quantities as are Presently

Found Adversely Impact the Economic Welfare of the U.S. Steel Industry," (C) "Displacement of Domestic Steel by Excessive Quantities of Imports has the Serious Effect of Weakening our Internal Economy," and (D) "Global Excess Steel Capacity is a Circumstance that Contributes to the Weakening of the Domestic Economy." Steel Report at 2–5. The report recommended a range of alternative actions, including global tariffs, each of which had the objective of maintaining 80 percent capacity utilization for the U.S. steel industry. Steel Report at 58–61. In response to the Secretary of Commerce's report, however, the Secretary of Defense indicated an absence of any steel-related threat to national military supply chains: "[T]he U.S. military requirements for steel and aluminum each only represent about three percent of U.S. production. Therefore, [the U.S. Department of Defense ("DoD")] does not believe that the findings in the reports impact the ability of DoD programs to acquire the steel or aluminum necessary to meet national defense requirements." Memorandum in Support of Plaintiffs' Motion for Temporary Restraining Order and Preliminary Injunction, ECF No. 16, at Ex. D. The Secretary of Defense further indicated his "concern[] about the negative impact on our key allies regarding the recommended options within the reports . . . among these reports' alternatives, targeted tariffs are more preferable than a global quota or global tariff." *Id.*

Proclamation No. 9705 was issued on March 8, 2018. Invoking Commerce's Steel Report and the authority granted by 19 U.S.C. § 1862 to enact trade measures to counter import-related threats to national security, the proclamation imposed a 25 percent *ad valorem* tariff on steel imports from every country except Canada and Mexico, effective March 23, 2018. Proclamation No. 9705, 83 Fed. Reg. at 11,625 and 11,627. The original proclamation also provided that:

> Any country with which we have a security relationship is welcome to discuss with the United States alternative ways to address the threatened impairment of the national security caused by imports from that country. Should the United States and any such country arrive at a satisfactory alternative means to address the threat to the national security such that I determine that imports from that country no longer threaten to impair the national security, I may remove or modify the restriction on steel articles imports from that country and, if necessary, make any corresponding adjustments to the tariff as it applies to other countries as our national security interests require.

Id. at 11,627. No formal procedure or standards were ever promulgated for making such changes,[1] but Proclamation No. 9705 was nevertheless amended on March 22, 2018, to extend additional exemptions to Australia, Argentina, Brazil, the member countries of the European Union, and South Korea. Proclamation No. 9711, 83 Fed. Reg. at 13,363. All exemptions were furthermore made temporary, lasting until May 1, 2018. *Id.* at 13,363–64. With these modifications, the Steel Tariff was implemented as scheduled on March 23, 2018. Proclamation No. 9711 continued to allow for nation-to-nation negotiations on exemptions and adjustments. *Id.* South Korea's temporary exemption was ultimately made permanent, in exchange for an agreement which, *inter alia*, limited South Korean steel imports to 70 percent of South Korea's average steel exports to the U.S. over the period from 2015 to 2017. South Korean Ministry of Trade, Energy and Industry, *Korea, US reach agreement on trade deal and steel tariff exemption* (Mar. 26, 2018), *available at english.motie.go.kr/en/* (last visited Mar. 27, 2018).

Severstal Export is a Swiss company that negotiates and arranges sales of steel products with foreign customers. Pl. Br. at Ex. A, ¶1, 4. Severstal Miami is a Florida corporation that assists in negotiating sales and acts as Severstal Export's importer of record for steel products entering the U.S. *Id.* at Ex. B, ¶4. Plaintiffs are both wholly-owned subsidiaries of a Russian steel producer, PAO Severstal. *Id.* at Ex. A, ¶1, 4. The steel being imported by plaintiffs is shipped from Russia and is thus subject to the 25 percent tariff levied by Proclamation No. 9705. Pursuant to contracts entered prior to announcement of the Steel Tariff, plaintiffs expect to enter steel goods affected by Proclamation No. 9705 after March 23, 2018. *Id.* at Ex. A, ¶17. Plaintiffs challenge the lawfulness of Proclamation No. 9705, as applied to plaintiffs' expected steel imports, and seek a preliminary

[1] On March 19, 2018, Commerce issued instructions on how to request exemptions for steel articles "not produced in the United States in a sufficient and reasonably available amount or of a satisfactory quality," as well as exclusions "based upon specific national security considerations." *Requirements for Submissions Requesting Exclusions From the Remedies Instituted in Presidential Proclamations Adjusting Imports of Steel Into the United States and Adjusting Imports of Aluminum Into the United States; and the Filing of Objections to Submitted Exclusion Requests for Steel and Aluminum*, 83 Fed. Reg. 12,106, 12,107 (Dep't Commerce Mar. 19, 2018) ("Exemption Regulations"). These regulations, however, apply only to domestic parties, Proclamation No. 9705, 83 Fed. Reg. at 11,625, defined as "individuals or organizations using steel articles identified in Proclamation 9705 in business activities (e.g., construction, manufacturing, or supplying steel to users) in the United States." Exemption Regulations, 83 Fed. Reg. at 12,110. The Federal Register notice announcing these regulations indicated that country-wide exclusions were to be negotiated separately. *Id.* at 12,108.

injunction to prevent the government from collecting the additional 25 percent tariff pending a decision on the merits of its action.[2]

JURISDICTION

The court has jurisdiction of any justiciable claim raised by plaintiff under 28 U.S.C. § 1581(i)(2), which grants the Court of International Trade ("CIT") "exclusive jurisdiction of 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 . . . tariffs, duties, fees, or other taxes on the importation of merchandise for reasons other than the raising of revenue[.]" This is a civil action commenced against the United States, challenging the government's imposition of tariffs under 19 U.S.C. § 1862 for reasons of national security.[3] *Cf. Motion Systems Corp. v. Bush*, 437 F.3d 1356, 1357 and 1362 (Fed. Cir. 2006) (on appeal of denial of claim against the President and U.S. Trade Representative under 19 U.S.C. § 2451, instead of reversing or remanding with a direction to dismiss for lack of subject matter jurisdiction, the Federal Circuit affirmed the CIT's judgment in favor of defendants). Elsewhere, however, the Federal Circuit has held that 28 U.S.C. § 1581(i) does not authorize proceedings directly against the President. *Corus Group PLC v. Int'l Trade Comm'n*, 352 F.3d 1351, 1359 (Fed. Cir. 2003) ("*Corus Group v. ITC*"). Nonetheless, the United States remains a defendant as do any other relevant officers or employees in their official capacities.

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[2] Although plaintiffs' initial filing sought a temporary restraining order, Pl. Br. at 1, it was agreed during a telephone conference that, as plaintiffs' goods had yet to enter the United States, the court would afford the government an opportunity to respond by March 28, 2018, hold a hearing on March 29, 2018, and thereafter issue an opinion as to the propriety of a preliminary injunction. Teleconference held on 3/23/2018 at 11:00 a.m., ECF No. 9.

[3] To the extent the government asserts that plaintiffs have no standing because 28 U.S.C. § 2631(i) limits standing to persons "adversely affected or aggrieved by *agency action* within the meaning of section 702 of title 5," *see* Def. Br. at 15 (citing 28 U.S.C. § 2631(i)) (emphasis added), while jurisdiction over the matters set forth in 28 U.S.C. § 1581 is exclusive to the CIT, the statutory standing provision is not so expressly limited. Further, at the time 28 U.S.C. § 2631 was passed in 1980, the broad wording of 5 U.S.C. § 702 had not been narrowed by *Franklin v. Massachusetts*. *See* 505 U.S. 788, 796 (1992). The court must conclude that, whatever narrow right of action exists for review of a Presidential Proclamation on tariffs under 28 U.S.C. § 1581(i), standing to assert such a right is not limited by the term "agency" action in 28 U.S.C. § 2631(i). Otherwise, while standing would only exist in the District Court, jurisdiction for the action would only lie in the CIT. Congress would not have intended such an absurd result. *Cf. Humane Soc. Of U.S. v. Clinton*, 236 F.3d 1320, 1328 (Fed. Cir. 2001) ("Unless the grant of jurisdiction [under 28 U.S.C. § 1581] carries with it a coextensive waiver of sovereign immunity, the Congressional grant would be a hollow act, with no significant consequences to the sovereign, and no significant benefits to the sovereign's subjects.").

DISCUSSION

The court employs a four factor test to determine whether a preliminary injunction should be granted, considering: (1) whether plaintiffs will suffer irreparable harm absent the requested relief; (2) plaintiffs' likelihood of success on the merits; (3) whether the balance of hardships favors plaintiffs; and (4) whether the public interest would be served by granting the relief. *Titan Tire Corp. v. Case New Holland, Inc.*, 566 F.3d 1372, 1375–76 (Fed. Cir. 2009). "[N]o one factor, taken individually, is necessarily dispositive, because the weakness of the showing regarding one factor may be overborne by the strength of the others." *Ugine & ALZ Belg. v. United States*, 452 F.3d 1289, 1292–93 (Fed. Cir. 2006) (internal quotation marks omitted). Nevertheless, "[c]entral to the movant's burden are the likelihood of success and irreparable harm factors." *Qingdao Taifa Group Co., Ltd. v. United States*, 581 F.3d 1375, 1378 (Fed. Cir. 2009). Having had the benefit of oral argument and submissions from plaintiffs and defendants, the court now will weigh these four factors.

I. Whether Plaintiffs will Suffer Irreparable Harm Absent a Preliminary Injunction

Irreparable harm constitutes potential harm that cannot be redressed by a legal or equitable remedy at the conclusion of the proceedings, so that a preliminary injunction is the only way of protecting the plaintiffs. *See Weinberger v. Romero-Barcelo*, 456 U.S. 305, 312 (1982). In evaluating irreparable harm, the court considers: "the magnitude of the injury, the immediacy of the injury, and the inadequacy of future corrective relief." *CannaKorp, Inc. v. United States*, 234 F. Supp. 3d 1345, 1350 (Ct. Int'l Trade 2017). "Of these three factors, 'immediacy [of the injury] and the inadequacy of future corrective relief' may be weighed more heavily than magnitude of harm." *Id.* (alteration in original).

After Commerce's Steel Report was issued, plaintiffs halted all U.S. contract-making in the reasonable expectation of some tariff action targeting, *inter alia*, Russian steelmakers. *See* Oral Argument at Morning Session, 40:32–41:03, Afternoon Session, 17:47–17:51, ECF No. 32, *Severstal Export GmbH v. United States*, No. 18–00057 (Ct. Int'l Trade Mar. 29, 2018) ("Oral Arg."). *See also* Pl. Br. at Ex. A, ¶15, 22, Ex. B, ¶16. Plaintiffs state that, should the Steel Tariff continue with exceptions granted for other significant steel-producing nations, plaintiffs will continue to suspend U.S. contracting. *See* Oral Arg. at Morning Session, 52:00–52:17, Afternoon Session, 17:51–18:32.

Pursuant to contracts concluded prior to the issuance of Proclamation No. 9705, plaintiffs will soon be entering Russian-made steel into the United States. Pl. Br. at Ex. A, ¶7, 17 (noting, at the time of plaintiffs' motion, [[ ]][4] of steel en route to the United States from St. Petersburg and [[ ]] scheduled to ship soon). Pursuant to the Proclamation, as amended, plaintiffs' imports are prima facie subject to the 25 percent tariff. *See* Proclamation No. 9705, 83 Fed. Reg. at 11,627; Proclamation No. 9711, 83 Fed. Reg. at 13,363–64. Steel being shipped to the U.S. falls into two categories, [[ ]] is under contract with traders. Oral Arg. at Morning Session, 56:06–56:43. The traders, not plaintiffs, will pay duties on those entries. Oral Arg. at Morning Session, 22:18–23:28. *See id.* at Afternoon Session, 15:46–15:56. [[ ]] of the steel, however, is under contract with end users. *Id.* at Morning Session, 56:06–56:43. Plaintiffs' standard practice in contracting with end users is to deliver the goods "duties paid," and under the original terms of the contracts in question, plaintiffs were indeed responsible for paying tariffs on these imports. *See* Pl. Br. at Ex. B, ¶18; Oral Arg. at Morning Session, 24:51–25:30, Afternoon Session, 14:10–14:34. As the tariffs were announced after [[ ]] these shipments were already on the water, plaintiffs were able to renegotiate tariff payments with their customers, such that plaintiffs anticipate a total tariff bill of about [[ ]], to be paid by Severstal Miami as the importer of record, of which about [[ ]] will subsequently be reimbursed by customers. Oral Arg. at Morning Session, 47:20–48:54, 50:11–50:24, Pl. Ex. 3 (a spreadsheet breaking down these figures); Pl. Br. at Ex. 1 (containing renegotiation correspondence between Severstal Miami and certain U.S. customers). For comparison, the total tariff bill *after* reimbursement is expected to nearly [[ ]] Severstal Miami's annual budget. *Compare* Pl. Br. at Ex. B ¶4, 17, *with* Oral Arg. at Morning Session, 47:30–48:54, 50:11–50:24. As Severstal Miami is unable to cover the increased cost on its own, it has obtained a loan from its parent company, brokered through Severstal Export. *See* Pl. Br. at Ex. B, ¶17; Oral Arg. at Morning Session, 1:33:23–1:33:50.

Plaintiffs first contend that, absent a preliminary injunction, once plaintiffs pay the tariffs, no legal mechanism exists for them to seek return of the funds if it is later determined the tariffs were unlawful. Pl. Br. at 11. Plaintiffs' contention is unfounded. While the relevant statutory authority may not spell out a clear procedure applicable to such refund requests, precedent reveals that an aggrieved party may secure the refund of a tax or tariff ultimately found to be unconsti-

[4] Confidential information is indicated by double brackets.

tutionally levied. *See, e.g., U.S. Shoe Corp. v. United States*, 114 F.3d 1564, 1577 (Fed. Cir. 1997), *aff'd*, 523 U.S. 360 (1998). *See also* Defendants' Motion to Dismiss and, in the Alternative, Opposition to Plaintiffs' Motion for Temporary Restraining Order and Preliminary Injunction, ECF No. 30, at 36 ("Def. Br.") (agreeing to the same).

The court will discuss the remainder of plaintiffs' alleged harms as current harm and future harm. Pl. Br. at 11–12. Plaintiffs' January decision to suspend U.S. sales, in reasonable anticipation of future tariffs, has resulted in current harm in the form of contracts foregone. Nevertheless, to the extent contracts have already been foregone, this will not be redressed by a preliminary injunction (or a favorable verdict at trial). An injunction could alter the business calculus to permit future contracts; however, the remedial value would be limited because, once a customer has been identified, plaintiffs' sales process requires roughly 4 months. *See* Pl. Br. at Ex. A ¶6, Ex. B ¶8. As success at trial would necessarily be uncertain, plaintiffs would likely have to again suspend contracting several months beforehand. The court does not find the opening of this brief window through a preliminary injunction to offer much additional relief, especially considering that if plaintiffs miscalculate the window and ultimately lose at trial, their customer relations stand to suffer further.

Plaintiffs further allege that, in anticipation of having to repay the loan from PAO Severstal, negotiations regarding tariff splitting with end user customers have damaged those customer relationships. Pl. Br. at Ex. B, ¶18, 24. Furthermore, plaintiffs argue that business relationships with trader customers have been damaged vis-à-vis foreign steel producers from countries currently exempted from the Steel Tariff, as the necessity of paying an additional tariff to import plaintiffs' goods has soured traders' assessments of plaintiffs as potential suppliers. Oral Arg. at Afternoon Session, 14:30–15:29. These harms would be redressed, plaintiffs contend, if the tariffs were withdrawn. *Id.* at 15:46–15:56.

The Federal Circuit has suggested that loss of customers may support an irreparable harm finding. *Qingdao Taifa*, 581 F.3d at 1381 ("[T]his court acknowledges the distinct probability that Taifa will ultimately incur the charge or lose customers. Thus, the trial court did not clearly err in determining that Taifa would suffer immediate and irreparable harm without an injunction"). The magnitude of the current damage to plaintiffs' customer base, however, is not itself sufficient to constitute "irreparable harm" for preliminary injunction purposes.

As for future harm, there is a substantial likelihood that plaintiffs will ultimately have to pay increased tariff duties once their goods have landed. Because plaintiffs' goods are custom-made, Pl. Br. at Ex. A, ¶11, the court finds it unlikely that plaintiffs could simply reroute the shipments elsewhere to avoid the duties. Even if this were feasible, the damage to plaintiffs' U.S. customer relationships would only grow. Regardless of whether Severstal Miami pays the tariffs using money loaned by its parent company, it must still pay the tariffs, and is liable to its parent company for the loan balance. *See* Pl. Br. at Ex. B, ¶17. The court thus finds the impending tariff payments sufficiently certain to constitute harm, but notes that courts may typically redress economic harms of this sort through the normal litigation process. *See* 28 U.S.C. § 2643(a)(1) ("The Court of International Trade may enter a money judgment (1) for or against the United States in any civil action commenced under section 1581 . . . .").

Severstal Miami contends, however, that normal litigation will not redress its harm because either the loan will bankrupt it, or a prolonged, tariff-induced contracting freeze will extinguish its customer relationships and drive it out of business. Pl. Br. at 11–12. If Severstal Miami is shuttered, this will cost two people their jobs. Pl. Br. at Ex. B, ¶4. Defendants contend that the court must consider the resources of plaintiffs' parent company in assessing the likelihood of Severstal Miami's closure. In support, defendants cite an employment contract case from the District Court of the District of Columbia. Def. Br. at 37 (citing *Econ. Research Servs., Inc. v. Resolution Econ., LLC*, 140 F. Supp. 3d 47 (D.D.C. 2015)). The court, however, does not find *Econ. Research Servs.* instructive. There, the District Court based its holding on *both* the financial strength of the plaintiff corporation itself, and its subsidiary relationship with a global parent corporation. *Id.* at 53. In general, the parties relevant to an irreparable harm determination are the plaintiffs themselves. Including the resources of plaintiffs' parent corporation in this assessment is akin to piercing the corporate veil. As the Federal Circuit has stated, "the corporate form is not to be lightly cast aside." *3D Sys., Inc. v. Aarotech Labs., Inc.*, 160 F.3d 1373, 1380 (Fed. Cir. 1998). Severstal Miami is a Florida corporation with annual revenue of [[ ]] and a single U.S. office. Pl. Br. at Ex. B ¶4, 17. Assuming, *arguendo*, that a parent corporation's resources may be relevant in assessing irreparable harm in some cases, defendants nevertheless fail to provide evidence that PAO Severstal intends to incur financial liabilities on the scale necessary to keep Severstal Miami open, and the court finds

no record evidence to command such an inference.[5] Rather, that the parent company has not, for several months, intervened so that Severstal Miami could resume U.S. contract solicitation, raises serious doubts as to whether such intervention might be forthcoming.

Damage which supports a finding of irreparable harm cannot be speculative. *See Zenith Radio Corp. v. United States*, 710 F.2d 806, 809 (Fed. Cir. 1983). Given the magnitude of the tariff and the import-curbing purpose of measures taken under Section 1862, plaintiffs can clearly expect a reduction in U.S. sales. *See* Proclamation No. 9705, 83 Fed. Reg. at 11,626; 19 U.S.C. § 1862(c)(1)(A)(ii). The question is, however, can plaintiffs reasonably expect a significant enough reduction in U.S. sales, such that Severstal Miami will have to close its doors? Plaintiffs estimate that the countries exempted by Proclamation No. 9711 account for over 60% of steel imports to the United States for the year 2017. Pl. Br. at 8 (citing calculations based on U.S. Dep't of Commerce, Enforcement & Compliance Table: US Imports of Steel Mill Products (last modified Mar. 7, 2018), *available at https://enforcement.trade.gov/* (last visited Mar. 26, 2018) ("Commerce Compliance Table")). While the Steel Tariff is of an indefinite duration, Proclamation No. 9711 only granted exemptions to other states for roughly five weeks, until May 1, 2018. Proclamation No. 9711, 83 Fed. Reg. at 13,363. The Proclamation further provides: "In the event that a satisfactory alternative means is reached such that [the President] decide[s] to exclude on a long-term basis a particular country from the tariff proclaimed in Proclamation 9705, [the President] will also consider whether it is necessary and appropriate in light of our national security interests to make any corresponding adjustments to the tariff . . . as it applies to countries." *Id.* at 13,362.

One such "alternative means" has apparently been arrived at for South Korean steel imports, granting tariff exemptions in favor of an annual quota equaling roughly 73.9 percent of Korea's 2017 steel imports.[6] Overall, plaintiffs must compete on a substantially unequal

[5] Furthermore, even if Severstal Miami's parent corporation were willing to continue paying the two employees' salaries to keep Severstal's doors open, unless it were also willing to mitigate the tariff costs such that contracts can be delivered, the loss of customers could nevertheless be expected to cripple Severstal Miami's business.

[6] South Korean steel imports accounted for roughly 10 percent of steel imports to the United States in 2017. Under the most recent agreement, Korean imports are heretofore exempt from the tariff, but subject to quantity limitations set at 70 percent of the average imports for the past three years. *See* South Korean Ministry of Trade, Energy and Industry, *Korea, US reach agreement on trade deal and steel tariff exemption* (Mar. 26, 2018), *available at english.motie.go.kr/en/* (last visited Mar. 27, 2018). Commerce's report to the President contained two alternatives of universal application: a 24 percent tariff or a quota of 63 percent of 2017 import figures. *See* Steel Report at 7. According to Commerce's statistics, 70 percent of South Korea's 2017 figures would be 2,534,550.2. Commerce Compliance Table (2017 Annual Total Quantity for Korea, multiplied by 0.7). According to the same, 70

footing with both U.S. producers and the countries responsible for most U.S. steel imports. The full breadth of harm anticipated by Severstal Miami is not definite, but given the concrete action already taken by the corporation to remove itself from the U.S. market in reaction to the recommendations contained in Commerce's Steel Report, and continued after the promulgation of Proclamations No. 9705 and 9711, the court does not find it to be merely speculative.[7] All versions of the Steel Tariff have hewn close to global tariff levels recommended by Commerce, and have furthermore included significant exemptions for other countries, but not Russia. This is a close case, but the sum total of plaintiffs' harm, both current and future, which a preliminary injunction might redress exceeds the threshold necessary to constitute "irreparable harm."[8]

II. Plaintiffs' Likelihood of Success on the Merits

Plaintiffs must demonstrate "at least a fair chance of success on the merits for a preliminary injunction to be appropriate." *Qingdao Taifa*, 581 F.3d at 1381 (internal quotation marks omitted). "[T]he greater the potential harm to the plaintiff, the lesser the burden on Plaintiffs to make the required showing of likelihood of success on the merits." *Ugine & ALZ Belg.*, 452 F.3d at 1293 (internal quotation marks omitted).

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percent of the 2015 to 2017 average would be 2,678,977.23, or 73.9 percent of South Korea's 2017 figures. Commerce Compliance Table (Average of the 2015–2017 Annual Total Quantities for Korea, multiplied by 0.7). If, according to Commerce's recommendation, a 24 percent tariff achieves a limiting effect roughly equal to that of a 63 percent quantity limitation, then Korea's terms appear somewhat more advantageous than those currently applicable to plaintiffs' imports.

[7] Defendants analogize this situation to that in *Corus Group PLC v. Bush*. Def. Br. at 38–39 (citing 217 F. Supp 2d 1347, 26 C.I.T. 937 (2002) ("*Corus Group v. Bush*")). Although the CIT's irreparable harm analysis was not discussed on appeal, *see generally Corus Group v. ITC*, 352 F.3d 1351, Severstal Miami's ongoing suspension of business activities is a critical distinction between this case and Corus' argument that sound business principles would require it to close its Bergen, Norway plant rather than operate at an anticipated tariff-induced loss. *See Corus Group v. Bush*, 217 F. Supp. 2d at 1354, 26 C.I.T. at 943. It remains true that "[e]very increase in duty rate will necessarily have an adverse effect on foreign producers and importers," *id.*, 217 F. Supp. 2d at 1355, 26 C.I.T. at 944, but unlike *Corus Group v. Bush*, which concerned *anticipated* revenue shortfalls that might force "closure at some future date," *id.*, Severstal Miami has produced evidence of an *ongoing* loss critical enough to threaten its very existence. The harm under consideration in this case thus differs materially, in terms of magnitude and immediacy, from that under consideration in *Corus Group v. Bush*.

[8] A significant change in the nature or character of exemptions granted to other nations, as compared with the tariff terms applicable to plaintiffs, may strengthen or weaken plaintiffs' claims of irreparable harm.

A. The Justiciability of the Challenged Actions

Plaintiffs raise a constitutional challenge to the actions of the executive branch under Section 1862.[9] Plaintiffs concede that Section 1862 constitutes a constitutional delegation of authority. *See Fed. Energy Admin. v. Algonquin SNG, Inc.*, 426 U.S. 548, 559–60 (1976) (holding a previous version of Section 1862, which did not include any legislative override, and was in other relevant respects the same as the current version, to be a constitutional delegation of authority). *See also* Trade Expansion Act of 1962, Pub. L. No. 87–794, 76 Stat. 877, § 232, *as amended by* Trade Act of 1974, Pub. L. No. 93–618, 88 Stat. 1993, § 127(d) (current version at 19 U.S.C. § 1862 (1988)). Furthermore, plaintiffs do not challenge the procedure followed by Commerce and the President in enacting the Steel Tariff. Oral Arg. at Afternoon Session, 13:00–13:06. Instead, acknowledging that this court lacks the power to review the President's lawful exercise of discretion, *see, e.g.*, *Dalton v. Specter*, 511 U.S. 462, 474 (1994); *United States v. George S. Bush & Co., Inc.*, 310 U.S. 371, 380 (1940), plaintiffs argue that in proclaiming steel tariffs under Section 1862 the President seriously misapprehended, and thus exceeded, his statutory authority. Oral Arg. at Afternoon Session, 9:15–9:38.

Defendants contend that plaintiffs' claim nevertheless is nonjusticiable. Def. Br. at 14–19. As defendants observe, Def. Br. at 16, in this situation, "the President's findings of fact and the motivations for his action are not subject to review," *Corus Group v. ITC*, 352 F.3d at 1361. Nonetheless, that a statute grants the President some discretionary decision-making authority does not automatically insulate all aspects of executive branch action taken under that statute from judicial review. *See Dalton*, 511 U.S. at 474 (assuming "that some claims that the President has violated a statutory mandate are judicially reviewable outside the framework of the APA"). Rather, "[f]or a court to interpose, there has to be a clear misconstruction of the governing statute . . . or action outside delegated authority." *Corus Group v. ITC*, 352 F.3d at 1361 (quoting, with approval, from *Maple Leaf Fish Co. v. United States*, 762 F.2d 86, 89 (Fed. Cir. 1985)) (alteration in original). Relevant to this case, therefore, where statutory language limits the President, the court may review the executive's actions for "clear misconstruction" of such limiting language. *See Corus Group v. ITC*, 352 F.3d at 1359 ("The statute only gives the President authority to impose a duty if the Commission makes 'an

[9] Plaintiffs do not argue that the President's actions are reviewable under the standards of the Administrative Procedure Act. *See Franklin*, 505 U.S. at 801.

affirmative finding regarding serious injury' . . . Therefore, the President's action was not discretionary, and the validity of the proclamation is dependent on whether three commissioners in fact found serious injury with respect to tin mill products.") (internal citations omitted).

As the Federal Circuit held in *Corus Group v. ITC*, this level of review is consistent with the Supreme Court's holdings in *Franklin* and *Dalton*. *Corus Group v. ITC*, 352 F.3d at 1357–60 (citing *Dalton*, 511 U.S. at 469–70, 476; *Franklin*, 505 U.S. at 797–800).[10] Defendants themselves implicitly recognize the distinction between reviewing the substance of an exercise of discretion and reviewing an action for clear misconstruction of the statute, so that the authority delegated by Congress is exceeded. That is, defendants contend that the President's exercise of discretion is unreviewable, and separately argue that the President acted in conformity with Section 1862. *See* Def. Br. at 16. Accordingly, the court turns to the issue of the bounds of Presidential authority under the relevant statute.[11]

B. Whether the President Exceeded his Authority under Section 1862

As a preliminary matter, defendants argue that, to the degree plaintiffs' claim is justiciable, it is barred because plaintiffs have failed to exhaust administrative remedies. Def. Br. at 19–20. *See* 28 U.S.C. § 2637(d) (in cases brought under 28 U.S.C. § 1581(i), exhaustion is required where appropriate). Specifically, they argue that

[10] Unlike *Dalton*, wherein plaintiffs challenged the President's ability to act based upon procedural flaws attributable to the agencies which prepared prerequisite recommendations, 511 U.S. at 474, plaintiffs in this case allege substantive, rather than procedural flaws attributable to both the President and defendant agencies.

[11] Defendants likewise contend this dispute is not ripe, alleging it is not fit for judicial decision, and that resolution of this matter by the court would impose a greater hardship on defendants than deferral would impose upon plaintiffs. Def. Br. at 20–21 (citing *Abbott Labs. v. Gardner*, 387 U.S. 136, 149 (1967), *abrogated on other grounds*, *Califano v. Sanders*, 430 U.S. 99, 105 (1977)). The court is unpersuaded. Contrary to defendants' suggestion, the Steel Tariff is not a matter of "case-by-case" application. Def. Br. at 21 (citing *Toilet Goods Ass'n v. Gardner*, 387 U.S. 158, 164 (1967)). Rather, it is a tariff of broad application to which Commerce may grant limited exceptions following applications by aggrieved domestic parties. *See* Proclamation No. 9705, 83 Fed. Reg. at 11,625; Exemption Regulations, 83 Fed. Reg. at 12,111–12. Furthermore, as discussed above, the hardship imposed upon plaintiffs by delaying resolution of this matter is significant, far exceeding "mere uncertainty as to the validity of a legal rule," and outweighs any hardship wrought by defendants' inability to review an administrative exclusion request under the terms provided by 83 Fed. Reg 12,107 et seq. Def. Br. at 21 (quoting *Nat'l Park Hospitality Ass'n v. Dep't of Interior*, 538 U.S. 803, 811 (2003)). No such request has been filed by plaintiffs, Oral Arg. at Morning Session, 49:17–49:55, and as discussed below, whether plaintiffs themselves might be afforded such an exemption is irrelevant to whether the Steel Tariff was issued in contravention of the authority granted by Section 1862. Defendants, therefore, would gain little, if anything, by reviewing such a request. Accordingly, the court finds this matter ripe for judicial decision.

defendants could have invoked the administrative process promulgated by Commerce on March 19, 2018, to request a product-specific exclusion from the Steel Tariff. *Id.* (citing Exemption Regulations, 83 Fed. Reg. at 12,110–12). Commerce's argument fails for two reasons. First, as Commerce implies, *see* Def. Br. at 20, Severstal Export, as a foreign entity, is likely not eligible for relief under the regulation. Second, plaintiffs are not arguing that their product should be excluded from the reach of the new tariffs because it "is not produced in the United States in a sufficient and reasonably available amount, is not produced in the United States in a satisfactory quality, or for a specific national security consideration." 83 Fed. Reg. at 12,110. Rather, plaintiffs argue that the Steel Tariff itself is invalid, as it was promulgated in clear misapprehension of the President's statutory authority under Section 1862. *See* Pl. Br. at 23. To the degree it is available to plaintiffs, the aforementioned regulatory process is not an appropriate forum for adjudicating plaintiffs' specific claim. Accordingly, no unexhausted administrative remedies bar consideration of plaintiffs' claim.

Plaintiffs argue that the President has misconstrued Section 1862 by over-reading what can constitute a threat to national security, in finding that steel imports currently represent such a threat. Pl. Br. at 18–19. Defendants appear to argue, on the other hand, that under Section 1862, as long as the President has received Commerce's report, the court can look no further. Oral Arg. at Afternoon Session, 32:29–33:09. *See also* Def. Br. at 16–17. The report is certainly a precondition, *see Fed. Energy*, 426 U.S. at 559, albeit one not challenged in this case, but the relevant statutory language indicates that the following additional conditions exist.[12] The President is limited to "action . . . to adjust the imports of the article and its derivatives so that such imports will not threaten to impair the national security." 19 U.S.C. § 1862(c)(1)(A)(ii). *See also Fed. Energy*, 426 U.S. at 559 ("Moreover, the leeway that the statute gives the President in deciding what action to take in the event the preconditions are fulfilled is far from unbounded. The President can act only to the extent 'he

[12] Defendants rely upon *Motion Systems* in arguing that the court is precluded from reviewing the action challenged in this case. *See* Def. Br. at 15–16. *Motion Systems* concerned a challenge to Presidential action under 19 U.S.C. § 2451(k). *Motion Systems*, 437 F.3d at 1359 (citing 19 U.S.C. § 2451 (since repealed)). How instructive *Motions Systems* is in the light of *Fed. Energy*, 426 U.S. at 559, 571, which involved the same statute at issue here, and later Supreme Court cases need not be resolved for purposes of the present motion. To the extent the court may review the action of the President, it is unlikely that the President has exceeded his statutory authority.

deems necessary to adjust the imports of such article and its derivatives so that such imports will not threaten to impair the national security.'"); *id.* at 571 ("[O]ur conclusion here . . . that the imposition of a license fee is authorized by [§] 232(b) in no way compels the further conclusion that [a]ny action the President might take, as long as it has even a remote impact on imports, is also authorized.").

Plaintiffs do not argue that a tariff or quota on steel imports is not authorized by Section 1862 where a threat to the national security encompassing the entire U.S. steel industry has been identified. The court agrees that such import-targeting actions are exactly the sort of actions authorized by Section 1862. Plaintiffs instead argue that the Section 1862 Steel Tariff is being used in trade negotiations to draw concessions from other countries unrelated to steel imports. Pl. Br. at 17–18. Such a mismatch – harm to domestic industry (A) threatens to impair national security, import-restricting actions favoring domestic industry (A) are taken under Section 1862, such restrictions are then lifted in exchange for concessions favoring unrelated domestic industry (B) – would raise a credible question as to whether the President misapprehended the authority granted by Section 1862. *See* 19 U.S.C. § 1862(c)(1)(A)(ii) ("action . . . to adjust the imports of *the* article and its derivatives") (emphasis added). As support, plaintiffs quote a statement by the President indicating that "Tariffs on Steel and Aluminum will only come off if new & fair NAFTA agreement is signed." Pl. Br. at 17–18. But the NAFTA trading parties are high on the list of exporters of steel to the United States and plaintiffs have not demonstrated that the Steel Tariff has been lifted in favor of measures only, or even mostly, benefitting unrelated industries.[13]

The statute contains more specific limitations as follows:

> [T]he Secretary and the President shall, in the light of the requirements of national security and without excluding other relevant factors, give consideration to domestic production needed for projected national defense requirements, the capacity of domestic industries to meet such requirements, existing and anticipated availabilities of the human resources, products, raw materials, and other supplies and services essential to the national defense, the requirements of growth of such industries

[13] Likewise, the magnitude of the exemptions currently granted by Proclamation No. 9711, by itself, does not place the Steel Tariff outside the bounds of Section 1862. *See* Pl. Br. at 17 n.12 (arguing these exemptions undercut the President's national security rationale). These exemptions have been granted temporarily, and in a stated effort to negotiate alternative measures beneficial to the steel industry. *See* Proclamation No. 9711, 83 Fed. Reg. at 13,362. Furthermore, record evidence indicates the desirability of exceptions for certain "key allies." Pl. Br. at Ex. D.

> and such supplies and services including the investment, exploration, and development necessary to assure such growth, and the importation of goods in terms of their quantities, availabilities, character, and use as those affect such industries and the capacity of the United States to meet national security requirements. In the administration of this section, the Secretary and the President shall further recognize the close relation of the economic welfare of the Nation to our national security, and shall take into consideration the impact of foreign competition on the economic welfare of individual domestic industries; and any substantial unemployment, decrease in revenues of government, loss of skills or investment, or other serious effects resulting from the displacement of any domestic products by excessive imports shall be considered, without excluding other factors, in determining whether such weakening of our internal economy may impair the national security.

19 U.S.C. § 1862(d). *See also Fed. Energy*, 426 U.S. at 559 ("232(c) [a]rticulates a series of specific factors to be considered by the President in exercising his authority under [§] 232(b)." (internal citations omitted)). Regarding this limitation, plaintiffs argue that the aforementioned statement regarding NAFTA, as well as related statements made in conjunction with a Congressional campaign in Pennsylvania, reveal that the President's stated national security motives were pretextual, and the President has clearly read Section 1862 as granting authority to adopt tariffs for purely economic reasons, including to bolster his position in trade renegotiations. *See* Pl. Br. at 12–16.

The factors listed in Section 1862(d) are required, but not exclusive. Commerce's Steel Report refers to each of these factors. Steel Report at 1 (recounting the factors generally), 23–25. 47–49 (describing domestic production needed for national defense requirements, the percentage of domestic capacity needed to cover national defense requirements, and overall economic requirements, including those related to growth, necessary for such production); 27–33 (surveying the importation of steel goods), 33–40 (explaining the effect of steel mill closures on employment, revenue generation, and investment), 41–46 (analyzing the effect of steel production stagnation on the availability of facilities and research relevant to national security needs). *See also* Pl. Br. at Ex. D (the Secretary of Defense's assessment of certain Section 1862(d) factors). Proclamation Nos. 9705 and 9711 likewise recite findings in terms of the Section 1862(d) factors. *See* Proclamation No. 9705, 83 Fed. Reg. at 11,625, ¶2 (reciting to the Secretary of Commerce's findings with reference to Section 1862(d)),

11,626, ¶5 (concurring in the Secretary's findings), 11,626, ¶8 (recounting factors considered), 11,626, ¶10 (explaining exemptions for Canada and Mexico with reference to Section 1862(d)); Proclamation No. 9711, 83 Fed. Reg. at 13,361, ¶2 (referring to the relevant paragraphs of Proclamation No. 9705), 13,361–62, ¶5–9 (explaining the U.S. "security relationship" with each of the exempted countries). The latter Section 1862(d) factors are economic in nature. The language therein is quite broad and permissive, and apparently not limited to production necessary for national defense purposes.[14] Plaintiffs have pointed to neither statutory authority nor legislative history which suggest that Section 1862(d) clearly forecloses the President from finding a threat to national security due to the overall economic situation of the steel industry. Where, as here, an industry is found to produce goods vital to U.S. national security, *see* Steel Report at 23–26, the court finds it highly unlikely that Presidential statements indicating an overarching economic rationale for Section 1862 tariffs are clearly inconsistent with that statute's grant of authority. Section 1862(d) furthermore requires consideration of "other relevant factors." The aforementioned statements regarding renegotiations of NAFTA, a trade agreement with two of the United States' largest foreign steel sources, are not wholly unrelated to the factors listed in Section 1862(d). Assuming *arguendo* that these types of statements could affect the analysis, the court does not find such statements sufficient on their own to underpin a credible case that the President has clearly misconstrued his authority under Section 1862. Accordingly, plaintiffs' likelihood of success on the merits is very low.

III. Whether the Balance of Hardships Favors Plaintiffs

Regarding the balance of hardships, plaintiffs simply argue that the hardships described above "far outweigh the Defendants' interests in enforcing an unlawful Steel Proclamation." Pl. Br. at 23. It is almost impossible to analyze the harm to the Government of halting the

[14] Defendants are wrong, however, that "Congress has never attempted to narrow the President's Section [1862] authority." Def. Br. at 31. Prior to Proclamation No. 9705, Section 1862 had only been used to adjust imports of oil. *See, e.g.*, Proclamation No. 3279, 24 Fed. Reg. 1,781 (Mar. 12, 1959); Proclamation No. 3290, 24 Fed. Reg. 3,527 (May 2, 1959); Proclamation No. 3693, 30 Fed. Reg. 15,459 (Dec. 16, 1965); Proclamation No. 3794, 32 Fed. Reg. 10,547 (July 19, 1967); Proclamation No. 4543, 42 Fed. Reg. 64,849 (Dec. 27, 1977). In 1980, Commerce specifically added a legislative override for oil-related action taken under this section. Crude Oil Windfall Profit Tax Act of 1980, Pub. L. No. 96–223, 94 Stat. 229, § 402. At minimum, this suggests that prior Presidential action under Section 1862 gave Congress reason to believe such an override might be desirable. Since this amendment, Section 1862 has been invoked rarely. Proclamation No. 4744, 45 Fed. Reg. 22,864 (Apr. 2, 1980); Proclamation No. 4748, 45 Fed. Reg. 25,371 (Apr. 11, 1980); Proclamation No. 4762, 45 Fed. Reg. 39,237 (June 6, 1980); Proclamation No. 4766, 45 Fed. Reg. 41,899 (June 19, 1980); Proclamation No. 4907, 47 Fed. Reg. 10,507 (Mar. 10, 1982); Proclamation No. 5141, 48 Fed. Reg. 56,929 (Dec. 22, 1983).

tariffs, if the merits of the tariffs are not reviewable. Thus, without addressing the balance of hardships specifically, defendants cite an immigration case for the proposition that the balance of hardships and public interest "merge when the Government is the opposing party." Def. Br. at 40 (citing *Nken v. Holder*, 556 U.S. 418, 435 (2009)). The Federal Circuit has not, however, adopted this approach in subsequent trade cases. *Am. Signature, Inc. v. United States*, 598 F.3d 816, 829–30 (Fed. Cir. 2010). Defendants go on to analogize a tariff injunction in this case, to enjoining the Navy from conducting training exercises. Def. Br. at 40–41 (citing *Winter v. Nat. Res. Def. Council*, 555 U.S. 7 (2008)). First security for a stay is required. *See* U.S. Ct. Int. Trade Rule 65(c). Second, temporary lifting of some tariffs intended to have some economic effects down the road is not the same as causing disruption and expense in connection with exercises directly linked to national defense; at most, the United States would be harmed by a delay. *Qingdao Taifa*, 581 F.3d at 1382. On the other hand, as described above, if plaintiffs are ultimately successful, but no injunction is provided, they will suffer at least some degree of irreparable harm. The balance of hardships likely favors plaintiffs.

IV. Whether the Public Interest would be Served by Granting a Preliminary Injunction

Finally, plaintiffs contend that the remedying of constitutional violations and ensuring the President's compliance with the law always serves the public interest. Pl. Br. at 23–24. *See Am. Signature*, 598 F.3d at 830 ("The public interest is served by ensuring that governmental bodies comply with the law, and interpret and apply trade statutes uniformly and fairly."). Defendants contend that permitting Commerce to collect the tariffs serves the public interest because it is in the interest of national security. Def. Br. at 41–43 (citing *Goldman v. Weinberger*, 475 U.S. 503, 507 (1986)). Both the rule of law and our nation's security are foundational to the public good. The court concludes that this factor favors neither party more than the other.

In sum, the court finds that plaintiffs have made a showing, but not a particularly strong showing, of irreparable harm. The degree of potential harm is thus insufficient to overcome plaintiffs' low likelihood of success on the merits. The balance of hardships and public interest are insufficiently weighted in plaintiffs' favor to overcome the deficiencies in the first two factors, which are central to the court's analysis. Therefore, a preliminary injunction will not issue.

CONCLUSION

Plaintiffs' motion for a preliminary injunction is **DENIED**. The parties will proceed to further brief the Government's motion to dismiss according to the Rules of the Court.

Dated: April 5, 2018
New York, New York

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

Slip Op. 18–38

U.S. AUTO PARTS NETWORK, INC., Plaintiff, v. UNITED STATES, UNITED STATES DEPARTMENT of HOMELAND SECURITY, SECRETARY KIRSTJEN NIELSEN, and CHIEF FREDERICK J. EISLER, III, Defendants.

Before: Jennifer Choe-Groves, Judge
Court No. 18–00068

[Granting in part and denying in part Plaintiff's Motion for Temporary Restraining Order.]

Dated: April 6, 2018

Barry F. Irwin and *Reid P. Huefner*, Irwin IP LLC, of Burr Ridge, IL, for Plaintiff U.S. Auto Parts Network, Inc. With them on brief were *Iftekhar A. Zaim* and *Chris Eggert*.

Beverly A. Farrell and *Monica P. Triana*, Trial Attorneys, Commercial Litigation Branch, Civil Division, U.S. Department of Justice, of New York, N.Y., and *Amy M. Rubin*, Assistant Director, for Defendants United States, U.S. Department of Homeland Security, Secretary Kirstjen Nielsen, and Chief Frederick J. Eisler, III. With them on brief was *Chad A. Readler*, Acting Assistant Attorney General. Of Counsel were *Ed Maurer* and *Yelena Slepak*, U.S. Customs and Border Protection.

MEMORANDUM AND ORDER

Choe-Groves, Judge:

Plaintiff U.S. Auto Parts Network, Inc. ("U.S. Auto" or "Plaintiff") is a company that sells, among other products, vehicle grilles and associated parts for vehicle repairs ("Repair Grilles"). Plaintiff commenced this action to obtain judicial review of the decision made by U.S. Customs and Border Protection ("Customs") to impose an enhanced single entry bond requirement for each of Plaintiff's shipments into the United States in the amount of three times the shipment value ("SEB Requirement"). *See* Am. Verified Compl. ¶ 9, Apr. 5, 2018, ECF No. 17 ("Compl."). Before the court is the Plaintiff's Motion for Temporary Restraining Order. *See* Pl.'s Mot. , Apr. 2, 2018, ECF No. 5; Mem. P. & A. Supp. U.S. Auto's Appl. TRO, Apr. 2, 2018, ECF No. 6 ("Pl.'s Mem."). For the reasons explained below, the court grants in part and denies in part Plaintiff's motion.

BACKGROUND

Section 42 of the Lanham Act forbids the importation and entry of merchandise into the United States that copies or simulates the name of a domestic manufacturer or registered trademark in such a way that causes confusion to the public regarding the true origins of the

product. *See* 15 U.S.C. § 1124 (2012).[1] Under Section 526 of the Tariff Act of 1930,[2] "[a]ny such merchandise bearing a counterfeit mark[3] . . . imported into the United States in violation of" Section 42 of the Lanham Act shall be seized by Customs officers and subject to forfeiture. *See* 19 U.S.C. § 1526(e). Customs officers have the additional authority to require "bonds or other security . . . they[] may deem necessary for the protection of the revenue or to assure compliance with any provision of law, regulation, or instruction which the Secretary of the Treasury or the Customs Service may be authorized to enforce." *Id.* § 1623(a). Customs' own regulation and directive provide further guidance as to how the agency determines the amount of a bond. *See* 19 C.F.R. § 113.13 (2018);[4] Compl. Ex. E, Apr. 5, 2018, ECF No. 17–5.

U.S. Auto received notice of the enhanced bond in an email from Customs on March 7, 2018. *See* Compl. Ex. B, Apr. 5, 2018, ECF No. 17–2. According to the correspondence, because U.S. Auto "had over 30 shipments containing" merchandise in violation of 19 U.S.C. § 1526(e), "a single entry bond at three times the value of the shipment [will be] required on all future shipments to adequately ensure compliance with applicable Intellectual Property Rights laws and the prohibition on importation of counterfeit or copyrighted goods. Any future entries without a single entry bond for three times the shipment value will be rejected." *Id.* Customs imposed the treble bond requirement pursuant to 19 C.F.R. § 113.13(c) and (d). *See id.*

U.S. Auto commenced this action on April 2, 2018. *See* Summons, Apr. 2, 2018, ECF No. 1; Compl., Apr. 2, 2018, ECF No. 2. The complaint alleges violations of the Administrative Procedure Act, as well as the Fifth and Eighth Amendments of the United States Constitution. *See* Compl. ¶¶ 22. Plaintiff filed its Motion for Temporary Restraining Order concurrently, seeking relief from Customs' treble bond requirement. *See* Pl.'s Mot. TRO, Apr. 2, 2018, ECF No. 5. Defendants (collectively, "Government") filed a response. *See* Defs.' Resp. Pl.'s Mot. TRO, Apr. 5, 2018, ECF No. 15 ("Defs.' Resp."). The court held a hearing by telephone conference with the Parties on April 6, 2018. *See* Teleconference, Apr. 6, 2018, ECF No. 19.

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[1] All further citations to Titles 5, 15, 19, and 28 of the U.S. Code are to the 2012 edition.

[2] All further citations to the Tariff Act of 1930 are to the relevant provisions of Title 19 of the U.S. Code.

[3] The Lanham Act defines "counterfeit" as a "spurious mark which is identical with, or substantially indistinguishable from, a registered mark." 15 U.S.C. § 1127. The same provision also delineates various types of marks. *See id.*

[4] All further citations to Title 19 of the Code of Federal Regulations are to the 2018 edition.

DISCUSSION

I. Subject Matter Jurisdiction

The court must first determine whether it possesses subject matter jurisdiction over this action. Plaintiff asserts that the court has jurisdiction over all currently-imported goods subject to the SEB Requirement under 28 U.S.C. § 1581(i).[5] *See* Compl. ¶ 24; Pl.'s Mem. 25–26. Plaintiff also contends that the court has jurisdiction over all prospective imports subject to the SEB Requirement under 28 U.S.C. § 1581(h) or, in the alternative, 28 U.S.C. § 1581(i). *See* Compl. ¶ 24; Pl.'s Mem. 26.

The court reviews challenges to Customs' determinations regarding bond sufficiency under 28 U.S.C. § 1581(i)(4). *See, e.g.*, *Harmoni Int'l Spice, Inc. v. United States*, 41 CIT __, __, 211 F. Supp. 3d 1298, 1306 (2017) (asserting jurisdiction under 28 U.S.C. § 1581(i)(4) over action involving Customs' requirement that company post single bond at a rate based on antidumping duty rate preliminarily assigned by the U.S. Department of Commerce); *Seafood Exps. Ass'n of India v. United States*, 31 CIT 366, 375, 479 F. Supp. 2d 1367, 1376 (2007) (asserting jurisdiction over challenge to Customs' bond directive pursuant to 28 U.S.C. § 1581(i)(4) "as it relates to § 1581(i)(1) and (i)(2)"). The court exercises subject matter jurisdiction, therefore, over the entirety of this action pursuant to 28 U.S.C. § 1581(i)(4).

II. Plaintiff's Motion for Temporary Restraining Order

A. Legal Standard

Rule 65(b) of the Rules of this Court allows for the issuance of a temporary restraining order in an action. USCIT R. 65(b). The court considers four factors when evaluating whether to grant a temporary restraining order or preliminary injunction. *See Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 20 (2008); *see also Silfab Solar, Inc. v. United States*, Slip Op. 18–15, 2018 WL 1176619, at *3 (CIT Mar. 5, 2018) (recognizing that the standard for evaluating a motion for a

[5] Under 28 U.S.C. § 1581(i), the Court has exclusive jurisdiction over:

> 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—
>
> (1) revenue from imports or tonnage;
>
> (2) tariffs, duties, fees, or other taxes on the importation of merchandise for reasons other than the raising of revenue;
>
> (3) embargoes or other quantitative restrictions on the importation of merchandise for reasons other than the protection of the public health or safety; or
>
> (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.

28 U.S.C. § 1581(i).

temporary restraining order and a motion for preliminary injunction are the same). These factors are: (1) whether the party will incur irreparable harm in the absence of such order or injunction; (2) that the party is likely to succeed on the merits of the action; (3) that the balance of hardships favors the imposition of temporary equitable relief; and (4) that the temporary restraining order or injunction is in the public interest. *See Winter*, 555 U.S. at 20; *see also Wind Tower Trade Coal. v. United States*, 741 F.3d 89, 95 (Fed. Cir. 2014). No one factor is "'necessarily dispositive,' because 'the weakness of the showing regarding one factor may be overborne by the strength of the others.'" *Belgium v. United States*, 452 F.3d 1289, 1292–93 (Fed. Cir. 2006) (citing *FMC Corp. v. United States*, 3 F.3d 424, 427 (Fed. Cir. 1993)). The factors should be weighed according to a "sliding scale," however, which means that a greater showing of irreparable harm in Plaintiff's favor lessens the burden on Plaintiff to show a likelihood of success on the merits. *See id.* (internal citations omitted). The court will evaluate each of the four factors in turn.

B. Irreparable Harm

Plaintiff must show that it will suffer irreparable harm absent a grant of a temporary restraining order. *See Winter*, 555 U.S. at 20. Irreparable harm includes "a viable threat of serious harm which cannot be undone." *Zenith Radio Corp. v. United States*, 710 F.2d 806, 809 (Fed. Cir. 1983) (internal citations omitted). An allegation of financial loss alone, generally, does not constitute irreparable harm if future money damages can provide adequate corrective relief. *See Sampson v. Murray*, 415 U.S. 61, 90 (1974). Bankruptcy or substantial loss of business may constitute irreparable harm, however, because "loss of business renders a final judgment ineffective, depriving the movant of meaningful judicial review." *Harmoni Int'l Spice, Inc.*, 41 CIT at __, 211 F. Supp. 3d at 1307 (citing *Doran v. Salem Inn, Inc.*, 422 U.S. 922, 932 (1975)). "Price erosion, loss of goodwill, damage to reputation, and loss of business opportunities" may also constitute irreparable harm. *Celsis In Vitro, Inc. v. CellzDirect, Inc.*, 664 F.3d 922, 930 (Fed. Cir. 2012) (internal citations omitted).

U.S. Auto claims that the SEB Requirement threatens the viability of its business. *See* Pl.'s Mem. 19–21. U.S. Auto receives an average of forty shipments per week, each having a commercial value of approximately $42,000. *See* Am. Decl. Aaron Coleman Supp. U.S. Auto Mem. Supp. Appl. TRO ¶ 6, Apr. 5, 2018, ECF No. 18 ("Coleman Decl."). Customs' new instructions require a bond valuing roughly $125,000 per shipment, which equates to an estimated $5 million per

week. *See id.* ¶ 9. U.S. Auto asserts that it has not been able to find a surety that will cover the bond requirement without full collateral, and the business cannot sustain itself on domestically-sourced inventory alone. *See id.* ¶¶ 10, 16. "Without the ability to import any merchandise . . . in a short period of time, U.S. Auto will no longer be able to continue in business and will likely be forced to cease all operations and liquidate the company." *Id.* ¶ 32. Plaintiff also contends that its inability to pay the bond requirement will harm its supply chain, cause inventory shortfalls, damage its relations with business partners, and lead to a loss of reputation and goodwill. *See id.* ¶¶ 18–29.

The Government contests Plaintiff's proffered support as "speculative, vague and/or unsupported statements." Defs.' Resp. 15. The court disagrees. Plaintiff has demonstrated that the SEB Requirement will cause it significant financial detriment resulting in likely closing its business. The court concludes that Plaintiff's statements are sufficient to show irreparable harm for the purpose of the motion.

C. Balance of Hardships

When evaluating a request for a temporary restraining order, it is the court's responsibility to balance the hardships on each of the Parties. *See Winter*, 555 U.S. at 20. To support its showing for this factor, U.S. Auto reiterates the same reasons it proffered to demonstrate a threat of irreparable harm. *See* Pl.'s Mem. 34–35. The Government attests that Customs, in contrast, "has suffered significant harm as a result of having to inspect each of plaintiff's shipments in order to locate and remove infringing merchandise." Defs.' Resp. 15–16. Customs officers at the port are required to inspect the containers because "infringing merchandise cannot be allowed into the U.S. stream of commerce." *Id.* at 16. Defendants argue that Customs has conducted these inspections for months, requiring "substantial diversion of resources" and "more than 1100 man hours." *Id.* at 18. There are an additional ninety containers at the port currently, which will require "thousands of man hours and significant resources" to inspect. *Id.* The court notes that Customs faces burdens of resource diversion and inconvenience, but does not face any permanent consequences. Based on the facts and arguments presented, the court concludes that the balance of hardships weighs in the favor of Plaintiff, who is facing the closing of its business, loss of reputation, loss of customers, and other potentially permanent consequences due to the enhanced bond requirements.

D. Likelihood of Success on the Merits

In order to obtain a temporary restraining order, Plaintiff bears the burden of showing that it is likely to succeed on the merits of its claims. *See Winter*, 555 U.S. at 20. U.S. Auto asserts four claims against the Government in its complaint. *See* Compl. ¶¶ 65–81. Plaintiff's first two counts allege that Customs' imposition of the treble bond requirement violated various provisions of the Administrative Procedure Act. *See id.* ¶¶ 65–73. U.S. Auto's third claim contends that the treble bond requirement constitutes a punitive action and is unconstitutional under the Eighth Amendment's Excessive Fines Clause. *See id.* ¶¶ 74–75. Plaintiff's fourth claim asserts that Customs did not provide U.S. Auto with the opportunity to challenge the increased bond requirement, which amounted to a violation of Plaintiff's right to due process under the Fifth Amendment. *See id.* ¶¶ 76–81. Plaintiff requests both injunctive and monetary relief. *See id.* ¶¶ A–H. Because Plaintiff's briefing does not discuss its likelihood of success on the merits with regards to its Eighth Amendment claim, *see* Pl.'s Mem. 25–34, the court declines to evaluate it here.

1. Counts I and II: Agency Action in Violation of the Administrative Procedure Act

U.S. Auto asserts that Customs' application of the SEB Requirement on all of its shipments constitutes an agency action that is reviewable under the Administrative Procedure Act. *See* Compl. ¶¶ 65–73. Plaintiff contends specifically that Customs, in setting the SEB Requirement, acted arbitrarily and capriciously, as well as beyond its statutory mandate, applicable regulations, and own Customs Directive. *See id.* The Government argues that Customs officers have the authority to impose bond requirements pursuant to 19 U.S.C. § 1623,[6] and implore that the SEB Requirement was necessary in order to ensure U.S. Auto's compliance with the Customs Modernization Act, Pub. L. No. 103–182, 107 Stat. 2057 (1993), which imposes on importers a duty to engage in reasonable care. *See* Defs.' Resp. 3, 11–12.

The Administrative Procedure Act prohibits an agency from acting in a manner that is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law." 5 U.S.C. § 706(2)(A). An

[6] The statute reads, in relevant part:

> In any case in which bond or other security is not specifically required by law, the Secretary of Treasury may by regulation or specific instruction require, or authorize customs officers to require, such bonds or other security as he, or they, may deem necessary for the protection of the revenue or to assure compliance with any provision of law, regulation, or instruction which the Secretary of the Treasury or Customs Service may be authorized to enforce.

19 U.S.C. § 1623(a).

agency cannot act, furthermore, "in excess of statutory jurisdiction, authority, or limitations, or short of statutory right," or "without observance of procedure required by law." *Id.* § 706(2)(C), (D). The court considers whether the agency "entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise." *Motor Vehicle Mfrs. Ass'n. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983); *see also Al. Aircraft Indus., Inc. v. United States*, 586 F.3d 1372, 1375 (Fed. Cir. 2009) (stating the same).

19 U.S.C. § 1623 facially appears to confer Customs officers with discretion in setting the amount of a bond. Customs' own directive provides further guidance in determining the amount. The directive states, in relevant part, "The purpose of the bond is to protect the revenue and ensure compliance. . . . However, it is not Customs *[sic]* intent to require bond amounts which unnecessarily put an excessive burden on a person or firm, or place them in an impossible situation." Compl. Ex. E, at 2, Apr. 5, 2018, ECF No. 17–5. Here, the SEB Requirement goes against the directive by placing U.S. Auto in a difficult position. The court notes that the Government confirmed that approximately 99% of the goods imported by U.S. Auto are not implicated by Customs' counterfeit allegations. *See* Pl.'s Mem. 2; *see also* Teleconference at 0:42:55–0:43:06, Apr. 6, 2018, ECF No. 19. The Government confirmed further that the SEB Requirement seeks to ensure compliance with respect to only 1% of U.S. Auto's shipments, but burdens all of U.S. Auto's imports. Customs' action of imposing an enhanced, punitive bond on all of Plaintiff's imports, when it actually should be directed towards only 1% of imports, is an abuse of discretion that is contrary to Customs' mandate. Based on the facts available at this juncture of the action, the court concludes that Plaintiff has shown a likelihood of success on the merits with regards to its claims under the Administrative Procedure Act.

2. Count IV: Due Process

U.S. Auto further alleges that Customs' imposition of the SEB Requirement "without giving U.S. Auto the opportunity to challenge the underlying factual and legal determinations judicially or the ability to challenge the bond requirement is contrary to the law" and amounts to a violation of the Fifth Amendment's Due Process Clause. *See* Compl. ¶¶ 76–81.

The Fifth Amendment prohibits the deprivation of life, liberty, or property without due process of law. U.S. Const. amend. V. "The core of due process is the right to notice and a meaningful opportunity to be heard." *LaChance v. Erickson*, 522 U.S. 262, 266 (1998) (citing *Cleveland Bd. of Ed. v. Loudermill*, 470 U.S. 532, 542 (1985)). "The first inquiry in every due process challenge is whether the plaintiff has been deprived of a protected interest in 'property' or 'liberty.'" *Int'l Custom Prods., Inc. v. United States*, 791 F.3d 1329, 1337 (Fed. Cir. 2015), *cert. denied*, 136 S. Ct. 2408 (2016) (quoting *Am. Mfrs. Mut. Ins. Co. v. Sullivan*, 526 U.S. 40, 59 (1999)). Only after establishing that the plaintiff has been deprived of a protected interest will the court evaluate whether the afforded procedures comport with due process requirements. *See Am. Mfrs. Mut. Ins. Co.*, 526 U.S. at 59.

Plaintiff likely cannot assert a genuine due process claim because it has not been deprived of a Constitutionally protected interest. Courts have recognized that individuals do not have a protectable interest to engage in international trade under the Constitution. *See Int'l Custom Prods., Inc.*, 791 F.3d at 1337 (citing *Am. Ass'n of Exps. & Imps.—Textile & Apparel Grp. v. United States*, 751 F.2d 1239, 1250 (Fed. Cir. 1985)). Plaintiff has not shown, therefore, a likelihood of success on the merits with regard to Count IV in its complaint.

E. Public Interest

Plaintiff must also demonstrate that a grant of a temporary restraining order serves the public interest. *See Winter*, 555 U.S. at 20. U.S. Auto contends that the public interest favors a temporary restraining order in this action because the company otherwise risks bankruptcy, which would deprive it access to meaningful judicial review. *See* Pl.'s Mem. 36. Plaintiff notes that the litigation of meritorious claims provides a check on Government enforcement and ensures the proper administration of the law. *See id.* U.S. Auto argues further that without the temporary restraining order, over 350 U.S. residents will lose their jobs, and the aftermarket auto parts market, which "saves U.S. Consumers $1.5 [billion] annually," will suffer. *Id.* The Government disagrees, asserting that the grant of a temporary restraining order "will allow U.S. Auto to continue to import goods that infringe upon registered trademarks and require [Customs] to expend significant time and resources to remove infringing goods from U.S. Auto's shipments." Defs.' Resp. 19. Defendants contend, furthermore, that "[w]hile it is possible that aftermarket parts are cheaper for customers, this does not negate the public interest in compliance with law or the protection of intellectual property rights." *Id.* at 20.

The court concludes that the public interest factor alone would be in Defendants' favor, since the public benefits from the efficient administration and enforcement of the law.

CONCLUSION

For the aforementioned reasons, and viewing all of the relevant factors as a whole, the court concludes that Plaintiff has sufficiently demonstrated its need for a temporary restraining order with respect to the subject merchandise not alleged to be infringing. Accordingly, upon consideration of Plaintiff's Motion for Temporary Restraining Order, and all other papers and proceedings in this action, it is hereby

ORDERED that Plaintiff's motion is granted in part and denied in part; and it is further

ORDERED that Defendants and their officers, employees, and agents be temporarily restrained starting at 5:00 P.M. on the date of this Order from enforcing a requirement that, for each shipment into the United States, U.S. Auto Parts Network, Inc. ("U.S. Auto") submit a single entry bond at three times the shipment value in order to obtain entry into the United States with respect to the subject merchandise not alleged to be infringing; and it is further

ORDERED that Defendants and their officers, employees, and agents may impose a single entry bond at three times the shipment value proportional to the percentage of allegedly infringing goods contained in the shipments; and it is further

ORDERED that Defendants and their officers, employees, and agents shall expeditiously process all of U.S. Auto's shipping containers and immediately release to U.S. Auto all imports not implicated by Customs' underlying trademark infringement allegations; and it is further

ORDERED that this temporary restraining order will expire on April 20, 2018 at 5:00 P.M.

Dated: April 6, 2018
New York, New York

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