U.S. Customs and Border Protection

Slip Op. 14–37

ITOCHU BUILDING PRODUCTS, Plaintiff, v. UNITED STATES, Defendant.

Before: Timothy C. Stanceu, Judge
Court No. 11–00208

[Remanding the final results of a changed circumstances review of an antidumping duty order on certain steel nails from China]

Dated: April 8, 2014

Ned H. Marshak, Grunfeld, Desiderio, Lebowitz, Silverman & Klestadt LLP, of New York, NY, argued for plaintiff. With him on the brief were Mark E. Pardo, Joseph M. Spraragen, Andrew T. Schutz, and Bruce M. Mitchell.

Carrie A. Dunsmore, Trial Counsel, Civil Division, U.S. Department of Justice, of Washington, DC, argued for defendant. With her on the brief were Tony West, Assistant Attorney General, Jeanne E. Davidson, Director, and Patricia M. McCarthy, Assistant Director. Of counsel on the brief was Nathaniel J. Halvorson, Attorney–International, Office of the Chief Counsel for Import Administration, U.S. Department of Commerce, of Washington, DC.

OPINION AND ORDER

Stanceu, Judge:

This case arose from a challenge to a final determination that the International Trade Administration, U.S. Department of Commerce ("Commerce" or the "Department") issued in a "changed circumstances" review of an antidumping duty order on certain steel nails from the People's Republic of China ("China" or the "PRC"). *See Certain Steel Nails From the People's Republic of China: Final Results of Antidumping Duty Changed Circumstances Review*, 76 Fed. Reg. 30,101, 30,101 (May 24, 2011) ("*Final Results*"). Commerce initiated the changed circumstances review in response to a request by one of the petitioners in the antidumping duty investigation who requested revocation of the antidumping duty order (the "Order") as to four types of steel nails. *Id.* Commerce agreed to the partial revocation of the Order and chose August 1, 2009 as the effective date. *Id.*

Plaintiff Itochu Building Products ("Itochu" or "IBP"), a U.S. importer of subject merchandise and a participant in the changed circumstances review, brought this action to contest the Department's final determination (the "*Final Results*"). Specifically, Plaintiff challenged the August 1, 2009 effective date, arguing that Commerce should have made the partial revocation effective as of January 23, 2008, the date of the preliminary determination in the original antidumping duty investigation and the date supported by the parties to the review. The court denied relief on plaintiff's claim on the ground that plaintiff failed to exhaust administrative remedies. *Itochu Bldg. Products v. United States*, 36 CIT __, __, 865 F. Supp. 2d 1332, 1339 (2012) ("*Itochu I*"), *rev'd and remanded*, 733 F.3d 1140 (Fed. Cir. 2013).

Before the court is the mandate issued by the U.S. Court of Appeals for the Federal Circuit ("Court of Appeals") following *Itochu Bldg. Products v. United States*, 733 F.3d 1140 (Fed. Cir. 2013) ("*Itochu II*"), which reversed the judgment the court issued in *Itochu I* and remanded for further proceedings. CAFC Mandate in Appeal # 13–1044 (Nov. 22, 2013), ECF No. 40. Addressing the merits of plaintiff's claim, the court now orders Commerce to reconsider the decision on the effective date of the partial revocation.

BACKGROUND

The background of this litigation is described in the court's prior opinion and is supplemented herein. *See Itochu I*, 36 CIT at __, 865 F. Supp. 2d at 1335–36.

Commerce issued the Order on August 1, 2008.[1] *Notice of Antidumping Duty Order: Certain Steel Nails From the People's Republic*

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[1] The scope language in the antidumping duty order (the "Order") provides that:

> The merchandise covered by this proceeding includes certain steel nails having a shaft length up to 12 inches. Certain steel nails include, but are not limited to, nails made of round wire and nails that are cut. Certain steel nails may be of one piece construction or constructed of two or more pieces. Certain steel nails may be produced from any type of steel, and have a variety of finishes, heads, shanks, point types, shaft lengths and shaft diameters. Finishes include, but are not limited to, coating in vinyl, zinc (galvanized, whether by electroplating or hotdipping one or more times), phosphate cement, and paint. Head styles include, but are not limited to, flat, projection, cupped, oval, brad, headless, double, countersunk, and sinker. Shank styles include, but are not limited to, smooth, barbed, screw threaded, ring shank and fluted shank styles. Screw-threaded nails subject to this proceeding are driven using direct force and not by turning the fastener using a tool that engages with the head. Point styles include, but are not limited to, diamond, blunt, needle, chisel and no point. Finished nails may be sold in bulk, or they may be collated into strips or coils using materials such as plastic, paper, or wire. Certain steel nails subject to this proceeding are currently classified under the Harmonized Tariff Schedule of the United States ("HTSUS") subheadings 7317.00.55, 7317.00.65 and 7317.00.75.

Notice of Antidumping Duty Order: Certain Steel Nails From the People's Republic of China, 73 Fed. Reg. 44,961, 44,961 (Aug. 1, 2008) ("*Order*"). As promulgated, the Order contained an exclusion, as follows:

> Excluded from the scope of this proceeding are roofing nails of all lengths and diameter, whether collated or in bulk, and whether or not galvanized. Steel roofing nails are specifically enumerated and identified in ASTM Standard F 1667 (2005 revision) as Type I, Style 20 nails.

Id.

of China, 73 Fed. Reg. 44,961 (Aug. 1, 2008) ("*Order*"). On September 22, 2009, Commerce initiated the first administrative review of the Order, which pertained to entries of subject merchandise made during a period of January 23, 2008 through July 31, 2009 ("period of review" or "POR"). *Initiation* of *Antidumping Duty & Countervailing Duty Admin. Reviews & Req. for Revocation in Part,* 74 Fed. Reg. 48,224 (Sept. 22, 2009). Commerce issued the preliminary results of the first administrative review on September 15, 2010. *Certain Steel Nails From the People's Republic of China: Notice of Prelim. Results & Prelim. Rescission, in Part, of the Antidumping Duty Admin. Review*, 75 Fed. Reg. 56,070 (Sept. 15, 2010).

On February 11, 2011, while the first administrative review was ongoing, Mid Continent Nail Corporation ("Mid Continent"), a petitioner in the antidumping duty investigation, requested a review based on changed circumstances, seeking revocation of the Order as to "[a]ll unliquidated and future entries" of four types of steel nails.[2] *Req. for Changed Circumstances Review* 1–3 (Admin.R.Doc. No. 1). *See* Tariff Act of 1930 ("Tariff Act") § 751(b), 19 U.S.C. § 1675(b); 19 C.F.R. §§ 351.216, 351.221(c)(3).[3] Mid Continent sought revocation of the Order as to these four types of nails on the ground that "the domestic industry no longer has an interest in maintaining the *Order* with respect these specific products." *Req. for Changed Circumstances Review* 4. *See id.* 1–2 & n.2, Attach. 1. *See* also 19 C.F.R. § 351.222(g)(1)(i). Mid Continent requested that the partial revocation be "effective as to all unliquidated entries back to the date of the preliminary determination in the original investigation," *i.e.*, January 23, 2008. *Req. for Changed Circumstances Review* 4. *See Certain Steel Nails From the People's Republic of China: Prelim. Determination of Sales at Less Than Fair Value & Partial Affirmative Determination of Critical Circumstances & Postponement of Final Determination*, 73 Fed. Reg. 3,928 (Jan. 23, 2008). Two other petitioners in the antidumping duty investigation submitted comments in support of Mid Continent's requested partial revocation and revocation date. *See Letter from Nat'l Nail Corp.* 1–2 (Mar. 1, 2011)

[2] For three of the four types of nails that were the subject of its request for a review based on changed circumstances, Mid Continent Nail Corporation requested that the revocation pertain to merchandise entries "whose packaging and packing marking . . . are clearly and prominently labeled 'Roofing' or 'Roof' nails." *Req. for Changed Circumstances Review* 3 (Admin.R.Doc. No. 1) (Feb. 11, 2011). Commerce did not grant this request in the language effecting the partial revocation. *Certain Steel Nails From the People's Republic of China: Final Results of Antidumping Duty Changed Circumstances Review*, 76 Fed. Reg. 30,101, 30,101 (May 24, 2011) ("*Final Results*").

[3] All statutory citations herein are to the 2006 edition of the United States Code and all citations to regulations are to the 2010 edition of the Code of Federal Regulations.

(Admin.R.Doc. No. 3); *Letter from United Sources Inc.* 1–2 (Mar. 24, 2011) (Admin.R.Doc. No. 8).[4] Itochu also filed comments supporting Mid Continent's request, including the proposed scope and the proposed January 23, 2008 effective date. *Itochu's Comments on the Changed Circumstances Review* 2 (Feb. 22, 2011) (Admin.R.Doc. No. 2). On March 8, 2011, counsel for Itochu met with Commerce officials and requested designation of January 23, 2008 as the effective revocation date. Mem. of Law in Supp. of Pl.'s Rule 56.2 Mot. for J. upon the Agency R. ("Pl.'s Mem.") at Attach. 1 (Dec. 5, 2011), ECF No. 19.

Commerce issued the final results of the first administrative review on March 23, 2011, *Certain Steel Nails From the People's Republic of China: Final Results of the First Antidumping Duty Admin. Review*, 76 Fed. Reg. 16,379 (Mar. 23, 2011), and, in response to allegations of ministerial errors, issued amended final results on April 26, 2011, *Certain Steel Nails From the People's Republic of China: Amended Final Results of the First Antidumping Duty Admin. Review*, 76 Fed. Reg. 23,279 (Apr. 26, 2011). On April 21, 2011, five days before publishing the amended final results, Commerce issued a combined notice initiating an expedited changed circumstances review of the Order under 19 U.S.C. § 1675(b) and announcing the Department's preliminary decision to revoke the Order as to four types of steel nails ("*Preliminary Results*"). *Certain Steel Nails From the People's Republic of China: Initiation & Prelim. Results of Antidumping Duty Changed Circumstances Review*, 76 Fed. Reg. 22,369, 22,369, 22,371 (Apr. 21, 2011) ("*Prelim. Results*"). Commerce preliminarily chose as the revocation date August 1, 2009, which it characterized as "the earliest date for which entries of certain steel nails have not been subject to a completed administrative review." *Id.* at 22,371. Commerce invited interested parties to comment on the *Preliminary Results*, *id.*, but no party commented within the specified period, *Final Results*, 76 Fed. Reg. at 30,101. On May 24, 2011, Commerce issued the *Final Results*, in which it revoked the Order as to the four types of steel nails, effective August 1, 2009.[5] *Id.* at 30,102.

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[4] There were six petitioners in the antidumping investigation. Int'l Trade Admin., Analysis of Industry Support 4 (July 11, 2007) in *Req. for Changed Circumstances Review* at Attach 1. Commerce made no finding in the *Final Results*, 76 Fed. Reg. at 30,101, that the "[p]roducers accounting for substantially all of the production of the domestic like product to which the order (or the part of the order to be revoke) . . . pertains have expressed a lack of interest in the order, in whole or in part," 19 C.F.R. § 351.222(g)(1)(i). This case does not involve a claim that the producers who supported the changed circumstances request did not account for substantially all production.

[5] The merchandise now excluded from the Order as a result of the Department's changed circumstances review is as follows:

Challenging the Department's selection of the August 1, 2009 effective date, plaintiff brought this action by filing a summons on June 22, 2011 and a complaint on July 21, 2011. Summons, ECF No. 1; Compl., ECF No. 8. Plaintiff filed a motion for judgment on the agency record, Pl.'s Rule 56.2 Mot. for J. upon the Agency R. 1 (Dec. 5, 2011), ECF No. 19 ("Pl.'s Mot."); Pl.'s Mem. 1, which defendant opposed, Def.'s Memo. in Opp'n to Pl.'s Rule 56.2 Mot. for J. upon the Agency R. 1 (Feb. 2, 2012), ECF No. 23 ("Def.'s Opp'n"). On March 28, 2012, plaintiff made a submission advising the court of the intervening decision in *Heveafil Sdn. Bhd v. United States*, 36 CIT __, Slip Op. 12–38 (Mar. 21, 2012) ("*Heveafil*"). *Letter Advising the Court of the Recent Decision in Heveafil Sdn. Bhd v. United States, Slip Op. 12–38* (Mar. 28, 2012), ECF No. 29. On September 13, 2012, the court held oral argument.

Concluding that Itochu failed to exhaust its administrative remedies, the court denied relief on plaintiff's claim. *Itochu I*, 36 CIT at __, 865 F. Supp. 2d at 1337–38 (citing *Mittal Steel Point Lisas Ltd. v. United States*, 548 F.3d 1375, 1383–84 (Fed. Cir. 2008)). The court reasoned that Itochu had waived its objection to the August 1, 2009 date when it declined to comment on the Department's choice of this revocation date in the *Preliminary Results* despite the Department's specifically having requested comment on this issue. *Id.*

On appeal, the Court of Appeals reversed the court's judgment, determining that application of the exhaustion doctrine was not "'appropriate'" because "[i]n the circumstances here, requiring exhaustion served no discernible practical purpose and would have risked harm to Itochu," *Itochu II*, 733 F.3d at 1142, by delaying the changed

(1) Non-collated (*i.e.*, hand-driven or bulk), two-piece steel nails having plastic or steel washers (caps) already assembled to the nail, having a bright or galvanized finish, a ring, fluted or spiral shank, an actual length of 0.500" to 8", inclusive; and an actual shank diameter of 0.1015" to 0.166", inclusive; and an actual washer or cap diameter of 0.900" to 1.10", inclusive.

(2) Non-collated (*i.e.*, hand-driven or bulk), steel nails having a bright or galvanized finish, a smooth, barbed or ringed shank, an actual length of 0.500" to 4", inclusive; an actual shank diameter of 0.1015" to 0.166", inclusive; and an actual head diameter of 0.3375" to 0.500", inclusive.

(3) Wire collated steel nails, in coils, having a galvanized finish, a smooth, barbed or ringed shank, an actual length of 0.500" to 1.75", inclusive; an actual shank diameter of 0.116" to 0.166", inclusive; and an actual head diameter of 0.3375" to 0.500", inclusive.

(4) Non-collated (*i.e.*, hand-driven or bulk), steel nails having a convex head (commonly known as an umbrella head), a smooth or spiral shank, a galvanized finish, an actual length of 1.75" to 3", inclusive; an actual shank diameter of 0.131" to 0.152", inclusive; and an actual head diameter of 0.450" to 0.813", inclusive.

Final Results, 76 Fed. Reg. at 30,101.

circumstances review, *id.* at 1147. The Court of Appeals determined that Commerce had sufficient opportunity to consider Itochu's objections to the August 1, 2009 effective date due to Itochu's argument in favor of the earlier date before Commerce published the *Preliminary Results*. *Id.* at 1146. The Court of Appeals remanded the case for further proceedings. *Id.* at 1148.

II. DISCUSSION

Because *Itochu I* did not reach the question of whether the Department's use of the August 1, 2009 effective date was lawful, the court now addresses this question in response to the mandate issued by the Court of Appeals.

The court exercises jurisdiction under section 201 of the Customs Courts Act of 1980, 28 U.S.C. § 1581(c), which grants this Court jurisdiction over any civil action commenced under section 516A of the Tariff Act, 19 U.S.C. § 1516a(a)(2)(B)(iii), including an action challenging the final results of a changed circumstances review issued under section 751 of the Tariff Act, 19 U.S.C. § 1675(b). The court must "hold unlawful any determination, finding, or conclusion found . . . to be unsupported by substantial evidence on the record, or otherwise not in accordance with law." *Id.* § 1516a(b)(1)(B)(i).

Commerce conducts a changed circumstances review when an interested party submits a request that "shows changed circumstances sufficient to warrant a review" of an antidumping duty order. *Id.* § 1675(b). Following a review, Commerce may revoke an antidumping duty order "in whole or in part." *Id.* § 1675(d)(1). Providing no standard by which Commerce is to determine an effective date for the revocation, the statute affords Commerce considerable discretion. *See id.* § 1675(d)(3) (a determination to revoke, in whole or in part, "shall apply with respect to unliquidated entries of the subject merchandise which are entered, or withdrawn from warehouse, for consumption on or after the date determined by the administering authority"). At issue in this case is the Department's exercise of that discretion to make the partial revocation effective as of August 1, 2009. In doing so, Commerce rejected the position of all interested parties that the effective date of the revocation should be January 23, 2008, the date of the preliminary determination in the original investigation.

In the *Preliminary Results*, Commerce rejected the January 23, 2008 effective date because it was not "consistent with its recent practice" of revoking an order "so that the effective date of revocation covers entries that have not been subject to a completed administrative review." *Prelim. Results*, 76 Fed. Reg. at 22,371. In the *Final Results*, Commerce addressed the revocation date issue in the same way but only in a footnote, in which it stated that "[t]he Department's recent practice has been to select the date after the most recent period for which a review was completed or issued assessment instructions as the effective date." *Final Results*, 76 Fed. Reg. at 30,102 n.5. As examples of its practice, the footnote cited two administrative determinations issued in 2004; one involved a changed circumstances review of an antidumping duty order on coumarin from China, the other a changed circumstances review of an antidumping duty order on Chinese bulk aspirin. *Id.* (citing *Notice of the Final Results of Changed Circumstances Review & Revocation of the Antidumping Order: Coumarin from the People's Republic of China*, 69 Fed. Reg. 24,122 (May 3, 2004); *Notice of Final Results of Changed Circumstances Review & Revocation of the Antidumping Duty Order: Bulk Aspirin from the People's Republic of China,* 69 Fed. Reg. 77,726 (Dec. 28, 2004)).

Plaintiff argues that the Department's choice of the August 1, 2009 effective date over the January 23, 2008 date is irrational, "contrary to administrative practice, judicial precedent, basic principles of fairness, and is inconsistent with the fundamental purpose" of the antidumping laws. Pl.'s Mem. 3. Plaintiff seeks an order directing Commerce to issue new final results of the changed circumstances review that adopt an effective date of January 23, 2008. *Id.* at 35. Defendant counters that the *Final Results* must be sustained because the date of revocation is made a matter of the Department's discretion by 19 U.S.C. § 1675(d)(3), because the date Commerce chose was reasonable, and because Commerce permissibly followed its practice "to select the date following the last date of the most recently completed review." Def.'s Opp'n 13–14.

In reviewing an agency decision, a court will "look for a reasoned analysis or explanation for an agency's decision as a way to determine whether a particular decision is arbitrary, capricious, or an abuse of discretion." *Wheatland Tube Co. v. United States*, 161 F.3d 1365, 1369 (Fed. Cir. 1998). The court must reject as arbitrary and capricious any determination that "entirely failed to consider an important aspect of the problem." *Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983) ("*State Farm*").

In the changed circumstances review, Commerce cloaked its decision in a "practice" without explaining the reasons why it established such a practice in the first place. The *Final Results* offer no explanation as to why a revocation date should not precede the date of a completed administrative review of an order. Commerce failed to demonstrate that the practice it identified pertains, or should pertain, to situations in which all parties to the proceeding favored an effective date occurring before the date of completion of the most recent administrative review and in which the choice of effective date was not in dispute among those parties.

The Department's mere citation to a practice is insufficient to save the reviewed decision from arbitrariness. Lacking is a discussion of the competing factors that must inform any rational selection of an effective date for a partial revocation of an antidumping duty order following a changed circumstances review. That all parties to the review supported revocation as of the date of the preliminary determination must be viewed as one of those factors, yet it was one that received no apparent consideration in the *Final Results*.

Plaintiff argues that, consistent with judicial precedent and past Department practice, Commerce should have adopted the revocation date proposed by Mid Continent. Pl.'s Mem. 2, 13–35. Plaintiff seeks an order compelling Commerce to apply the partial revocation to all entries of merchandise affected by the changed circumstances review that were made on or after January 23, 2008 and that remain unliquidated. *Id.* at 35–36, proposed order. Further, plaintiff argues that "[t]he facts in this case compel a conclusion that the Department should have agreed to Petitioner's requested revocation date." *Id.* at 2.

Plaintiff cites *Ugine & Alz Belgium, N.V. v. United States*, 31 CIT 1536, 517 F. Supp. 2d 1333 (2007), *aff'd* 551 F.3d 1339 (Fed. Cir. 2009), and *Canadian Wheat Bd. v. United States*, 641 F.3d 1344, 1346–51 (Fed. Cir. 2011), in arguing that judicial precedent compels a conclusion that revocation should apply to all unliquidated entries. *Id.* at 30–33. Neither of these decisions establishes a precedent under which Commerce was required to make its revocation applicable to all unliquidated entries on the facts of this case. Plaintiff also directs the court's attention to the decision of this Court in *Heveafil*, 36 CIT __, Slip Op. 12–38, in support of its argument that the Department's decision must be held to be unreasonable. *Heveafil* is not a binding precedent, and, having arisen from a factual situation in which the sole producer of the domestic like product had undergone bankruptcy and ceased operations, was not decided upon facts analogous to those relevant here. *See Heveafil*, 36 CIT at __, Slip Op. 12–38, at 2–3.

Plaintiff's argument pertaining to administrative precedent is also insufficient to support a conclusion that Commerce was required to adopt the January 23, 2008 effective date. Plaintiff cites various administrative decisions (other than the decisions involving coumarin and bulk aspirin, discussed above) that it claims support a conclusion that Commerce has a "practice of selecting an effective date for a changed circumstances revocation requested by the domestic industry." Pl.'s Mem. 24. If such a practice exists, it cannot bind Commerce beyond imposing an obligation to explain any departure made in an individual instance. *See SKF USA Inc. v. United States*, 630 F.3d 1365, 1373 (Fed. Cir. 2011) ("*SKF*") ("When an agency changes its practice, it is obligated to provide an adequate explanation for the change."). It certainly is not a basis upon which the court could order Commerce to adopt the earlier effective date. On remand, Commerce should address whether an administrative practice such as plaintiff describes exists and, if so, the reasons why it chooses to follow it or not follow it in the circumstances posed by the changed circumstances review.

For the reasons stated above, the court declines to issue the specific relief plaintiff seeks. The court must order a remand of the *Final Results* due to the arbitrariness of that determination, not because it concludes that the effective date of August 1, 2009 was, *per se*, impermissible under 19 U.S.C. § 1675(d)(3) or disallowed under binding judicial precedent. The statutory provision, as discussed above, provides Commerce with discretion in the selection of the effective date for a partial revocation following a changed circumstances review, but that discretion may not be exercised arbitrarily so as to decide the question presented without considering the relevant and competing considerations. On remand, Commerce must reconsider its decision as to effective date and provide adequate reasoning, grounded in the facts and circumstances of this case, for any decision it reaches.

III. CONCLUSION AND ORDER

For the reasons discussed in the foregoing, the Department's choice of an August 1, 2009 effective date for the partial revocation of the Order, as set forth in the *Final Results*, cannot be sustained. Therefore, upon consideration of all papers and proceedings in this case, and upon due deliberation, it is hereby

ORDERED that the final determination of the International Trade Administration, U.S. Department of Commerce ("Commerce" or the "Department") in *Certain Steel Nails From the People's Republic of China: Final Results of Antidumping Duty Changed Circumstances Review*, 76 Fed. Reg. 30,101 (May 24, 2011) be, and hereby is, set aside as unlawful and remanded for reconsideration and redetermination in accordance with this Opinion and Order; it is further

ORDERED that Commerce shall file, within sixty (60) days of the date of this Opinion and Order, a new determination upon remand ("remand redetermination") that conforms to this Opinion and Order and redetermines the effective date of partial revocation as necessary; it is further

ORDERED that plaintiff may file comments on the remand redetermination within thirty (30) days from the date on which the remand redetermination is filed; and it is further

ORDERED that defendant may file a response to the aforementioned comments within fifteen (15) days from the date on which the last comment is filed.

Dated: April 8, 2014
New York, New York

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

Slip Op. 14–38

YANTAI XINKE STEEL STRUCTURE CO., LTD., Plaintiff, and NINGBO JIULONG MACHINERY CO., LTD. and NINGBO HAITIAN INTERNATIONAL CO., LTD., Plaintiff-Intervenors, v. UNITED STATES, Defendant, and ALABAMA METAL INDUS. CORP. and FISHER AND LUDLOW, Defendant-Intervenors.

Before: Richard K. Eaton, Judge
Court No. 10–00240

[The Department of Commerce's Final Results of Redetermination are sustained.]

Dated: April 9, 2014

David J. Craven, Riggle & Craven, of Chicago, IL, argued for plaintiff.

Michael D. Snyder, Trial Attorney, Commercial Litigation Branch, Civil Division, U.S. Department of Justice, of Washington, D.C., argued for defendant. With him on the brief were *Stuart F. Delery*, Acting Assistant Attorney General, *Jeanne E. Davidson*, Director, and *Franklin E. White, Jr.*, Assistant Director. Of counsel on the brief was *Scott D. McBride*, Senior Attorney, Office of the Chief Counsel for Import Administration, United States Department of Commerce, of Washington, D.C.

Timothy C. Brightbill, Wiley Rein, LLP of Washington, D.C., argued for defendant-intervenors. With him on the brief were *Alan H. Price* and *Christopher B. Weld*.

OPINION

EATON, Judge:

Before the court are the Department of Commerce's ("the Department" or "Commerce") final results following remand of its antidumping investigation of certain steel grating exported from the People's Republic of China ("PRC") made pursuant to the court's order issued in *Yantai Xinke Steel Structure Co. v. United States*. *See Yantai Xinke Steel Structure Co. v. United States*, 36 CIT __, Slip Op. 12–95 (July 18, 2012) ("*Yantai I*"); Final Results of Redetermination Pursuant to Ct. Remand (Dep't of Commerce July 18, 2012) (ECF Dkt. No. 83) ("Remand Results").

On remand, Commerce was instructed to (1) reexamine the surrogate value data on the record, and determine a more accurate antidumping margin for separate rate respondents Yantai Xinke Steel Structure Co., Ltd. ("Xinke" or "plaintiff") and Ningbo Haitian International Co., Ltd. ("Haitian") using surrogate value information that was more contemporaneous with the period of investigation ("POI");[1] (2) "determine a separate rate for [mandatory respondent Ningbo Jiulong Machinery Manufacturing Co., Ltd. ('Jiulong')] that is corroborated as required by 19 U.S.C. § 1677e(c) [(2006)];" and (3) "explain how the discrepancies between Jiulong's supplier mill test certificates [submitted to Commerce] and those the company prepared for its customers justified using facts available or [adverse facts available ('AFA')] to determine the quantity of Jiulong's U.S. sales." *Yantai I*, 36 CIT at __, Slip Op. 12–95, at 12, 30. The court also permitted the Department to "reopen the record to solicit any information it determine[d] to be necessary to make its determination." *Yantai I*, 36 CIT at __, Slip Op. 12–95, at 30.

In its Final Determination, Commerce assigned a separate antidumping duty margin of 136.76 percent for Xinke and Haitian, using the average of the margins alleged in the Petition,[2] and assigned mandatory respondent Jiulong the PRC-wide rate of 145.18 percent utilizing AFA. Certain Steel Grating From the PRC, 75 Fed. Reg. 32,366, 32,368, 32,369 (Dep't of Commerce June 8, 2010) (final determination of sales at less than fair value), and the accompanying Issues & Dec. Mem., A-570–947 (Dep't of Commerce May 28, 2010) (P.R. Doc. 229) ("Issues & Dec. Mem.") (collectively, the "Final Determination").

In the Remand Results, the Department "complied under protest with the [c]ourt's order . . . [w]ith respect to the calculation of a separate rate for Xinke and Haitian, . . . and reviewed the [surrogate value] data placed on the administrative record after the initiation of the investigation." Remand Results at 2. As instructed by the court, Commerce used more contemporaneous surrogate values data from the record to calculate a revised weighted-average dumping margin of 38.16 percent for separate rate respondents Xinke and Haitian. Remand Results at 4, 7. Additionally, the Department determined a separate rate for Jiulong. Remand Results at 8–9. Despite assigning Jiulong a separate rate, however, the rate itself remained unchanged

[1] The POI was October 1, 2008 through March 31, 2009. *Yantai I*, 36 CIT at __, Slip Op. 12–95, at 2.

[2] As will be explained in greater detail below, Commerce made adjustments to the margins before averaging them.

at “145.18 percent, the highest rate alleged from the [P]etition.”[3] Remand Results at 8; Final Determination, 75 Fed. Reg. at 32,369. The Department also provided additional explanation as to why Jiulong’s defective “mill test certificates prevented [Commerce] from accurately determining the quantity of Jiulong’s U.S. sales,” and why this submission warranted the application of AFA to the quantity of Jiulong’s U.S. sales. Remand Results at 11, 36.

Plaintiff Xinke and defendant-intervenors, Alabama Metal Industries Corporation and Fisher and Ludlow (collectively, “defendant-intervenors”),[4] filed comments to the Remand Results. For the following reasons, the court holds that Commerce’s determination of a margin for Xinke and Haitian, and the separate AFA rate for Jiulong are supported by substantial evidence and otherwise in accordance with law. In addition, Commerce has adequately explained why the lack of reliable mill test certificates prevented it from accurately determining the quantity of Jiulong’s U.S. sales and warranted the use of AFA with respect to Jiulong’s sales volume. Thus, the Remand Results are sustained.

STANDARD OF REVIEW

“The court shall hold unlawful any determination, finding, or conclusion found . . . to be unsupported by substantial evidence on the record, or otherwise not in accordance with law.” 19 U.S.C. § 1516a(b)(1)(B)(i) (2006). “The results of a redetermination pursuant to court remand are also reviewed for compliance with the court’s remand order.” *Xinjiamei Furniture (Zhangzhou) Co. v. United States*, 38 CIT __, __, Slip Op. 14–17 (Feb. 18, 2014) (citation omitted) (internal quotation marks omitted).

DISCUSSION

I. BACKGROUND

In 2009, Commerce initiated an investigation of producers of steel grating from the PRC to determine whether the subject merchandise was being sold in the United States at less than fair value. *See* Notice of Initiation, 74 Fed. Reg. at 30,273–74. As part of its investigation, Commerce selected two mandatory respondents, Shanghai DAHE Grating Co., Ltd. (“Shanghai DAHE”) and Jiulong. *See* Certain Steel Grating From the PRC, 75 Fed. Reg. 847, 847 (Dep’t of Commerce

[3] Based on data supplied by defendant-intervenors in the Petition, “the estimated dumping margins for [certain steel grating] from the PRC range[d] from 131.51 percent to 145.18 percent.” Certain Steel Grating from the PRC, 74 Fed. Reg. 30,273, 30,276–77 (Dep’t of Commerce June 25, 2009) (initiation of antidumping duty investigation) (“Notice of Initiation”).

[4] Defendant-intervenors are domestic producers of steel grating.

Jan. 6, 2010) (prelim. determination of sales at less than fair value and postponement of final determination) ("Preliminary Determination"). Shanghai DAHE did not respond to Commerce's questionnaires, nor did it otherwise participate in the investigation. Preliminary Determination, 75 Fed. Reg. at 847. As a result, Jiulong was the sole mandatory respondent.[5] *See* Preliminary Determination, 75 Fed. Reg. at 847, 851.

In the Final Determination, the Department found that Jiulong had supplied inaccurate mill test certificates to Commerce, thereby withholding requested information, impeding the less than fair value investigation, providing information that could not be verified, and failing to cooperate to the best of its ability. *See* Final Determination, 75 Fed. Reg. at 32,367. Commerce therefore assigned Jiulong a rate based on AFA. Final Determination, 75 Fed. Reg. at 32,367. Commerce further determined that, as a result of Jiulong's inaccurate mill test certificates, it could not rely on the information provided by Jiulong in its separate rate questionnaire and, consequently, as an adverse inference, found that Jiulong was part of the PRC-wide entity. Final Determination, 75 Fed. Reg. at 32,367. Accordingly, the Department assigned Jiulong the PRC-wide rate of 145.18 percent. Final Determination, 75 Fed. Reg. at 32,369.

Because Jiulong was the sole mandatory respondent, and its rate was determined using AFA, Commerce, pursuant to its regulations, decided to use a "reasonable method" to determine the rates of the non-mandatory respondents. Issues & Dec. Mem. at 33; *see* 19 U.S.C. § 1673d(c)(5)(B) (2006). Specifically, Commerce determined a rate of 136.76 percent for separate rate respondents Xinke and Haitian, based on a simple average of the five dumping margins alleged in defendant-intervenors' Petition seeking the initiation of the less than fair value investigation. Final Determination, 75 Fed. Reg. at 32,368.

Xinke, Haitian, and Jiulong, each exporters of steel grating from the PRC, challenged Commerce's actions in *Yantai I*. In particular, Xinke objected to Commerce's use of a simple average of the margins alleged in the Petition to determine the margins for the non-mandatory respondents. *See Yantai I*, 36 CIT at __, Slip Op. 12–95, at 8. Xinke "argued that the normal value [of grated steel exports from the PRC used to calculate the Petition rates] 'should be recalculated using the [surrogate values] for financial ratios, material inputs, energy, and packing materials that ha[d] been submitted for the

[5] As noted in *Yantai I*, although Commerce did not select a mandatory respondent to replace Shanghai DAHE, no party challenged this decision. *Yantai I*, 36 CIT at __, Slip Op. 12–95, at 3 n.3.

record in this case." *Id.* at __, Slip Op. 12–95, at 8 (quoting Issues & Dec. Mem. at 32). Xinke claimed that Commerce ignored more contemporaneous data, specific to the POI, that Xinke had placed on the record during the investigation, from which the Department could have adjusted the Petition rates and thus, determined a more accurate antidumping margin for the non-mandatory respondents. *Id.* at __, Slip Op. 12–95, at 8.

In addressing this argument, the court found that the Department "had record evidence before it that may well have assisted in determining an accurate rate for the [s]eparate [r]ate [r]espondents[, Xinke and Haitian]." *Id.* at __, Slip Op. 12–95, at 12. The court elaborated that, "[f]or instance, it appears that Commerce relied on [P]etition rates that were calculated using financial ratios for the year prior to the POI, when financials for the POI were on the record." *Id.* Thus, the court concluded that the Department's "decision to ignore readily available and possibly more reliable surrogate value information when assigning an antidumping duty rate was not a reasonable one." *Id.* The case was then remanded to the Department "to determine whether a more accurate antidumping margin could be assigned based on the surrogate data submitted during the investigation." *Id.*

In addition, Jiulong challenged Commerce's determination regarding the quantity of Jiulong's U.S. sales in the Final Determination. *Id.* at __, Slip Op. 12–95, at 23. In particular, Jiulong objected to the application of facts available and AFA to determine the quantity of its U.S. sales based on the unreliability of its supplier mill test certificates. The court agreed, finding that "[i]t [was] unclear . . . why the lack of reliable mill test certificates would prevent the Department from accurately determining the quantity of Jiulong's U.S. sales." *Id.* The court consequently remanded the issue to Commerce, seeking further clarification from the Department as to "how the discrepancies between Jiulong's supplier mill test certificates and those the company prepared for its customers justified using facts available or AFA to determine the quantity of Jiulong's U.S. sales." *Id.* at __, Slip Op. 12–95, at 30.

Further, Jiulong challenged Commerce's denial of separate rate status without considering Jiulong's questionnaire responses concerning its independence from Chinese government control. *See id.* at __, Slip Op. 12–95, at 26. In doing so, Jiulong argued that it was improper to extend the finding that its mill test certificates were unreliable, to a finding that the responses provided in the separate rate questionnaire were unreliable as well. *See id.* The court agreed, holding that "Commerce ha[d] made no finding that Jiulong's questionnaire responses concerning its separate rate status were deficient in any respect. . . . Accordingly, the Department is required to determine Jiulong's separate rate based on the company's questionnaire responses." *Id.* at __, Slip Op. 12–95, at 27.

II. REMAND RESULTS–UNCONTESTED DETERMINATIONS

A. Relevancy of Mill Test Certificates to Quantity of U.S. Sales

In the Remand Results, Commerce addressed the adequacy of the inaccurate mill test certificates to provide the substantial evidence needed to support the use of facts available and AFA when determining the volume of Jiulong's U.S. sales. Remand Results at 9–11. Jiulong's mill test certificates were requested by Commerce during its investigation as a means of establishing the type of hot-rolled steel inputs used to manufacture Jiulong's steel grating "in order to properly value the company's factors of production and accurately calculate dumping margins." *Yantai I*, 36 CIT at __, Slip Op. 12–95, at 22. In the Final Determination, the Department found that Jiulong had provided inaccurate mill test certificates to Commerce, and the Department was therefore unable to verify the type of steel inputs used by Jiulong in the manufacturing of its steel grating. *See* Issues & Dec. Mem. at 12–13. "Without a reliable mill test certificate on the record," the Department explained, Commerce "d[id] not have sufficient information on the record to know whether or not . . . Jiulong ha[d] correctly reported U.S. sales models . . . *and further determine whether each U.S. sales observation* [*was*] *correctly reported with respect to quantity*." Issues & Dec. Mem. at 13 (emphasis added). It was the finding with respect to quantity that the court questioned in *Yantai I*.

On remand, Commerce clarified that, in constructing comparison U.S. prices, the physical characteristics of the product determine both the price and quantity used to calculate a weighted average. Remand Results at 10–11 ("The inaccuracy of the reported steel-type physical characteristic is significant. . . . If . . . one of the physical characteristics has been falsely reported, . . . [t]his will result in not only an inaccurate average U.S. price, but also an inaccurate U.S. sales quantity for the averaging group [of sales], which is used when aggregating comparison results to calculate the weighted-average dumping margin for Jiulong."). In other words, without reliable mill test certificates, the Department was unable to determine the type of steel used to manufacture Jiulong's steel grating merchandise sold in the United States. This affected Commerce's ability to determine quantity, because products with different principal physical characteristics could be erroneously grouped together and thus wrongly accounted for. This erroneous grouping would lead to an inaccurate representation of U.S. sales and an inaccurate dumping margin. Because Commerce's explanation is reasonable and because no party contests this finding, it is sustained.

B. Jiulong's Separate Rate Status

In compliance with the court's order in *Yantai I*, on remand the Department reexamined the information in Jiulong's separate rate response without consideration of Jiulong's submission of inaccurate supplier mill test certificates. Remand Results at 8. Finding "Jiulong's separate rate information to be complete," the Department "grant[ed] Jiulong a separate rate in accordance with the [c]ourt's direction." Remand Results at 8. As noted, despite assigning Jiulong a separate rate on remand, based on the application of AFA, Jiulong's antidumping duty rate remained unchanged at 145.18 percent, the highest margin from the Petition, as revised by the Department through supplemental questionnaires. Remand Results at 8; Issues & Dec. Mem. at 18.

The determination to grant Jiulong a separate rate has not been contested, and based on the reasonable explanation found in the Remand Results, the court sustains it.

III. THE SEPARATE RATE ASSIGNED TO JIULONG IS REASONABLE

In accordance with the court's direction to corroborate the separate rate assigned to Jiulong in the Remand Results, Commerce "determined that the rate of 145.18 percent, the highest rate alleged from the [P]etition, [as revised through supplemental questionnaires, was] both reliable and relevant to Jiulong's own reported commercial experience, and, therefore . . . corroborated pursuant to [19 U.S.C. § 1677e(c)]." Remand Results at 8. "In order to corroborate this rate, the Department . . . found that the 145.18 percent rate from the [P]etition [was] lower than three [of the five] product-specific dumping margins, and [was] thus within the range of the product-specific dumping margins from the [P]reliminary [D]etermination for Jiulong's sales of steel grating during the POI." Remand Results at 8–9.

The Department explained further that, because Jiulong had provided "falsified documents regarding its hot-rolled steel inputs during the investigation," it was reasonable to presume that had Jiulong reported accurate information to the Department, "dumping margins would have been even higher than those calculated in the Preliminary Determination based on Jiulong's reported, falsified data." *See* Remand Results at 9. In other words, Commerce inferred from Jiulong's submission of inaccurate mill test certificates that the submission of accurate documents would have resulted in the calculation of a higher dumping margin.

Because Jiulong has not contested the assignment of the 145.18 percent rate, and because the rate is lower than three of five of the price-to-normal value dumping margins used in the Petition, the court finds the rate reasonable and therefore sustains the assignment of the rate. To the extent the Department rests its determination to use the 145.18 percent rate on the mill test certificates, however, it stretches a point. That is, the circumstances surrounding the submission of the questionable mill test certificates do not necessarily warrant an inference that Jiulong knowingly submitted them in order to obtain a lower rate. *See Yantai I*, 36 CIT at __, Slip Op. 12–95, at 18–22.

IV. REMAND RESULTS –CONTESTED DETERMINATIONS

A. Commerce's Selection of Wide-Gauge Steel Coils Is Sustained

In the Final Determination, because Jiulong was the sole mandatory respondent, and its rate was determined using AFA, Commerce sought to use a "reasonable method" to determine the rates of the non-mandatory respondents pursuant to 19 U.S.C. § 1673d(c)(5)(B).[6] There, the Department found reasonable the use of the five price-to-normal value dumping margins set forth in the Petition (with some adjustments). The Department used a simple average of those margins to assign the separate rate of 136.76 percent for Xinke and Haitian. Issues & Dec. Mem. at 33. For use in its price-to-normal value calculation, defendant-intervenors computed the normal value of grated steel exports from the PRC using "factors of production data from comparable U.S. steel producers regarding raw material quantities, labor consumption, and energy consumption." *Yantai I*, 36 CIT at __, Slip Op. 12–95, at 8 n.7. These factors of production were then

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[6] The statute reads as follows:

> If the estimated weighted average dumping margins established for all exporters and producers individually investigated are zero or de minimis margins, or are determined entirely under section 1677e of this title [(i.e., using AFA)], the administering authority may use any reasonable method to establish the estimated all-others rate for exporters and producers not individually investigated, including averaging the estimated weighted average dumping margins determined for the exporters and producers individually investigated.

19 U.S.C. § 1673d(c)(5)(B).

valued by defendant-intervenors "using publicly available surrogate data from India, including information from the Global Trade Information Service's Global Trade Atlas database." *Id.*

To value "factory overhead, selling, general and administrative expenses, and profit," in their Petition, defendant-intervenors used the 2006–2007 financial statements of an Indian producer of welded pipe, Bihar Tubes Limited ("Bihar"), and an Indian producer of welded line pipes, Jindal SAW Limited ("Jindal"). *Id.* In the preliminary and final determinations, however, the Department declined to use the financials used by defendant-intervenors. Instead, Commerce calculated the financial ratios using the financial statements of two different Indian companies for the fiscal year 2007–2008, Mekins Agro Products Limited ("Mekins") and Rama Steel Tubes Limited ("Rama"). Preliminary Determination, 75 Fed. Reg. at 854–55. As noted, Commerce then averaged the resulting rates to determine the margin for the separate rate respondents.

Now, in the Remand Results, Commerce has assigned Xinke and Haitian a revised dumping margin of 38.16 percent. Remand Results at 7. Here, it determined Xinke and Haitian's rate using a weighted-average of the five price-to-normal value dumping margins originally found in the Petition. Mem. from Robert Bolling, Program Manager, Import Administration, and Thomas Martin, International Trade Compliance Analyst, Import Administration, to the File at 2, PD 24 at bar code 3115630–01 (Jan. 18, 2013), ECF Dkt. No. 107–24 (July 31, 2013) ("Calculation Mem."). The Department, however, adjusted these margins by using alternative surrogate value information. Remand Results at 4–7. Thus, the Department reexamined the surrogate values used to calculate the Petition dumping margins, and "determined that there [were] more contemporaneous [surrogate values] on the record for some of the factors of production . . . used to calculate the [P]etition margins." Remand Results at 4. The Department then "updated the [surrogate values] in the [P]etition with more contemporaneous information [specific to the POI] for hot-rolled steel coil, . . . steel scrap, wire rod, electricity, labor, and the ratios from the financial statements for overhead, selling expenses, general and administrative expenses, and profit." Remand Results at 4–5. Commerce explained further that, for the surrogate values "based on import data, the Department only updated [surrogate values] where the record contained data from the interested parties which corresponded to the descriptions for the [factors of production] from the [P]etition." Remand Results at 5. Although the Department updated the surrogate values, it retained the factors of production (i.e., the individual inputs) from the Petition.

As part of this update, Commerce used Indian import data for hot-rolled steel coil that was derived from tariff schedule subheadings for wide-gauge steel coils. The Department then used that data as the basis for the surrogate valuation of the steel coil input. *See* Remand Results at 4–5. Defendant-intervenors had identified wide-gauge steel as a factor of production used to calculate the margins in the Petition. For this factor of production, Commerce "update[d] one of the three [Harmonized Tariff Schedule ('HTS')] subheadings (i.e., 7208.37.30) used in the [P]etition for the Indian import data as the basis for [hot-rolled steel coil] because only this HTS subheading had more contemporaneous data on the record." Remand Results at 5. Thus, "[t]he Indian import data for [the] remaining two HTS subheadings (i.e., 7208.37.10 and 7208.37.90) for the [surrogate value] for hot-rolled steel coil from the [P]etition . . ." remained unchanged. Remand Results at 5.

Before Commerce, and now here, plaintiff insists that the proper input was narrow-gauge steel coil, not wide-gauge. Commerce, however, declined to "consider[] using the Indian import data for HTS subheadings 7211.14.50 and 7211.19.50" (i.e., narrow-gauge steel coil) because doing so "would involve a redefinition of the [P]etition's [factors of production] for hot-rolled steel coil." Remand Results at 16–17. Commerce explained that using alternative tariff provisions to base the surrogate values would extend "beyond the instructions from the [c]ourt in updating the [surrogate values] for the [P]etition margins where appropriate." Remand Results at 17. Put another way, the Department contends that the court's remand order directed it to update the values for the factors of production, but not to reevaluate the factors themselves.

In making its argument, Xinke contends that the issue of the proper tariff provision for the hot-rolled strip was before the Department in the original investigation. Xinke's Cmts. on Remand Determination 4 (ECF Dkt. No. 85) ("Pl.'s Cmts."). Further, plaintiff notes that Commerce was instructed on remand "to consider the complete record in order to determine whether a more accurate antidumping margin could be assigned based on the surrogate data submitted during the investigation." *Yantai I*, 36 CIT at __, Slip Op. 12–95, at 12. Thus, "Xinke submits that the Department . . . should have [also revisited], and then corrected, the tariff provision" used as the basis for surrogate values for the steel coil. Pl.'s Cmts. 3; Remand Results at 12–13. Therefore, while not objecting to the values being made more contemporaneous to the POI, Xinke claims that Commerce used the wrong type of steel as a factor of production in the production of the steel grating, and should have corrected its error on remand.

During the investigation, Jiulong supplied values for narrow-gauge subheadings (i.e., HTS 7211.14.50 and 7211.19.50) in its mill test certificates that were used to value the hot-rolled steel coil in the Preliminary Determination. Pl.'s Cmts. 6. Xinke contends that, in order to value the steel input used in the manufacturing of the subject merchandise, Commerce should have used the HTS headings covering the narrow-gauge steel found in Jiulong's mill test certificates for the steel input. Pl.'s Cmts. 6–7. In support of its claim, plaintiff points to the verification report which notes that representatives of Commerce measured steel coils at Jiulong's factory and found that all of the coils were narrow-gauge. Pl.'s Cmts. 6; *see* Mem. from Robert Bolling, Program Manager, Thomas Martin, International Trade Compliance Analyst, and Brian Soiset, Staff Attorney, Office of the Chief Counsel for Import Administration, to the File at 10, A-570947 (Feb. 23, 2010) (P.R. Doc. 164) ("Verification Report"). In addition, plaintiff argues that there is no evidence on the record supporting the use of wide-gauge steel coils for steel grating production in the PRC. Pl.'s Cmts. 3–7.

Despite plaintiff's arguments to the contrary, defendant-intervenors point to record evidence that they claim demonstrates that wide-gauge steel is the input used in the manufacturing of steel grating. Defendant-intervenors argue that record evidence establishes, for instance, that wide-gauge steel coils were used in the production of steel grating in the United States. *See* Def.-Ints.' Resp. to Pl.'s Cmts. on the Final Results of Redetermination Pursuant to Ct. Remand 6 (EFC Dkt. No. 97) ("Def.-Ints.' Resp. Cmts.").

Further, defendant-intervenors argue that there is record evidence that "steel producers do not generally produce hot-rolled steel coil in narrow form," but rather "'most producers of steel produce wide steel coil and slit it to size for use in products that require narrower coil, such as steel grating.'" Def.-Ints.' Resp. Cmts. 6 (quoting Aff. ¶¶ 3–4, at 40–41, A-570–947 (Dec. 7, 2009) (P.R. Doc. 124) ("[T]he commonly accepted practice is to purchase wide coils from a mill and slit into widths less than 30[inches] and then slit again into narrow bearing bar widths. . . . [I]f a customer requests a coil of width less than 30 inches, it is customary for the steel producer to produce a wide coil, and slit the coil for the customer.")).

As to the Department's verification of Jiulong, defendant-intervenors point out that company representatives for Jiulong were unable to say whether its purchased coils were rolled to a narrow size or slit from a larger coil. Def.-Ints.' Resp. Cmts. 10; Verification Report at 10. Moreover, since the verification was conducted months after the Department's investigation, defendant-intervenors insist that the presence of narrow-gauge steel at Jiulong's factory is of little probative value. *See* Def.-Ints.' Resp. Cmts. 11. Further, defendant-intervenors argue that, because "Jiulong's falsification of [its mill test certificates] deprived the Department of the ability to verify the type of hot-rolled steel that the company used in its production of steel grating[,] . . . there is no basis on the record" to support a finding that Jiulong used narrow-gauge steel coils. Def.-Ints.' Resp. Cmts. 10.

Defendant-intervenors further argue that Commerce's "use of narrow[-gauge steel coils] would require a redefinition of the Petition's [factors of production]." Def.-Ints.' Resp. Cmts. 2. They contend that injecting "surrogate values from one production process into a production process that does not incorporate that input [would] fundamentally chang[e] the Petition's cost model" and "would require that it choose entirely different [factors of production] (*e.g.*, raw materials, electricity, labor, and yield losses) that corresponded to the production process incorporating narrow steel coil," thus "exceed[ing] the scope of the Court's instructions to the Department to update the surrogate values for the Petition margins where appropriate." Def.-Ints.' Resp. Cmts. 8–9.

For its part, the Department contends that, upon review of all "of the surrogate value information on the administrative record," there was nothing that "undermined [defendantintervenors'] claim that the factors reported in the [P]etition were the best available information on the factors of production from their surrogate for the PRC producer." Def.'s Resp. to Cmts. Regarding the Remand Determination 8, 10 (ECF Dkt. No. 93) (internal quotation marks omitted) ("Def.'s Resp. Cmts."). Echoing defendant-intervenors' argument, the Department further maintains that "[a]pplying a surrogate value for a steel input with different widths from the input actually used by the domestic producer—as Xinke argues—results in a normal value derived from surrogate values based upon one production experience being applied to the factors of production of another, different production experience," and thus, "go[es] 'beyond the instructions from the Court.'" Def.'s Resp. Cmts. 9 (quoting Remand Results at 17). Accordingly, defendant asserts that Commerce's determination "to continue using surrogate values from the Indian HTS schedule [for wide-gauge steel] that correspond[ed] to the physical characteristics of the hot-rolled steel in coils used by the domestic producer in producing steel grating" was reasonable. Def.'s Resp. Cmts. 10.

The court sustains the Department's use of wide-gauge steel coils as a factor of production. While disputing the Department's decision to use wide-gauge steel coils for the steel input, plaintiff has not been able to establish that the choice was unreasonable or not fully explained. In other words, no usable record evidence undermines defendant-intervenors' claim that the factors reported in the Petition were "the best available information on the [factors of production] from their surrogate for a PRC producer at the time the [P]etition was filed." Remand Results at 15; *see Peer Bearing Co.-Changshan v. United States*, 35 CIT __, __, 752 F. Supp. 2d 1353, 1372 (2011) (explaining that the Department "must provide a rational explanation for its choice"). That is, (1) there was evidence on the record that wide-gauge steel was used as the input in the production of steel grating by a producer in the United States, *see* Petition for the Imposition of Antidumping and Countervailing Duties Pursuant to Sections 701 and 731 of the Tariff Act of 1930, as Amended, Volume II at 101–04, A-570–947 (May 29, 2009) (P.R. Doc. 1); (2) there was evidence that the common industry practice is for companies to purchase wide-gauge steel and slit it into narrow-gauge, Aff. ¶¶ 3–4 at 40–41; (3) during verification, company representatives of Jiulong were unable to say whether its purchased coils were rolled to a narrow size or slit from a larger coil, *see* Verification Report at 10;(4) because verification of Jiulong's facility was conducted months after the close of the POI, the presence of narrow-gauge coils on site is of little probative value, *see* Verification Report at 1; and (5) because Jiulong's mill test certificates describing the specifications of its hot-rolled steel coil were found to be inaccurate, and thus, unusable, there is no evidence on the record indicating that Jiulong's merchandise, or that of any other Chinese manufacturer, was produced from narrow-gauge steel. In other words, the only usable evidence on the record is that wide-gauge steel was used in the production of steel grating. The court is constrained in its review to the evidence on the record, and plaintiff has failed to produce any other evidence that narrow-gauge steel was used in the production of steel grating by Jiulong itself, or elsewhere.

Moreover, plaintiff waived its claim that Commerce used the wrong type of steel for the steel input by failing to raise it before the court prior to the remand. Because plaintiff did not raise this issue until after remand, the court's instructions necessarily did not direct the Department to reconsider its selection of the input itself. "A waiver is [ordinarily evidenced by] an 'intentional relinquishment or abandonment of a known right or privilege.'" *NSK Ltd. v. United States*, 28 CIT 1535, 1555, 346 F. Supp. 2d 1312, 1330 (2004) (quoting *Johnson v. Zerbst*, 304 U.S. 458, 464 (1938)). In the court's order, Commerce was instructed to "reexamine the surrogate value data on the record, and determine an antidumping margin for the [s]eparate [r]ate [r]espondents[, Xinke and Haitian,] that [was] reasonable in light of the Department's duty to determine rates as accurately as possible." *Yantai I*, 36 CIT at __, Slip Op. 12–95, at 30. The court's order was directed at valuing the factors of production, not reconsideration of the factors of production themselves. In its papers before this court challenging the Final Determination, plaintiff did not make a claim that the surrogate values for steel should be derived from narrow-gauge subheadings. Had plaintiff done so, the court would have made a holding concerning this issue in *Yantai I*. As counsel for Xinke expressly stated at oral argument prior to the issuance of *Yantai I*, however, it did not challenge the factors of production used to calculate the Petition margins. *Yantai I* Oral Arg. Tr. 49:7–12, Mar. 14, 2012 (ECF Dkt. No. 77) ("[Xinke's counsel (addressing the court):] We didn't challenge the factors of production in the [P]etition. We simply challenged the valuations of those factors and that's something that's a simple mathematical exercise, so there are rates that can be looked at and used to calculate a rate for Xinke and that's the [P]etition rates with the proper surrogate value supply.").

Relatedly, plaintiff did not challenge the methodology used to calculate the Petition margins. As Commerce points out, changing the input used to value Jiulong's factors of production from wide-gauge to narrow-gauge steel would require other changes in the factors of production because the production processes would change. Thus, using narrow-gauge HTS subheadings to value Jiulong's hot-rolled steel coil rather than the wide-gauge HTS subheadings used in the Petition would require Commerce to choose different factors of production (e.g., raw materials, electricity, labor, and yield losses) that corresponded to the production process for narrow-gauge steel coil. Because plaintiff declined to raise this issue before the court prior to remand, Commerce is correct that reviewing the factors of production themselves is beyond the scope of the court's order. Thus, the Department complied with the court's order that instructed the use of updated surrogate values, not different factors of production.

B. Commerce's Choice of Financial Statements Used for the Calculation of Financial Ratios Was Reasonable

1. *Greatweld*

When calculating the dumping margins included in its Petition, defendant-intervenors used the 2006–2007 financial statements of an Indian producer of welded line pipes, Jindal, and of an Indian producer of welded pipe, Bihar, to value "factory overhead, selling[,] general and administrative expenses, and profit percentages." Mem. from Rebecca Pandolph, International Trade Compliance Analyst, Import Administration, to the File at 152, A-570–947 (Oct. 30, 2008) (P.R. Doc. 1). In the preliminary and final determinations, the Department chose not to employ these financial statements. Rather, Commerce used financial ratios derived from the 2007–2008 financial statements of, what the Department determined to be, two Indian producers of comparable merchandise, Mekins and Rama. Preliminary Determination, 75 Fed. Reg. at 854–55. Mekins's financial statement was supplied by defendant-intervenors in a supplement to their Petition, and the Rama financial statement was submitted to the Department by Jiulong during Commerce's investigation. Preliminary Determination, 75 Fed. Reg. at 854. Using these financials, Commerce recalculated "a weighted-average margin based on the number of pieces of steel grating from the Petition," to reach the 136.76 percent rate assigned to Xinke and Haitian in the Final Determination. Calculation Mem. at 2.

The court, in its remand order, instructed Commerce in *Yantai I* "to determine whether a more accurate antidumping margin could be assigned based on the surrogate data submitted during the investigation." *Yantai I*, 36 CIT at __, Slip Op. 12–95, at 12. On remand, Commerce updated the financial ratios to recalculate the Petition margins. In updating the ratios, the Department reevaluated "each set of financial statements submitted to the record by interested parties as the basis for calculating these surrogate financial ratios." Remand Results at 6 & n.14.

In its draft results of redetermination, Commerce initially used the 2008–2009 Greatweld Steel Grating Private Ltd. ("Greatweld") financial statements, offered by defendant-intervenors, "to calculate and update the financial ratios, based on record evidence that Greatweld [was] the only company whose financial statements [were] on the record which produce[d] *identical* merchandise (i.e., steel grating)." Remand Results at 6 n.15 (emphasis added); Draft Results of Redetermination Pursuant to Ct. Remand 6, PD 1 at bar code 3102556–01 (July 18, 2012), ECF Dkt. No. 107–1 (July 31, 2013) ("Draft Remand Results"). Upon further review of the record, however, the Department decided not to use the 2008–2009 Greatweld financial statements after finding that they were not publicly available, and thus, "not usable for the Department's calculations." *See* Remand Results at 6 n.15.

Greatweld is an Indian manufacturer of steel grating. *See* Remand Results at 6 n.15. Defendant-intervenors contend that Commerce erred in finding that components of Greatweld's financial statements, particularly the profit-and-loss statement, were not publicly available. Def.-Ints.' Cmts. on Final Results of Redetermination Pursuant to Ct. Remand 12 (ECF Dkt. No. 88) ("Def.-Ints.' Cmts."). Defendant-intervenors assert that they were able to obtain at least portions of the financials from three independent sources: (1) India's Ministry of Corporate Affairs' Registrar of Companies ("MCARC"), to which they paid a fee, (2) a market research firm ("Brisk") they hired, and (3) from the website of a debt rating agency ("ICRA Limited"). Def.-Ints.' Cmts. 13. They further claim that they obtained the entire profit-and-loss statement from Brisk. *See* Mem. from Brandon Farlander, International Trade Compliance Analyst, to the File, PD 22 at bar code 3112144–01 (Dec. 26, 2012), ECF Dkt. No. 107–22 (July 31, 2013) ("Profitand-loss Statement Mem."); Letter from Timothy C. Brightbill, Wiley Rein LLP, to the Hon. Rebecca M. Blank, Acting Secretary of Commerce, Dep't of Commerce at 10, PD 21 at bar code 3107582–01 (Nov. 27, 2012), ECF Dkt. No. 107–21 (July 31, 2013) ("Resp. to Clarification Supplemental Questionnaire"). Therefore, defendant-intervenors maintain that the Greatweld financials were "widely available to any number of individuals, market research companies, and ratings bodies" and are therefore publicly available. Def.-Ints.' Cmts. 14. Accordingly, defendant-intervenors argue that Greatweld's financial statements were the best information available on the record from which to calculate and update the financial ratios, and that Commerce erred by abandoning use of the Greatweld financials in the Remand Results.

Defendant-intervenors also contend that the Department's finding that Greatweld's financial statements were not publicly available is inconsistent with Commerce's prior practice. *See* Def.-Ints.' Cmts. 14 & n.4. That is, they insist that Commerce has previously found other financial statements that were available by similar means to be publicly available. *See* Def.-Ints.' Cmts. 13 & n.4.

In order to test whether Greatweld's 2008–2009 financial statements were publicly available, Commerce asked defendant-intervenors to provide a step-by-step history of how they located the company's financial information "of sufficient detail so that any party would be able to replicate these steps to acquire Greatweld's . . . financial statements." Remand Results at 20. In response, defendant-intervenors explained that they obtained Greatweld's annual report and balance sheet from the MCARC's website and, using that information, "asked [Brisk] to obtain Greatweld's entire financial statement. [Brisk] did this, using its *relevant sources* in India." Resp. to Clarification Supplemental Questionnaire at 4 (emphasis added). Additionally, defendant-intervenors provided summaries of

"Greatweld's profit [and loss], turnover[,] and other key data" that it obtained from the ICRA Limited debt rating agency's website. Resp. to Clarification Supplemental Questionnaire at 5. Commerce states, however, that defendantintervenors "did not provide a detailed explanation of how [Brisk] acquired Greatweld's complete financial statements" and determined that defendant-intervenors' explanation was insufficient "[b]ecause the other interested parties to the proceeding, as well as the Department itself, d[id] not know the steps necessary to acquire [portions of the financial statements, including the profit-and-loss statement], and, therefore, could not acquire that data themselves . . . ." Remand Results at 20, 22.

Thus, for Commerce, while Greatweld's financial statements might be obtainable through the payment to an unnamed "foreign market research company" that then obtained the financials from unidentified "relevant sources," defendant-intervenors' explanation did not provide a sufficient road map for others to follow, in order to obtain the documents. Further, Commerce found that "while [defendant-intervenors] submitted financial data from ICRA Limited . . . and Brisk, these data are not complete financial statements and [were] thus not usable to calculate financial ratios." Remand Results at 23. Put another way, for Commerce, the publicly available information was incomplete, and the remaining information was not publicly available. As a result, according to Commerce, the financials could not be said to be publicly available.

In non-market economy antidumping cases, such as this, in selecting financial statements to calculate the financial ratios used to determine an exporter's dumping margin, "Commerce looks to specificity, contemporaneity, and quality of the data." *Dongguan Sunrise Furniture Co. v. United States*, 37 CIT __, __, 904 F. Supp. 2d 1359, 1366 (2013) (citation omitted) (internal quotation marks omitted). Further, the Department's "selection of financial statements to calculate the financial ratios . . . is guided by a general regulatory preference for publicly available, non-proprietary information." *Since Hardware (Guangzhou) Co. v. United States*, 37 CIT __, __, 911 F. Supp. 2d 1362, 1366 (2013) (citing 19 C.F.R. §§ 351.408(c)(1), (4) (2012) ("For manufacturing overhead, general expenses, and profit, the [Department] normally will use non-proprietary information gathered from producers of identical or comparable merchandise in the surrogate country.")). Commerce's regulatory preference for publicly available information stems from its "concern that a lack of transparency about the source of the data could lead to proposed data sources that lack integrity or reliability." *Id.* at __, 911 F. Supp. 2d at 1367 (citation omitted) (internal quotation marks omitted).

This Court has repeatedly confirmed the importance of public availability of the financial statements used for surrogate values. *See, e.g.*, *Jining Yongjia Trade Co. v. United States*, 34 CIT __, __, Slip Op. 10–134, at 23 (2010) ("Commerce's practice, in selecting the best available information for valuing [factors of production], is to select surrogate values which are product-specific, representative of a broad market average, *publicly available*, contemporaneous with the [period of review] and exclusive of taxes and duties." (emphasis added) (citation omitted) (internal quotation marks omitted)); *Home Prods. Int'l, Inc. v. United States*, 32 CIT 337, 342, 556 F. Supp. 2d 1338, 1343 (2008) ("If there is no quantitative or qualitative difference between the two statements, and one is completely publicly available and the other is not (missing a profit and loss statement), then Commerce's choice of a complete, publicly available financial statement consistent with its regulatory preference is, in the court's view, not only reasonable, but correct.").

The importance of having a profit-and-loss statement included in surrogate financial statements has been consistently expressed by Commerce because its practice is to not use surrogate data from companies that record a loss or zero profit during the POI. *See, e.g.*, Steel Concrete Reinforcing Bars From the PRC, 66 Fed. Reg. 33,522 (Dep't of Commerce June 22, 2001) (notice of final determination of sales at less than fair value), and accompanying Issues & Dec. Mem. at cmt. 8; Certain Fresh Cut Flowers From Ecuador, 64 Fed. Reg. 18,878, 18,883 (Dep't of Commerce Apr. 16, 1999) (prelim. results and partial rescission of antidumping duty admin. review); Silicomanganese From Brazil, 62 Fed. Reg. 37,869, 37,877 (Dep't of Commerce July 15, 1997) (final results of antidumping duty admin. review). This is because the Statement of Administrative Action, which accompanies the Uruguay Round Agreements Act, requires that an element of profit be included in the calculation of constructed value. H.R. DOC.NO. 103–316 at 839–40 (1994), *reprinted in* 1994 U.S.C.C.A.N. 4040, 4175–76. "Because constructed value serves as a proxy for a sale price, and because a fair sales price would recover [selling, general, and administrative] expenses and would include an element of profit, constructed value must include an amount for [selling, general, and administrative expenses] and for profit." H.R. DOC. NO. 103–316 at 839 (1994), *reprinted in* 1994 U.S.C.C.A.N. at 4175. Indeed, this Court has found that, under certain circumstances, it would be unreasonable for Commerce to rely on financial statements that lack a profit-and-loss statement. *See, e.g.*, *Home Prods. Int'l*, 32

CIT at 342; *cf. Dongguan*, 37 CIT at __, 904 F. Supp. 2d at 1366 (finding a company's financial statement to be incomplete and unreliable, and thus, unusable, because the statement was missing a tax line item).

The court finds that the profit-and-loss statement placed on the record by defendant-intervenors does not rise to the level of "publicly available." Commerce, in preparing the Remand Results, was presented with the question of determining whether to use the financial statements of a company that produced identical merchandise to steel grating, but whose financials were not publicly available, or the financial statements of eight companies that produced comparable merchandise to steel grating, but whose financials were readily available to the public. Commerce reasonably chose the latter.

The Department, on several occasions, asked defendant-intervenors to submit a step-by-step explanation, outlining how they obtained Greatweld's 2008–2009 profit-and-loss statement. Remand Results at 22. Defendant-intervenors' responses were inadequate because they failed to provide a sufficiently detailed explanation of how the unnamed foreign market research company acquired Greatweld's complete financial statements from its unidentified "relevant sources." Thus, defendant-intervenors failed to make the requisite demonstration that the Department or the other interested parties could access the same financial data. Remand Results at 22. Consequently, no publicly available profit-and-loss statement was placed on the record for Greatweld, and, as a result, as the Department notes, Commerce could not ascertain whether Greatweld recorded a profit or a loss during the POI. *See* Remand Results at 23. Because it is Commerce's reasonable practice to use financial statements of companies that record a profit to calculate surrogate financial ratios, Greatweld's publicly available partial financial statements are materially incomplete. The court reaches this conclusion after having taken into account defendant-intervenors' arguments.

As part of their argument, defendant-intervenors assert that, here, Commerce has departed from its prior practice by finding Greatweld's financial statements were not publicly available. The court is not persuaded. Defendant-intervenors cite Certain Lined Paper Products From the PRC, 71 Fed. Reg. 53,079 (Dep't of Commerce Sept. 8, 2006) (notice of final determination of sales at less than fair value, and affirmative critical circumstances, in part), and accompanying Issues & Dec. Mem. at cmt. 1, where Commerce concluded that "financial statements of private companies filed with Indian Registrar of Companies are in the public realm." They also cite Certain Activated Carbon from the PRC, 74 Fed. Reg. 57,995 (Nov. 10, 2009) (final results of admin. review), and accompanying Issues & Dec. Mem. at cmt. 2, in which Commerce accepted financial statements from the Indian Ministry of Corporate Affairs' website as publicly available. Remand Results at 21 & n.47; Def.-Ints.' Cmts. 13 & n.4. The court notes, however, that these decisions appear to support only the conclusion that Commerce consistently considers documents, such as those from MCARC (India's Ministry of Corporate Affairs' Registrar of Companies), to be publicly available. In this case, Commerce has not disputed the public availability of the MCARC documents, but rather the public availability of the profit-and-loss statement that defendant-intervenors acknowledge was not retrieved from MCARC. *See* Remand Results at 22; Profit-and-loss Statement Mem.

Defendant-intervenors next cite 1-Hydroxyethylidene-1, 1-Diphosphonic Acid from the PRC, 74 Fed. Reg. 10,545 (Dep't of Commerce Mar. 11, 2009) (final determination of sales at less than fair value), and accompanying Issues & Dec. Mem. at cmt. 1, in which Commerce notes that it "frequently accept[s] sources of information obtained through fee-based internet services." Here, however, the only fee-based internet service that defendant-intervenors state that they used was MCARC, and Commerce has accepted documents from that source as publicly available. Brisk, on the other hand, is a research company located in India. Remand Results at 20. It is the public availability of the profit-and-loss statement provided by Brisk that Commerce questions, not information supplied by a fee-based internet service. Thus, this agency determination does not help defendant-intervenors.

Defendant-intervenors also cite Floor-Standing, Metal-Top Ironing Tables and Certain Parts Thereof From the PRC, 76 Fed. Reg. 15,297 (Dep't of Commerce Mar. 21, 2011) (final results of antidumping duty admin. review), in which Commerce found that it could use financial statements obtained from a public source. Def.-Ints.' Cmts. 13 n.4. Citation of this review does not aid defendant-intervenors, however, because it is precisely that the profit-and-loss statement has *not* been obtained from a public source that caused Commerce to decline to use the Greatweld profit-and-loss statement obtained by Brisk.

Finally, defendant-intervenors cite Persulfates From the PRC, 67 Fed. Reg. 50,866, 50,869 (Dep't of Commerce Aug. 6, 2002) (prelim. results of antidumping duty admin. review and notice of partial recission) ("*Persulfates*"), in which Commerce found that the financial statements of a private firm under review could be considered publicly available if, among other conditions, the statements were placed on the record by that firm. *Persulfates*, however, is distinguishable from the case at-hand because Greatweld has not placed its financial statements on the record. Rather, it is defendant-intervenors that have placed the Greatweld financial statements on the record. Further, unlike the companies in *Persulfates*, Greatweld is neither a respondent under review, nor a party to this action. In sum, the court finds that the record does not reflect that Commerce has unreasonably deviated from its prior practices in determining public availability.

Next, the court cannot credit defendant-intervenors' assessment that, because they were able to obtain Greatweld's financial data, these statements were necessarily widely available to the public. As defendant-intervenors note, Commerce "'must address significant arguments and evidence which seriously undermines its reasoning and conclusions.'" Def.-Ints.' Cmts. 14 (quoting *Altx, Inc. v. United States*, 25 CIT 1100, 1117–18, 167 F. Supp. 2d 1353, 1374 (2001)). Defendant-intervenors, however, have failed to present any significant argument. Commerce's concern is that other interested parties may not be able to independently access the information, and this is the bar that Commerce has reasonably set for public availability. That Brisk, which specializes in mining financial data, was able to obtain the profit-and-loss statement, provides little indication that other interested parties lacking the data mining skills and expertise of Brisk, could independently do the same. *See* Profit-and-loss Statement Mem. ("[Defendantintervenors] stated that the market research company [(Brisk)] acquired Greatweld's profit and loss statement.").

Nor can defendant-intervenors rely on *Ass'n of American School Paper Suppliers v. United States* as an instance where this Court has upheld Commerce's use of incomplete financial statements. *See Ass'n of Am. Sch. Paper Suppliers v. United States*, 35 CIT __, __, 791 F. Supp. 2d 1292, 1303–05 (2011). Defendant-intervenors' assert that *School Paper Suppliers* stands for the proposition that Commerce has used incomplete financial statements in the past to calculate financial ratios. In *School Paper Suppliers*, however, Commerce chose to use incomplete financial statements only after finding that they were not missing "key sections that [were] vital" to its analysis and calculations. *Id.* at __, 791 F. Supp. 2d at 1304 (internal quotation marks omitted). In particular, although the financial statements in *School Paper Suppliers* were incomplete, they contained a publicly available profit-and-loss statement. *See id.* at __, 791 F. Supp. 2d at 1299 ("[Commerce] found that the . . . data contained a director's report, auditor's reports, balance sheet, *profit and loss statement*, notes, and accounting policies." (emphasis added) (citation omitted)). As discussed above, Commerce has been reasonable in consistently emphasizing the importance it places on profit-and-loss statements. Moreover, this Court has upheld this practice, and continues to do so here. *See, e.g.*, *Home Prods. Int'l*, 32 CIT at 342, 556 F. Supp. 2d at 1343.

Accordingly, the court finds that Greatweld's 2008–2009 financial statements were incomplete because they lacked a profit-and-loss statement that was publicly available. Thus, Commerce reasonably determined, on remand, that Greatweld's financials could not be used to calculate the surrogate financial ratios.

2. Mekins

By means of a supplement to the Petition underlying this investigation, defendant-intervenors placed on the record the 2007–2008 financial statements of Mekins, an Indian company, which they asserted manufactured wire decking, merchandise comparable to steel grating from the PRC. *See* Preliminary Determination, 75 Fed. Reg. at 854. Although the Department initially used the 2007–2008 Mekins financial statements in the preliminary and final determinations to calculate surrogate financial ratios, Commerce declined to use Mekins's financials on remand, "find[ing] that the record d[id] not support finding that any of Mekins'[s] products [manufactured during the fiscal year were] comparable to steel grating" (i.e., wire decking). Remand Results 31. Thus, Commerce found that, Mekins neither manufactured an identical product to steel grating, nor did it produce a comparable product.

Defendant-intervenors insist that Commerce should have used Mekins's financials in its surrogate value analysis, stating that, in fact, Mekins produces wire decking, a comparable product to steel grating. *See* Def.-Ints.' Cmts. 17. In support of their position, defendant-intervenors point to a printout of Mekins's webpage that lists wire decking as one product that it produces, and they contend that Commerce has not addressed this evidence in the Remand Results. Def.-Ints.' Cmts. 17–18.

The court fails to find merit in any of these assertions. As Commerce points out, the printout of Mekins's webpage, while some evidence that Mekins could produce wire decking, is insufficient evidence that Mekins was a producer of wire decking *during the POI*. *See* Remand Results at 31; Def.'s Resp. 22–23. That is, although the webpage indicates Mekins's ability to produce wire decking, it does not demonstrate that Mekins produced wire decking between the period of October 1, 2008 and March 31, 2009 (during the POI). Thus, the webpage does not provide any evidence of the importance of wire decking production to Mekins's financials, i.e., how much wire decking Mekins produced annually, how much it produced relative to its other products, whether it produced wire decking regularly, or whether it produced wire decking during the POI.

Moreover, Commerce examined Mekins's financial statements from 2007–2008 (the year prior to the POI) that defendant-intervenor placed on the record, and found that they provide no evidence that the company produced any wire decking that year. That is, the financials list quantities produced of specific products, and wire decking is notably absent. *See* Remand Results at 31. Further, Commerce examined Mekins's financial statements from 2008–2009 (the year of the POI) which plaintiff initially placed on the record during the investigation, and found that there was nothing that speaks directly to Mekins's production of wire decking during the POI. *See* Remand Results at 31. Accordingly, because defendant-intervenors can only point to evidence that Mekins had the ability to produce a comparable product to steel grating, and the Department lacked record evidence that the company actually manufactured this product during the POI, Commerce reasonably concluded "that there [was] insufficient evidence on the record to indicate that Mekins actually manufactured wire decking during the [POI]," and the Department was thus reasonable in its decision not to use the company's financials to calculate surrogate financial ratios. Remand Results at 31.

3. Comparability of Steel Pipe and Tube Producers

As noted, in the Remand Results, Commerce determined that there were no usable financial statements on the record of manufacturers of identical merchandise to steel grating. Thus, the Department used the 2008–2009 financial statements, which were specific to the POI, of Rama, Vallabh, NIL, NTL, North Eastern, Good Luck, Zenith Birla, and Shri Lakshmi, eight manufacturers of steel pipe and tube (merchandise Commerce determined to be comparable to steel grating), as the basis for calculating the surrogate financial ratios. Remand Results at 6.

Defendant-intervenors object to the use of financial statements from steel pipe producers, arguing that (1) steel pipes are not comparable merchandise to steel grating, (2) they placed evidence on the record to that effect, that Commerce failed to adequately address, and (3) because Commerce failed to articulate a satisfactory explanation for its action and address evidence that undermines its conclusion," the Department's decision is not based on substantial evidence. Def.-Ints.' Cmts. 19, 20 (citations omitted) (internal quotation marks omitted).

As an initial matter, and as has been previously discussed, because the Department reasonably found that Greatweld's financials were not publicly available, there are consequently no usable financial statements on the record for manufacturers of steel grating, i.e., the identical product. Additionally, as noted, Commerce reasonably determined that there was insufficient evidence that Mekins produced comparable merchandise to steel grating (i.e., wire decking) during the POI. Thus, Commerce looked to the record for financials of other producers of comparable merchandise. *See, e.g.*, *Viraj Forgings, Ltd. v. United States*, 27 CIT 1472, 1485, 283 F. Supp. 2d 1335, 1347 (2003) ("While it is certainly simpler for Commerce to identify and compare identical merchandise when it exists; lacking identical goods for comparison[,] Commerce must find similar merchandise in order to make a proper comparison with the United States imports" (citing *NTN Bearing Corp. of Am. v. United States*, 127 F.3d 1061, 1063 (Fed. Cir. 1997))).

With respect to comparability, defendant-intervenors make the following arguments: that (1) "[s]teel pipe production requires substantially more machinery, technical skill, expense, and sophistication than the production of steel grating;" (2) Commerce "failed to address [defendantintervenors'] contention that the end-uses of steel grating and steel tube and pipe differ;" (3) "[p]ipe and tube products clearly have no such similar use . . . to steel grating;" and (4) pipe producer Vallabh, whose financial statements were used as a source of the surrogate financial ratios, "devotes a significant portion of its operations—well over 50 percent—to the production of cold-rolled steel" and sponge iron, and is "therefore far removed from the business" of steel grating manufacturing." Def.-Ints.' Cmts. 19–22.

"Comparability" is not defined in the governing statute or regulation. *See* 19 U.S.C. § 1677b(c); 19 C.F.R § 351.408(c)(4). To determine comparability, Commerce's regular practice is to consider the products' physical characteristics, end uses, and production processes. *See Jiaxing Brother Fastener Co. v. United States*, 34 CIT __, __, 751 F. Supp. 2d 1345, 1355 (2010); *see also Lifestyle Enter., Inc. v. United States*, 35 CIT __, __, 768 F. Supp. 2d 1286, 1307 (2011) ("In creating surrogate values, Commerce uses data from producers of 'comparable merchandise,' considering end uses, physical characteristics, and production processes." (citation omitted)).

Contrary to defendant-intervenors' contentions, the court finds that Commerce has adequately demonstrated that steel grating and steel piping and tubing are comparable products. As an initial matter, Commerce noted on remand that it found the steel pipe and tube industry to be comparable to the steel grating industry in the Preliminary Determination. Remand Results at 24 (citing Preliminary

Determination, 75 Fed. Reg. at 855). In the Remand Results, Commerce based its findings largely on the similarities of the production processes. *See* Remand Results at 24–25. The Department noted that steel pipe and tube, and steel grating use hot-rolled steel coil as the main input and that both have a similar method of production that involves cutting hotrolled steel coil into strips, shaping the strips, and welding the strips. *See* Remand Results at 24– 25 (citation omitted). Although welding shaped strips into pipe differs from welding the strips together to form grating, the similarities in the processes are obvious. Thus, the main input for steel grating and steel tubing are identical and the production processes are similar. Further, although defendant-intervenors allege that the production process for steel pipe is considerably more challenging and costly than that of steel grating, because welding strips together is the primary process used to make both products, Commerce reasonably determined that the production processes for the two products were nonetheless sufficiently similar to render the steel pipe and tube industry comparable.

Though Commerce's practice is to consider a product's end use, physical characteristics, and production process in determining comparability, it is not restricted to using products that are comparable along all three fronts, and the conclusion that two products may be comparable for the purposes of surrogate valuation, and yet have different end uses, is not novel. *See, e.g.*, *Musgrave Pencil Co. v. United States*, 31 CIT 445, 450 (2007); *Shanghai Foreign Trade Enters. v. United States*, 28 CIT 480 (2004) (listing past cases in which Commerce "has found comparability despite differences in shape, size and end use," because the "two classes of products [were] made using similar materials and production processes"); Wire Decking from the PRC, 75 Fed. Reg. 32,905 (Dep't of Commerce June 10, 2010) (final determination of sales at less than fair value), and accompanying Issues & Dec. Mem. at cmt. 2 ("Although the end use of tyre bead, steel wire rope, other wire products, hinges, nails and blades may differ from wire decking the raw material inputs, production process, and machinery required are sufficiently similar to that of wire decking."); Glycine from the PRC, 66 Fed. Reg. 8,383 (Dep't of Commerce Jan. 31, 2001) (final results of new shipper administrative review), and accompanying Issues & Dec. Mem. at cmt. 7 ("[G]lycine and phenylglycine have similarities with regard to material inputs and production processes. For example, both processes appear to use similar equipment . . . in manufacturing the glycine and phenylglycine[, and] . . . the steps involved in the production processes [of both products] appear to be similar."); *cf.*H.R. REP.NO. 100–576, at 591 (1988) (Conf. Rep.), *reprinted in* 1988 U.S.C.C.A.N. 1547, 1624 ("Commerce should seek to use, if possible, data based *on production of* the same general class or kind of merchandise using similar levels of technology and at similar levels of volume as the producers subject to investigation." (emphasis added)).

That Commerce has not specifically addressed defendant-intervenors' contentions that steel grating and steel piping have different end uses, does not warrant a remand. While Commerce takes into account a product's end use, physical characteristics, and production processes in its comparability analysis, the objective here is to determine surrogate financial ratios based on the cost of production. Production processes and the physical characteristics of the compared products are therefore the more important factors. Here, because the major input is identical, and cutting and welding steel strips are the most important manufacturing processes, the manner of manufacture is similar, and thus, Commerce has not erred in finding comparability. *See* H.R. REP.NO. 100–576, at 591, *reprinted in* 1988 U.S.C.C.A.N. at 1624.

Finally, defendant-intervenors' contention that Commerce failed to address evidence that Vallabh produces cold-rolled steel and sponge iron, in addition to piping and tubing, and is "therefore far removed from the business of" manufacturing steel grating, is at odds with the record. Def.-Ints.' Cmts. 22. In the Remand Results, Commerce points directly to evidence on the record, namely Vallabh's financial statements, demonstrating that Vallabh "is primarily a manufacturer and seller of steel pipe and tube" insofar as it produced significantly more steel piping than any other product during the POI with more than twice as much of its revenue coming from the sale of steel piping as from cold-rolled steel, its next most important product. *See* Remand Results at 25–26, 26 n.68 (citing Vallabh Steels Limited Annual Report 2008–2009 at 307, A-570–947 (Mar. 1, 2010) (P.R. Doc. 167) ("Vallabh Annual Report")). As Commerce correctly notes, "[t]hat Vallabh *also* produces cold-rolled steel [and sponge iron] does not undermine the fact that Vallabh is a producer of [steel pipe and tubing,] which is a comparable merchandise" to steel grating. Def.'s Resp. 15. In other words, Vallabh's financial statements indicate that a major source of the company's business is the manufacturing and sale of steel pipe and tubing. Vallabh's financials are thus largely reflective of the production of steel pipe and tubing, comparable merchandise to steel grating. In addition, because Vallahb's financial statements are used in combination with seven other companies, whose primary production is of comparable merchandise, it cannot be said that the use of Vallabh's financials was unreasonable.

Accordingly, Commerce's determination to use the financial statements of the steel piping and tubing producers is supported by substantial evidence.

4. *Receipt of Subsidies by Producers of Comparable Merchandise*

As noted, on remand, Commerce used the financial statements of Indian companies, Rama, Vallabh, NIL, NTL, North Eastern, Good Luck, Zenith Birla, and Shri Lakshmi, to calculate the surrogate financial ratios, finding that these companies' financial statements were for comparable merchandise and "more contemporaneous than the financial statements used in the [P]etition and the Preliminary Determination." *See* Remand Results 6.

a. NTL, NIL, North Eastern, and Good Luck

Defendant-intervenors challenge Commerce's use of the NTL, NIL, North Eastern, and Good Luck financial statements, claiming that there is evidence that these companies received countervailable subsidies during the POI. Def.-Ints.' Cmts. 23–24. Defendant-intervenors suggest that "the significant amount of subsidies referenced in the companies' financial statements strongly indicate that these statements are distorted and unreliable." Def.-Ints.' Cmts. 24. In particular, defendant-intervenors note that NTL received a subsidy listed as "Duty Entitlement on Exports," which they claim is similar to the "Duty Entitlement Pass Book Scheme" that Commerce has previously found to be countervailable. Def.-Ints.' Cmts. 23–24. Defendant-intervenors contend that, "given the nearly identical name of these two programs, the Department erred in failing to provide evidence to support its conclusion that [the two] are distinct subsidy programs." Def.-Ints.' Cmts. 24.

Commerce's general practice is not to use financial statements to calculate financial ratios from companies that are known to receive countervailable subsidies. This practice results, in part, from Congress's direction in the legislative history to the Omnibus Trade and Competitiveness Act of 1988, that "Commerce shall avoid using any prices which it has reason to believe or suspect may be dumped or subsidized prices . . . base[d] on information generally available to it at that time." H.R. REP.NO. 100–576, at 590–91, *reprinted in* 1988 U.S.C.C.A.N. at 1623–24. The Department has further observed that its practice of declining to use the financials of companies known to have received countervailable subsidies is based on the idea that these financial statements may be less representative of the financial experience of the relevant industry than financial statements that do not contain evidence of these types of subsidies. Remand Results at 26; *see also Jiaxing*, 34 CIT at __, 751 F. Supp. 2d at 1353.

Nevertheless, Commerce's policy is not to reject financials containing evidence of subsidies of an unknown character unless there is evidence that the subsidies were distortive with respect to the subject merchandise during the POI. *See, e.g.*, Persulfates from the PRC, 68 Fed. Reg. 68,030 (Dep't of Commerce Dec. 5, 2003) (final results of antidumping duty administrative review), and accompanying Issues & Dec. Mem. at cmt. 3 (collectively, "Persulfates Final Results"). The Department's stated reason for not disregarding all financials with evidence of a subsidy is that, "[i]n the case of a potential surrogate in receipt of government subsidies, the [mere] existence of a subsidy is not, in and of itself, sufficient evidence of such distortion." Persulfates Final Results at cmt. 3. Thus, except for countervailable subsidies, the Department requires evidence of distortion before it will discard financial statements.

Moreover, as stated in the Conference Report for the enacting statute, Congress did "not intend for Commerce to conduct a formal investigation" [with respect to subsidization,] but rather intend[ed] that Commerce base its decision on information generally available to it at th[e] time." H.R. REP.NO. 100–576, at 590–91, *reprinted in* 1988 U.S.C.C.A.N. at 1623–24.

The court finds that the Department's decision to use the financial statements of NTL, NIL, North Eastern, and Good Luck to calculate financial ratios was reasonable.[7] Here, although NIL, North Eastern,

[7] It should be noted that the facts and circumstances of this case differ from those found in *Fuyao Glass Indus. Group Co. v. United States*, 29 CIT 109 (2005). In that case, Commerce determined that surrogate prices from a country should be disregarded based on a finding that there was a "reason to believe or suspect" that the surrogate prices were subsidized. *See Fuyao Glass*, 29 CIT at 111–21 (quoting H.R. REP.NO. 100–576, at 590, *reprinted in* 1988 U.S.C.C.A.N. at 1623). In *CS Wind Vietnam Co. v. United States*, the Court discussed the standard set forth in *Fuyao Glass*. *CS Wind Vietnam Co. v. United States*, 38 CIT __, __, Slip Op. 14–33, at 32–33. As noted by the Court in *CS Wind*, the *Fuyao Glass* standard requires the Department, when considering such a determination, to justify its belief or suspicion with respect to the prices of products of specific companies by showing that "'(1) subsidies of the industry in question existed in the supplier countries during the [POI]; (2) the supplier in question is a member of the subsidized industry or otherwise could have taken advantage of any available subsidies; and (3) it would have been unnatural for a supplier not to have taken advantage of such subsidies.'" *Id.* (quoting *Fuyao Glass*, 29 CIT at 114). Here, there is no claim that any financials should not be used because of the availability of countervailable subsidies for a particular industry in a particular country. Rather, the claim is that there is evidence of the receipt of countervailable subsidies within the financials themselves, and that the financials are therefore unusable for purposes of calculating the financial ratios. Because the claim involves financials that are on the record, the Department's inquiry need not reference the *Fuyao Glass* standard. Rather, Commerce has reasonably looked to the financials themselves for evidence of unacceptable subsidies.

Good Luck, and NTL's financial statements indicate the receipt of subsidies during the POI, there is no evidence on the record that any of the subsidies have been previously investigated by the Department, and found to be countervailable. More specifically, none of NIL, North Eastern, or Good Luck's financials refer to a particular subsidy or export incentive program. Rather, their financial statements refer to the receipt of subsidies in general terms (e.g., "Export Incentives/Benefits Receivable," "State Capital Investment Subsidy," "Central Capital Investment Subsidy," "Development Subsidy," etc.). In addition, there is no record evidence of the receipt of distortive subsidies. Thus, although it is possible that the listed subsidies could be found to be countervailable or to be otherwise distortive, there is no evidence that, in fact, they were either.

Neither does the record contain evidence that the "Duty Entitlement on Exports" column in NTL's financials refer to the "Duty Entitlement Pass Book Scheme," a program previously investigated by the Department, and found to be countervailable. Def.-Ints.' Cmts. 23–24. Also, nothing on the record points to the amounts NTL received as being distortive.

Finally, contrary to defendant-intervenors' assertion that Commerce should have conducted a formal investigation to determine whether these programs were distinct from one another, defendant-intervenors have been unable to point to, and the court is unaware of, any statute, regulation, or agency practice that would require the Department to undertake such an investigation. Indeed, Congress's direction is that "Commerce base its [subsidy] decision on information generally available to it at that time." H.R. REP.NO. 100–576, at 590–91, *reprinted in* 1988 U.S.C.C.A.N. at 1623–24.

Thus, because there is no evidence of specific countervailable subsidies, or any evidence of distortive subsidies in NIL, North Eastern, Good Luck, or NTL's financial statements, the Department did not err in including their financial statements in its calculations of the surrogate financial ratios.

b. Shri Lakshmi

Defendant-intervenors also object to the Department's reliance on the financial statements of Shri Lakshmi, an Indian company that Commerce found to be a producer of comparable merchandise to steel grating. Defendant-intervenors claim that there is evidence that Shri Lakshmi benefitted from a countervailable subsidy received by its owner, Bihar, under the "Duty Entitlement Pass Book" scheme. Def.-Ints.' Cmts. 24. As noted, Commerce previously found that subsidy to be countervailable. In particular, defendant-intervenors contend that they provided evidence to the Department that Shri Lakshmi purchased finished pipe from Bihar, thus benefitting from Bihar's subsidy stream, but that Commerce failed to address this evidence. *See* Def.-Ints.' Cmts. 24.

As noted, Commerce will not reject a company's financial statements for use in calculating surrogate financial ratios, on the sole basis that the company's financials mention a subsidy, unless the Department has previously found that specific subsidy program to be countervailable or finds the subsidy distortive. In addition, there must also be evidence that a benefit has actually been received as a result of the subsidy. *See Delverde, SrL v. United States*, 202 F.3d 1360, 1364 (Fed. Cir. 2000) ("[T]he Tariff Act requires that Commerce make such a determination by examining the particular facts and circumstances of the sale and determining whether [the company] directly or indirectly received both a financial contribution and benefit from a government."); *DuPont Teijin Films v. United States*, 37 CIT __, __, 896 F. Supp. 2d 1302, 1310 (2013). Further, for a set of financials to be found unusable because of a countervailable subsidy having been provided to a related company, there must be evidence that a benefit received by one company actually benefited its related company. *Delverde*, 202 F.3d at 1364. For instance, in the context of the purchase of assets from a subsidized company, the United States Court of Appeals for the Federal Circuit held that "the Tariff Act as amended does not allow Commerce to presume conclusively that the subsidies granted to the [seller] automatically 'pass[] through' to [the purchaser]." *Id.*

Here, the court finds that defendant-intervenors' position lacks merit. First, defendant-intervenors' entire claim before Commerce was that, because Shri Lakshmi bought pipe from Bihar, and Bihar received a countervailable subsidy, Shri Lakshmi "may benefit" from the subsidy. Rebuttal Br. of Alabama Metal Indus. Corp. and Fisher & Ludlow at 44–45, A-570–947 (Apr. 13, 2010) (P.R. Doc. 223). Defendant-intervenors, however, have proffered no evidence indicating that Shri Lakshmi received a benefit from any subsidy program identified by Commerce to be countervailable, either through Bihar or otherwise. The mere purchase of pipe that might have been subsidized simply does not constitute substantial evidence. That is, absent some evidence, for instance, that the pipe was purchased at less than the market price, there is nothing to indicate that Shri Lakshmi benefitted from the supposed countervailable subsidy received by Bihar.

Accordingly, because Commerce may not presume a "pass through" of the subsidy, without more, the Department's determination to use

Shri Lakshmi's financial statements to update the financial ratios as part of its calculation of the surrogate financial ratios cannot be said to be unreasonable.

Finally, because defendant-intervenors have failed to present any evidence that any of the companies whose financial statements were used received countervailable or distortive subsidies, Commerce reasonably determined to use these companies' financial statements in its calculations of surrogate financial ratios.

C. Commerce Correctly Accepted Plaintiff's Comments on the Draft Remand Results

Defendant-intervenors next argue that Commerce improperly accepted the untimely submission of plaintiff's comments on the Draft Remand Results. Def.-Ints.' Cmts. 5. The parties were initially given until October 29, 2012 to submit comments on the Draft Remand Results, and were all subsequently granted a two-day extension until October 31, 2012. *See* Letter from Robert Bolling, Program Manager, Import Administration, to All Interested Parties, PD 14 at bar code 3103048–01 (Oct. 25, 2012), ECF Dkt. No. 107–14 (July 31, 2013). On October 29 and 30, 2012, the federal government was closed due to Hurricane Sandy, and, as a result, on October 31, 2012, the Import Administration issued a general memorandum "tolling all Import Administration deadlines for two days." *See* Mem. from Paul Piquado, Assistant Secretary for Import Administration, to the Record at 3, PD 17 at bar code 3103946–01 (Oct. 31, 2012), ECF Dkt. No. 107–17 (July 31, 2013) ("Tolling Mem."). Two days after October 31, 2012 was November 2, 2012. Defendant-intervenors submitted their comments to the Draft Remand Results on Wednesday, October 31, 2012, while plaintiff submitted its comments on Friday, November 2, 2012.

Defendant-intervenors argue that the two-day extension granted by the Import Administration did not apply to this case because the "deadline for the Final Remand Results and . . . all comments w[as] October 31, 2012," the day that the Tolling Memorandum was issued. Def.-Ints.' Cmts. 5. Thus, according to defendant-intervenors, plaintiff's submission on November 2, 2012 was untimely. Defendant-intervenors contend that, pursuant to 19 C.F.R. § 351.302(d)(1) (2012), Commerce should have rejected plaintiff's submission. *See* Letter from Timothy C. Brightbill, Wiley Rein LLP, to the Hon. Rebecca M. Blank, Acting Secretary of Commerce, Dep't of Commerce at 3, PD 18 at bar code 3104867–01 (Nov. 7, 2012), ECF Dkt. No. 107–18 (July 31, 2013); 19 C.F.R. § 351.302(d)(1) ("Unless the Secretary [of Commerce] extends a time limit [for good cause,] the Secretary will not consider or retain in the official record of the proceeding

. . . [u]ntimely filed factual information, written argument, or other material that the Secretary rejects . . . .”).

The court finds defendant-intervenors’ position unconvincing because the submission of plaintiff’s comments on the Draft Remand Results was timely. As a result of the government closure on October 29 and 30, the Department was unable to issue a general notice of extension until October 31, and indeed was unaware until October 31 of the number of days for which the extension should be granted. In addition, October 31 was the first day on which a notice granting the extension could be published. Thus, although the reason for granting the extension occurred prior to October 31, that date was the first on which notice of extensions could be made public. Moreover, the text of the extension explicitly covers plaintiff. *See* Tolling Mem. at 3 (“After careful consideration, the Import Administration has determined that the impact of the recent Government closure during Hurricane Sandy will best be minimized by uniformly tolling all Import Administration deadlines for two days. The day on which any submission to the Import Administration is due should be calculated under the regulations as usual, except with the addition of two days (including weekends and holidays). This determination applies to every proceeding before the Import Administration, including . . . pending deadlines for actions by parties to our proceedings (such as the submission of AD/CVD questionnaire responses, supplemental questionnaire responses, and case and rebuttal briefs).”). Thus, plaintiff’s submission was timely.

V. DEFENDANT-INTERVENORS ASK THAT THE COURT RECONSIDER ITS PRIOR RULING

Defendant-intervenors ask the court to reconsider its prior rulings directing Commerce to (1) reexamine the surrogate value data and calculate an antidumping margin for Xinke, and (2) separately determine and corroborate a rate for Jiulong. Def.-Ints.’ Cmts. 11–12. “[W]ithout any margin on the record other than a margin based on total AFA, they argue that “the Department appropriately resorted to the use of *any reasonable method* to calculate a separate rate for Xinke and [Haitian].” Def.-Ints.’ Cmts. at 11–12. Defendant-intervenors contend that Commerce’s selected rate, whereby it calculated “‘the rate for the separate rate respondents, including Xinke and . . . Haitian, using the simple average’ of the five-price-to-[normal-value] dumping margins contained in the [P]etition,” was revised and corroborated, and accordingly a reasonable methodology. Def.-Ints.’ Cmts. 12 (quoting Issues & Dec. Mem. at 33).

The court declines defendant-intervenors’ invitation, and reaffirms its holding in *Yantai I*. In *Yantai I*, the court found that Commerce had available to it relevant surrogate data on the record that was likely to assist it in calculating a more accurate rate for Xinke and Haitian. *See Yantai I*, 36 CIT at __, Slip Op. 12–95, at 12. While Commerce is empowered "to use any reasonable method" to calculate the margins, this does not relieve Commerce of its "duty to determine margins as accurately as possible, and to use the best information available to it in doing so." *Lasko Metal Prods., Inc. v. United States*, 43 F.3d 1442, 1443 (Fed. Cir. 1994); *see* 19 U.S.C. § 1677f(3)(A) (2006) (requiring a final determination issued by Commerce to include "an explanation of the basis for its determination that addresses relevant arguments, made by interested parties who are parties to the investigation or review"). Moreover, the court found that Commerce acted unreasonably by disregarding Jiulong's separate-rate questionnaire responses in calculating Jiulong's AFA rate. *Yantai I*, 36 CIT at __, Slip Op. 12–95, at 27–29. Consistent with this Court's holdings, "imput[ing] the unreliability of a company's questionnaire responses and submissions concerning its factors of production and/or U.S. sales to its separate-rate responses when there is no evidence on the record indicating that the latter were false, incomplete, or otherwise deficient," is unreasonable. *Yantai I*, 36 CIT at __, Slip Op. 12–95, at 27 (collecting cases). Accordingly, based on the foregoing, this court continues to find its rulings in *Yantai I*, 36 CIT __, Slip Op. 12–95 to be correct, and will not disturb them now.

CONCLUSION

Based on the foregoing, it is hereby

ORDERED that the Department of Commerce's Final Results of Redetermination are sustained.

Dated: April 9, 2014
New York, New York

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

Slip Op. 14–39

SAMSUNG ELECTRONICS CO., LTD., Plaintiff, UNITED STATES, Defendant, and WHIRLPOOL CORPORATION, Defendant-Intervenor.

Before: Nicholas Tsoucalas, v. Senior Judge
Court No.: 13–00099
Public VERSION

[Plaintiff's motion for judgment on the agency record is granted in part and denied in part.]

Dated: April 11, 2014

Warren E. Connelly, Akin Gump Strauss Hauer & Feld LLP, of Washington, DC, for plaintiff. With him on the brief were *J. David Park*, *Jarrod M. Goldfeder*, *Nazakhtar Nikakhtar*, and *Phyllis L. Derrick*.

Douglas G. Edelschick, Trial Attorney, Commercial Litigation Branch, Civil Division, U.S. Department of Justice, of Washington, DC, for defendant. With him on the brief were *Stuart F. Delery*, Assistant Attorney General, *Jeanne E. Davidson*, Director, and *Franklin E. White, Jr.*, Assistant Director. Of counsel on the brief was *Whitney Rolig*, Attorney, Office of the Chief Counsel for Trade Enforcement & Compliance, U.S. Department of Commerce, of Washington, DC.

Jack A. Levy, Cassidy Levy Kent USA LLP, of Washington, DC, for defendant-intervenor. With him of the brief were *John D. Greenwald*, *Myles S. Getlan*, *Matthew Frumin*, *Thomas M. Beline*, and *Jonathan M. Zielinski*.

OPINION AND ORDER

Tsoucalas, Senior Judge:

Plaintiff Samsung Electronics Co., Ltd. ("Samsung"), moves for judgment on the agency record contesting defendant United States Department of Commerce's ("Commerce") determination in *Large Residential Washers From the Republic of Korea: Final Affirmative Countervailing Duty Determination*, 77 Fed. Reg. 75,975 (Dec. 26, 2012) ("*Final Determination*"). Commerce and defendant-intervenor Whirlpool Corporation, oppose Samsung's motion. For the following reasons, Samsung's motion is granted in part and denied in part.

BACKGROUND

In January 2012, Commerce initiated a countervailing duty ("CVD") investigation of large residential washers ("LRWs") from Korea. *See LRWs From the Republic of Korea: Initiation of CVD Investigation*, 77 Fed. Reg. 4279 (Jan. 27, 2012). The period of investigation ("POI") covered the 2011 calendar year. *Id.* Samsung was one of three companies Commerce investigated. *Id.* at 4281.

In the *Final Determination*, Commerce found that the Government of Korea ("GOK") provided countervailable subsidies to Samsung, warranting the application of a 1.85% ad valorem CVD rate. *See Final Determination*, 77 Fed. Reg. at 75,977. Of particular relevance to the instant action, Commerce found that Samsung received countervailable benefits through its receipt of tax credits under the Restriction of Special Taxation Act ("RSTA") Articles 10(1)(3) and 26. Also at issue is Commerce's calculation of the sales value it used to determine Samsung's ad valorem rate.

Under RSTA Art. 10(1)(3), the GOK provides a tax credit to companies making eligible investments in research and human resources development ("R&D"). *See LRWs From the Republic of Korea: Preliminary Affirmative CVD Determination and Alignment of Final Determination With Final Antidumping Determination*, 77 Fed. Reg. 33,181, 33,187 (Jun. 5, 2012) ("*Preliminary Determination*"). The GOK introduced Art. 10(1)(3) in 1982 and during the POI approximately 11,000 companies received tax credits under the program. *Id.* The GOK calculates a company's Art. 10(1)(3) tax credit in one of two ways, either 40% of the difference between eligible expenditures in the tax year and the average of eligible expenditures in the prior four years, or a maximum of 6% of eligible expenditures in the current tax year. *Id.* Commerce found that Samsung's Art. 10(1)(3) tax credits were de facto specific because Samsung received a disproportionately large share of the total benefit the GOK conferred under this program. *See Issues and Decision Memorandum for the Final Determination in the CVD Investigation of LRWs from the Republic of Korea* at 11–13 (Dec. 18, 2012) ("*IDM*"). Specifically, Commerce determined that Samsung received [[ ]]% of the total benefit the GOK conferred under RSTA Art. 10(1)(3), while the average beneficiary received [[ ]]%. *See* Calculations for Samsung (Dec. 18, 2012), Confidential Rec. 196,[1] Att. 7 at 1.

Under RSTA Art. 26, the GOK provides a tax credit for eligible investments in "business assets out of overcrowding control region of the Seoul Metropolitan Area." *Preliminary Determination*, 77 Fed. Reg. at 33,188. Companies can receive a tax credit of 7% of their eligible investments. *Id.* Commerce found that Samsung's Art. 26 tax credits were "regionally specific" because the GOK "established a designated geographical region to which th[e] program is available." *Id.*

Finally, the ad valorem rate of 1.85% for the *Final Determination* was greater than the 1.20% rate Commerce calculated for the *Preliminary Determination*. *See Final Determination*, 77 Fed. Reg. at 75,977; *Preliminary Determination*, 77 Fed. Reg. at 33,193. For the

[1] Hereinafter, documents in the public record will be designated "PR" and documents in the confidential record designated "CR" without further specification except where relevant.

Preliminary Determination, Commerce calculated the ad valorem rate using Samsung's total worldwide sales value.[2] *See* Calculations for Samsung for the Preliminary Determination Memorandum (May 29, 2012), CR 114 at 2. However, Commerce adjusted the sales value in the *Final Determination*, excluding revenue from the sale of merchandise produced by Samsung's foreign subsidiaries and from non-production related activities. *Id.* These adjustments reduced the sales value from approximately [[ ]] Korean Won to approximately [[ ]] Korean Won and, as a result, increased Samsung's ad valorem CVD rate. *See* Calculations for Samsung (Dec. 18, 2012), CR 196 at 2.

Samsung now moves for judgment on the agency record contesting several aspects of the *Final Determination*. *See* Pl.'s Mem. Supp. R. 56.2 Mot. J. Agency. R. at 1–2. Oral Argument was held on January 30, 2014. Oral Argument, *Samsung Electronics Co. v. United States*, Ct. No. 13–00099 (Ct. Int'l Trade Jan. 30, 2014).

JURISDICTION AND STANDARD OF REVIEW

The Court has jurisdiction pursuant to 28 U.S.C. § 1581(c) (2006) and section 516A(a)(2)(B)(I) of the Tariff Act of 1930 (the "Act"),[3] as amended, 19 U.S.C. § 1516a(a)(2)(B)(I) (2006). The court will uphold Commerce's final determination in a CVD investigation unless it is "unsupported by substantial evidence on the record, or otherwise not in accordance with law." 19 U.S.C. § 1516a(b)(1)(B)(I).

Additionally, "an agency's interpretation of its own regulations is entitled to broad deference from the courts." Cathedral Candle Co. v. U.S. Int'l Trade Comm'n, 400 F.3d 1352, 1363 (Fed. Cir. 2005).

DISCUSSION

The following issues are before the court: (1) Whether Commerce properly determined that Samsung received specific benefits under RSTA Arts. 10(1)(3) and 26; (2) Whether Commerce properly determined that Samsung failed to demonstrate that the benefits it received were tied to products other than LRWs; and (3) Whether Commerce properly excluded certain sources of revenue from Samsung's sales value when calculating the ad valorem CVD rate.

[2] Commerce calculates the ad valorem CVD rate by dividing the "amount of the benefit" the respondent received by the sales value of the product or products to which Commerce attributes the subsidy. 19 C.F.R. § 351.525(a). Accordingly, in the ad valorem rate calculation, the benefit the respondent received is the numerator and the sales value is the denominator.

[3] Further citations to the Tariff Act of 1930 are to the relevant portions of Title 19 of the U.S. Code, 2006 edition, and all applicable amendments thereto.

I. Specificity

Under the Act, "a countervailable subsidy is a subsidy . . . which is specific as described in [19 U.S.C. § 1677(5A)]." 19 U.S.C. § 1677(5)(A). Where the subsidy in question is a domestic subsidy, as is the case here, Commerce may find that the subsidy is specific as a matter of law or as a matter of fact. 19 U.S.C. § 1677(5A)(D).

Here, as noted above, Commerce found that Samsung's Art. 10(1)(3) tax credits were specific as a matter of fact because Samsung received a "disproportionately large amount" of the total benefit the GOK conferred under that program. *See IDM* at 34. Additionally, Commerce found that Samsung's Art. 26 tax credits were regionally specific because the GOK limited benefits to companies that made investments within a "designated geographical area." *Id.* at 46. Samsung contests both of these findings.

A. RSTA Article 10(1)(3)

A domestic subsidy is specific in fact if "[a]n enterprise or industry receives a disproportionately large amount of the subsidy." 19 U.S.C. § 1677(5A)(D)(iii)(III). The Court of Appeals for the Federal Circuit ("Federal Circuit") held that "determinations of disproportionality . . . are not subject to rigid rules, but rather must be determined on a case-by-case basis taking into account all the facts and circumstances of a particular case." *AK Steel Corp. v. United States*, 192 F.3d 1367, 1385 (Fed. Cir. 1999). Accordingly, the court seeks to determine whether Commerce's disproportionality finding was reasonable given the facts of the instant case. *Id.*

Here, Commerce determined disproportionality by comparing "the average amount of the tax credits provided to companies in Korea that used [the Art. 10(1)(3)] program during 2010, to the actual amount of the tax credits received by Samsung . . . in that same year." *IDM* at 35. Commerce found that Samsung received a disproportionate benefit because it received [[ ]]% of the total benefit the GOK conferred under Art. 10(1)(3), while the average recipient received [[ ]]%. *See* CR 196, Att. 7 at 1.

Samsung argues that its Art. 10(1)(3) tax credits were large but proportionate to its eligible R&D expenditures.[4] *See* Pl.'s Br. at 9. Samsung argues that Commerce simply equated the larger benefit with disproportionality, but failed to provide any additional evidence

[4] Alternatively, Samsung argues that Commerce should have measured disproportionality by comparing the use of Art. 10(1)(3) tax credits by other Korean companies with the use of Art. 10(1)(3) credits by its Home Appliance Unit alone. Pl.'s Br. at 10 n.9. Samsung raises this argument in a footnote and does not identify any authority supporting its position. *See id.* Accordingly, this argument is waived. *See SmithKline Beecham Corp. v. Apotex Corp.*, 439 F.3d 1312, 1320 (Fed. Cir. 2006) ("[A]rguments raised in footnotes are not preserved").

indicating that the benefit was disproportionate. *Id.* According to Samsung, the Art. 10(1)(3) tax credits were based on a standard mechanism as each participant received the same benefit relative to its eligible investments. *Id.* Samsung contends that both case precedent and prior administrative determinations indicate that a large benefit is proportionate where the respondent receives the same benefit as all other beneficiaries relative to its expenditures. *Id.* at 10–13.

There is no dispute that Samsung's share of the Art. 10(1)(3) tax credits was larger than that of the average beneficiary. *See* CR 196, Att. 7 at 1. The issue is whether this comparison was sufficient to support a finding of disproportionality given the facts of the instant case. *See AK Steel*, 192 F.3d at 1385. The court finds that it was not.

In focusing solely on Samsung's relative share of the total benefit, Commerce failed to consider aspects of the Art. 10(1)(3) program relevant to disproportionality. Specifically, the record indicated that the GOK confers Art. 10(1)(3) tax credits based on usage and pursuant to a standard pricing mechanism. *See* CR 40 at 108. Accordingly, the GOK did not exercise discretion in awarding Samsung's tax credit, but simply conferred the benefit relative to the eligible expenditures. *Id.*

This Court previously found that it was reasonable for Commerce to consider an enterprise or industry's use of a subsidy program in determining whether the benefit was proportionate. In *Bethlehem Steel v. United States*, the Korean steel industry received 51% of the total benefit the GOK awarded under an electricity rate reduction subsidy. *See* 25 CIT 307, 322, 140 F. Supp. 2d 1354, 1369 (2001). Nevertheless, Commerce found that the benefit was proportionate because high electricity usage was an inherent characteristic of the steel industry, all recipients received an identical rate reduction based on a standard mechanism, and the subsidy was not designed to benefit any one industry over another. *See id.* at 321–23, 140 F. Supp. 2d at 1368–70. Commerce insists that *Bethlehem Steel* is distinguishable from the instant case given the Korean steel industry's electricity use. *See IDM* at 37. The Court recognized, however, that "[i]n virtually every program that confers benefits based on usage levels one or more groups will receive a greater share of the benefits[,]" and therefore concluded that the fact that one group received more benefits is not, on its own, indicative of disproportionality. *Bethlehem Steel*, 25 CIT at 322, 140 F. Supp. 2d at 1369.

Similarly, in *AK Steel*, the respondent received 75% of the total benefit the GOK provided under an asset revaluation program, but

Commerce found that this large benefit was proportionate because the respondent revalued its assets 0.2% lower than the average participant. *See AK Steel*, 192 F.3d at 1385. The Federal Circuit recognized that Commerce need not always consider the relative share of the total benefit to determine disproportionality because that method "could produce an untenable result, i.e., that a benefit conferred on a large company might be disproportionate merely because of the size of the company." *Id.*

Neither the Federal Circuit in *AK Steel* nor this Court in *Bethlehem Steel* required Commerce to consider whether the benefit awarded was proportionate relative to a beneficiary's use of the program. *See AK Steel*, 192 F.3d at 1384–85; *Bethlehem Steel*, 25 CIT at 322–23, 140 F. Supp. 2d at 1369–70. However, both courts found that Commerce's method must account for the facts of the case, including aspects of the subsidy program itself. Commerce's explanation fails to meet this standard.

Commerce claimed that its method was reasonable in light of the evidence on the record. *IDM* at 36. Specifically, Commerce insists that it compared Samsung's share of the total benefit with the share an average beneficiary received because the GOK did not provide data on individual beneficiaries. *Id.* at 36–37. However, Commerce's questionnaire did not request information on individual beneficiaries other than the mandatory respondents. *See* CR 40 at 114. Furthermore, as noted above, the GOK provided information detailing the Art. 10(1)(3) tax credit program and Samsung provided its tax return detailing its expenditures. *Id.* ; Resp. of Samsung to Commerce's Sept. 10, 2012 Supplemental Questionnaire (Sep. 17, 2012), CR 156 at 1–3.

Commerce also noted that it previously found that a benefit was disproportionate where the respondent's share of the total benefit was greater than the share an average beneficiary received. *See IDM* at 36 n.139 (citing *Final Affirmative CVD Determinations: Pure Magnesium and Alloy Magnesium From Canada*, 57 Fed. Reg. 30,946 (Jul. 13, 1992) ("*Magnesium From Canada*"); *Corrosion-Resistant Carbon Steel Flat Products From the Republic of Korea: Preliminary Results and Partial Rescission of CVD Administrative Review*, 75 Fed. Reg. 55,745 (Sep. 14, 2010) ("*CSFP From Korea -Preliminary*"); and *Final Affirmative CVD Determination: Certain Stainless Steel Wire Rod From Italy*, 63 Fed. Reg. 40,474 (Jul. 29, 1998) ("*Wire Rod from Italy*")). However, these determinations are not analogous to the instant case. Neither *Magnesium from Canada* nor *Wire Rod From Italy* concerned a subsidy based on a standard pricing mechanism, but rather involved grants and interest-savings programs awarded at the discretion of the administering authority. *See Magnesium from*

Canada, 57 Fed. Reg. at 30,949–50; *Wire Rod From Italy*, 63 Fed. Reg. at 40,485–86. Furthermore, Commerce's reliance on *CSFP From Korea — Preliminary* is misplaced because Commerce found that the subsidy in question was specific as a matter of law in the final results of that review.[5] *See Corrosion-Resistant Carbon Steel Flat Products From the Republic of Korea: Decision Memorandum: Final Results of CVD Administrative Review* at 2–3 (Jan. 12, 2011).

Finally, Commerce insists that its method was consistent with the purpose of CVD law. *IDM* at 37. According to Commerce, "[t]he very purpose for the analysis of *de facto* specificity . . . is to ensure that companies that qualify and receive more benefits under a government subsidy program do not escape redress of the [CVD] law simply because the law implementing the subsidy program does not explicitly limit the benefits to a group of enterprises or industries." *Id.* (underscoring in original). To that end, Commerce rejected Samsung's assertion that it should measure the benefit relative to the size of the beneficiary or to the amount of qualifying investments. *Id.*

The court acknowledges Commerce's concern and the purpose of de facto specificity within the Act. However, this concern does not obviate Commerce's responsibility to determine whether a large benefit is disproportionate based on the facts of the case. *See AK Steel*, 192 F.3d at 1385. Although Commerce's method indicated that Samsung received a large benefit, more was required to determine whether the benefit was disproportionate. *See* 19 U.S.C. § 1677(5A)(D)(iii)(III). Simply reciting a concern that applies equally to all broadly-worded subsidy provisions is insufficient to show that, on the facts of this case, the subsidy was disproportionate. *See AK Steel*, 192 F.3d at 1384–85.

Commerce's determination was unreasonable because it did not adequately address how Samsung's Art. 10(1)(3) tax credit was disproportionately large based on the facts in the case. Accordingly, the court must remand this case to Commerce with directions to reconsider its determination. On remand, Commerce is not barred from comparing Samsung's share of the total benefit to the share an average beneficiary received, but it must explain, with specific reference to the facts of this case, why such a comparison is indicative of disproportionality.

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[5] Commerce did not review specificity as a matter of law during the preliminary results because it did not have a full translation of the law in question. *CSFP From Korea — Preliminary*, 75 Fed. Reg. at 55,745.

B. RSTA Article 26

"Where a subsidy is limited to an enterprise or industry located within a designated geographical region within the jurisdiction of the authority providing the subsidy, the subsidy is specific." 19 U.S.C. § 1677(5A)(D)(iv). As noted above, under Art. 26, the GOK provided tax credits for eligible investments in "business assets" outside the "overcrowding control region of the Seoul Metropolitan Area." *Preliminary Determination*, 77 Fed. Reg. at 33,188. Commerce found that Samsung's Art. 26 tax credits were regionally specific because they were limited to a "designated geographical region." *See IDM* at 46.

Samsung's primary argument is that Commerce's determination was erroneous because the area "outside the Seoul Metropolitan Area" was too broad to constitute a designated geographical region. Pl.'s Br. at 24–27. According to Samsung, "[t]he tax credit benefits available under Article 26 encompassed the entire country minus just [2%] of its land mass." *Id.* at 24. Therefore, Samsung insists that Art. 26 tax credits were "generally available" and not of a type contemplated by the regional specificity standard. *Id.* at 25–26. Instead, Samsung suggests that regional specificity should be limited to "administrative jurisdictions such as provinces or states." *Id.* at 26.

This argument is unpersuasive. The Act requires that the authority providing the subsidy limit the subsidy's availability to a "designated geographical area." 19 U.S.C. § 1677(5A)(D)(iv). Contrary to Samsung's insistence, there are no limitations on the size or administration of the designated area. *Id.* This Court previously upheld Commerce's finding that a subsidy providing cheaper electricity rates to all areas in Thailand outside the Bangkok metropolitan area was regionally specific. *See Royal Thai Government v. United States*, 30 CIT 1072, 1079, 441 F. Supp. 2d 1350, 1358 (2006). The Court held that Commerce's finding was reasonable because "[a]ccess to this relatively cheaper electricity was expressly contingent upon only one factor: a company's regional location within Thailand." *Id.*, 441 F. Supp. 2d at 1358. Similarly, the GOK limited the availability of Art. 26 tax credits to companies making investments in a designated region: the area outside the Seoul Metropolitan Area. *See IDM* at 46. Because access to Art. 26 tax credits was conditioned upon investment in a "designated geographical region," Commerce's regional specificity determination was reasonable. *See* 19 U.S.C. § 1677(5A)(D)(iv); *Royal Thai*, 30 CIT at 1079, 441 F. Supp. 2d at 1358.

Samsung also argues that Commerce's determination contradicts its prior finding in *Initiation of CVD Investigation of Live Cattle From Canada*, 63 Fed. Reg. 71,889 (Dec. 30, 1998) ("*LCC Initiation*"). Pl.'s Br. at 25–26. There, Commerce declined to investigate the British

Columbia Farm Product Industry Act because, although the subsidy was available only in British Columbia, it was not limited to an industry or entity within the province. *See LCC Initiation*, 63 Fed. Reg. at 71,892. Samsung insists that the case is instructive because the designation of British Columbia was not sufficient to establish regional specificity. *See* Pl.'s Br. at 26.

Samsung's reliance on this determination is misplaced. There is no indication that the British Columbia Farm Product Industry Act designated a geographical region. Although British Columbia is a region, all indications are that the authority providing the subsidy in question was a provincial authority of British Columbia, as was the case with the other Canadian subsidy programs Commerce investigated. *See Final Negative CVD Determination; Live Cattle From Canada*, 64 Fed. Reg. 57,040, 57,040–55 (Oct. 22, 1999) (recognizing that each of the subsidy programs under review was administered by a provincial authority). It is consistent with both the Act and the instant case that Commerce found that a subsidy available throughout British Columbia and administered by the province itself was not regionally specific. *See* 19 U.S.C. § 1677(5A)(D)(iv). Accordingly, Samsung fails to show that Commerce's determination was unreasonable. *Id.*

II. Tying to Non-Subject Merchandise

The next issue is whether Commerce properly disregarded evidence indicating that Samsung used the tax credits in question towards the production of merchandise other than LRWs. During the review Samsung placed a document onto the record which detailed its actual use of the tax credits under review. *See* Response of Samsung to the Department's Feb. 15, 2012 Questionnaire (Apr. 9, 2012), CR 85, Exh. 25 at 1 ("Exhibit 25"). Exhibit 25 indicated that [[ ]]% of Samsung's eligible investments under Art. 10(1)(3) and [[ ]]% of its eligible investments under Art. 26 were tied to products other than LRWs. *Id.* Commerce disregarded this evidence because it did not demonstrate that the GOK was aware of or acknowledged Samsung's intended use of the tax credits at the time it provided them to Samsung. *See IDM* at 41–42.

Commerce "will attribute a domestic subsidy to all products sold by a firm, including products that are exported." 19 C.F.R. § 351.525(b)(3) (2014). However, "[i]f a subsidy is tied to the production or sale of a particular product, [Commerce] will attribute the subsidy only to that product." 19 C.F.R. § 351.525(b)(5). Commerce explained that it will find that a subsidy is tied to a certain product "when the intended use is known to the subsidy giver and so acknowledged prior to or concurrent with the bestowal of the subsidy." *See Countervailing Duties: Final Rule*, 63 Fed. Reg. 65,348, 65,402 (Nov. 25, 1998) ("*CVD Preamble*"). Commerce will not "trace the use of subsidies through a firm's books and records," but rather will analyze whether a subsidy is tied "based on information available at the time of bestowal." *Id.* at 65,403.

Samsung argues that Commerce's decision to disregard Exhibit 25 was unreasonable because its analysis was inapplicable to tax credits. Pl.'s Br. at 19–23, 27. According to Samsung, its tax credits operate retroactively — Samsung makes its eligible investments during the tax year, claims a tax credit on its tax return, and then the GOK awards the tax credit if it is properly claimed. *See id.* at 19–20. Because Samsung made the eligible investments well before the GOK awarded the tax credits, the GOK does not require a declaration of intended use. *Id.* at 20. In fact, Samsung contends that Commerce's insistence that Samsung declare its intended use in its tax return contradicts Commerce's statement that it will not trace how a respondent uses a subsidy. *Id.* at 21. Despite Commerce's policy, Samsung insists that the Federal Circuit upheld Commerce's use of post-bestowal evidence in *Kajaria Iron Castings Pvt. Ltd. v. United States*, 156 F.3d 1163, 1176 (Fed. Cir. 1998). *See* Pl.'s Br. at 22. Accordingly, Samsung insists that Commerce should have considered its documentation of actual use as evidence of tying. *Id.*

Samsung's argument is unpersuasive. First, Samsung failed to identify any authority compelling Commerce to adjust its tying methodology based on the nature of the subsidy in question. *Kajaria* predated the *CVD Preamble* and therefore did not analyze Commerce's interpretation of 19 C.F.R. § 351.525(b). *See Kajaria*, 156 F.3d at 1176 (Fed. Cir. Sep. 8, 1998); *CVD Preamble*, 63 Fed. Reg. 65,348 (Nov. 25, 1998). Moreover, *Kajaria* did not mandate that Commerce rely on post-bestowal evidence, it merely upheld Commerce's decision to do so. *Id.* Furthermore, insofar as Samsung contests Commerce's interpretation of the regulation, this argument is unavailing. As noted above, the Court grants broad deference to Commerce's interpretation of its own regulations. *See* Cathedral Candle, 400 F.3d at 1363. Commerce's concern with what the government providing the subsidy knew at the time it provided the subsidy is entirely consistent with the regulation, regardless of whether a subsidy operates prospectively or retroactively. *See CVD Preamble*, 63 Fed. Reg. at 65,403; 19 C.F.R. § 351.525(b)(5).

Ultimately, the record indicates that the GOK was not aware of and did not acknowledge Samsung's intended use of the tax credits. Samsung's tax returns did not indicate that its eligible investments benefitted the production of particular merchandise. *See* CR 85, Exh. 22 at 3–5. And, as Samsung admits, Exhibit 25 did not establish the GOK's awareness of Samsung's intended use of the benefits at the time of bestowal. *See* CR 85, Exh. 25 at 1. Finally, the GOK indicated that it intended the tax credits in question to "boost the general national economic activities in all sectors." *See* CR 40 at 108. Because Samsung cannot demonstrate that at the time of bestowal the GOK was aware of its intended use of the tax credits, Commerce reasonably concluded that the tax credit benefitted domestic production generally. *See* 19 C.F.R. § 351.525(b)(3); *CVD Preamble*, 63 Fed. Reg. at 65,402.

III. The Sales Value

The final issue before the court is whether Commerce properly adjusted Samsung's sales value when calculating the ad valorem CVD rate. Commerce calculates an ad valorem CVD rate by "by dividing the amount of the benefit allocated to the period of investigation or review by the sales value during the same period of the product or products to which [Commerce] attributes the subsidy." 19 C.F.R. § 351.525(a).

Here, Commerce did not include certain sources of revenue in Samsung's sales value because they were not derived from the sale of products to which Samsung's tax credits were attributable. *See IDM* at 52–53. Of particular relevance in the instant case are revenue generated from the production of merchandise by Samsung's foreign subsidiaries and revenue from royalty payments.[6] *See* Pl.'s Br. at 29. According to Samsung, these sources of revenue were derived from products that benefitted from the tax credits Samsung received. *Id.* at 28–42. Samsung continues that Commerce's decision to remove them was wrongful because the benefit and the revenue figures Commerce used to calculate the ad valorem rate did not reflect the same universe of products. *Id.* at 29–31. Furthermore, Samsung insists that Commerce did not provide Samsung with an opportunity to submit evidence demonstrating this fact.

A. Foreign Production

Commerce declined to include revenue from sales of merchandise produced by Samsung's foreign subsidiaries because Samsung failed to demonstrate that, at the time of bestowal, the GOK expressly

[6] Samsung also claims that Commerce wrongfully excluded revenue from sales of scrap. *See* Pl.'s Br. at 35–36 n.26. However, this argument is waived because Samsung raises it in a footnote without citing any legal or record support. *See* SmithKline Beecham, 439 F.3d at 1320.

intended the tax credits in question to benefit foreign production. *See IDM* at 52. Samsung insists that Commerce ignored two prior antidumping duty proceedings involving bottom mount combination refrigerator-freezers ("BMCRFs") in which it found that Samsung's R&D expenditures benefitted foreign production. *See* Pl.'s Br. at 31–35 (citing *Notice of Final Determination of Sales at Less Than Fair Value and Negative Critical Circumstances Determination: BMCRFs From the Republic of Korea*, 77 Fed. Reg. 17,413 (Mar. 26, 2012) ("*BMCRFs Korea*") and *Notice of Final Determination of Sales at Less Than Fair Value and Affirmative Critical Circumstances Determination: BMCRFs From Mexico*, 77 Fed. Reg. 17,422 (Mar. 26, 2012) ("*BMCRFs Mexico*")). Samsung insists that this evidence demonstrated that its tax credits were tied to foreign production and was consistent with the GOK's intent to benefit foreign production. *Id.* at 35–38. Samsung's argument is unpersuasive.

Where a respondent is a multinational company, Commerce "will attribute the subsidy to products produced by the firm within the country of the government that granted the subsidy." 19 C.F.R. § 351.525(b)(7). However, Commerce allows a respondent to rebut this presumption and will attribute a subsidy to multinational production "if it is demonstrated that the subsidy was tied to more than domestic production." *Id.*

The regulations are silent as to how such a showing can be made, but Commerce has stated that "[r]espondents must show that, in the authorization and/or approval documents, the government explicitly stated that the subsidy was being provided for more than domestic production." *CVD Preamble*, 63 Fed. Reg. at 65,404. "The documentation must show that, at the point of bestowal, one of the express purposes of the subsidy was to provide assistance to the firm's foreign subsidiaries." *Id.* And, "[a]bsent such a demonstration, all subsidies, whether tied or untied, will be attributed to . . . domestically-produced sales." *Id.* The Federal Circuit has approved this methodology. *See Inland Steel Indus., Inc. v. United States*, 188 F.3d 1349, 1360 (Fed. Cir. 1999) ("Commerce acted correctly in performing its tying determination by assessing the likely effects of the subsidies at issue at the time of their bestowal.").

Here, Samsung failed to provide evidence demonstrating that its tax credits were tied to foreign production. Samsung itself noted that there were no approval or authorization documents expressing the GOK's intent to benefit foreign production. *See* Pl.'s Br. at 36. Furthermore, BMCRFs Mexico and BMCRFs Korea do not demonstrate that the GOK intended the subsidies to benefit foreign production at the time of bestowal and, therefore, they are insufficient evidence that the tax credits were tied to foreign production under the regulation. *See CVD Preamble*, 63 Fed. Reg. at 65,404. Finally, the statements of the GOK did not indicate that the "express purpose" of the subsidy was to benefit foreign production. *See* CR 40 at 108 (stating that the tax credits were intended to "boost the general national economic activities in all sectors"). Because Samsung did not provide evidence indicating that, at the time it bestowed the tax credits, the GOK intended to benefit foreign production, Commerce reasonably concluded that the tax credits were not tied to foreign production. *See Inland Steel*, 188 F.3d at 1360.

B. Royalty Payments

Commerce did not include revenue Samsung generated from its receipt of royalty payments from its subsidiaries in the sales value because such revenue is non-production related income. *See IDM* at 52–53. Samsung insists that royalty payments are reimbursements for R&D expenditures that benefitted production of merchandise and therefore constitute an "integral" component of Samsung's sales revenue. Pl.'s Br. at 37. According to Samsung, Commerce recognized this fact in *BMCRFs Mexico* and *BMCRFs Korea*, and included such payments in *Final Affirmative CVD Determination: Dynamic Random Access Memory Semiconductors from the Republic of Korea*, 68 Fed. Reg. 37,122 (Jun. 23, 2003) ("*DRAMS Korea*"). *See* Pl.'s Br. at 31–35, 40–41. Samsung analogizes the royalty payments at issue with processing fees, noting that Commerce included such fees in the sales value in previous CVD proceedings involving tax credits. Id. at 41.

Commerce "will attribute a domestic subsidy to all products sold by a firm, including products that are exported." 19 C.F.R. § 351.525(b)(3). Accordingly, as noted above, Commerce includes in ad valorem rate calculation the "sales value . . . of the product or products to which [Commerce] attributes the subsidy." 19 C.F.R. § 351.525(a). Royalty payments are not revenue generated by the sale of products. *Id.* Commerce's inclusion of royalty payments in *DRAMS Korea* is distinguishable because the subsidy at issue in that case was not tied to the production of merchandise. *Issues and Decision Memorandum for the Final Determination in the CVD Investigation of DRAMS from the Republic of Korea* at 114 (Jun. 16, 2003). However, as Commerce noted and as Samsung acknowledges in its brief, the tax credits here were tied to the production of merchandise. *IDM* at 53.

Furthermore, Samsung's attempt to analogize its royalty payments to processing fees is unavailing. In the cases in which Commerce included processing fees in the sales value, those fees generated the tax benefits in question. *See, e.g.*, *Final Affirmative CVD Determination: Certain Carbon Steel Butt-Weld Pipe Fittings From India*, 60 Fed. Reg. 10,564, 10,568 (Feb. 27, 1995) (finding that the fees for respondent's refurbishing program generated tax credits). There is no evidence that the royalty payments Samsung received generated the tax credits at issue. *IDM* at 53. Because Samsung's royalty payments were not derived from the sale of products to which the subsidy was attributable, it was reasonable for Commerce to exclude them from the ad valorem rate calculation. 19 C.F.R. § 351.525(a).

C. Procedural Claims

Samsung also argues that it was not afforded an adequate opportunity to rebut the presumption that its tax credits benefitted solely domestic production. Pl.'s Br. at 39. According to Samsung, Commerce altered its methodology for calculating the sales value midway through the investigation without notifying Samsung that it intended to do so. *Id.* Samsung compares the instant case with *Usinor Sacilor v. United States*, 19 CIT 711, 893 F. Supp. 1112 (1995), in which this Court remanded Commerce's determination where it decided to alter its methodology for calculating the sales value following the preliminary results. Pl.'s Br. at 39–40.

Samsung's argument is unpersuasive. Here, Commerce did indicate to Samsung that it intended to exclude certain sources of revenue. *See* CR 156 at 1. Samsung recognized that Commerce planned to make these exclusions and protested in its questionnaire response, insisting that Commerce include the sources of revenue at issue in the sales value. *Id.* at 1–3.

Furthermore, Samsung's reliance on *Usinor* is misplaced. In *Usinor*, Commerce applied its newly-developed presumption that domestic subsidies benefit domestic production midway through the proceeding. *See Usinor Sacilor*, 19 CIT at 741–42, 893 F. Supp. at 1138. However, section 351.525(b)(7) was long established at the time of the underlying investigation. Samsung had the opportunity to provide evidence that its tax credits were tied to foreign production, but failed to do so. *See* CR 156 at 1–3.

CONCLUSION

Commerce erroneously determined that Samsung's RSTA Art. 10(1)(3) tax credits constituted a disproportionately large benefit. Commerce properly determined that Samsung's RSTA Art. 26 tax credits were regionally specific and that Samsung failed to demonstrate that its tax credits were tied to products other than large residential washers. Additionally, Commerce properly adjusted Samsung's sales value when determining the ad valorem CVD rate. Accordingly, Samsung's motion for judgment on the agency record is granted with regards to Commerce's disproportionality finding, but denied in all other respects.

ORDER

In accordance with the above, it is hereby

ORDERED that the *Final Determination* is to be remanded to the United States Department of Commerce, to reconsider its finding that Samsung Electronics Co., Ltd., received a disproportionately large benefit through its receipt of RSTA Art. 10(1)(3) tax credits; and it is further

ORDERED that the *Final Determination* is sustained in all other respects; and it is further

ORDERED that remand results are due within ninety (90) days of the date this opinion is entered. Any responses or comments are due within thirty (30) days thereafter. Any rebuttal comments are due within fifteen (15) days after the date responses or comments are due.

Dated: April 11, 2014
New York, New York

/s/ Nicholas Tsoucalas
NICHOLAS TSOUCALAS SENIOR JUDGE

Slip Op. 14–40

THE FLORIDA TOMATO EXCHANGE, Plaintiff, v. UNITED STATES, Defendant, and CAADES SINALOA, A.C., CONSEJO AGRICOLA DE BAJA CALIFORNIA, A.C., ASOCIACION MEXICANA DE HORTICULTURA PROTEGIDA, A.C., UNION AGRICOLA REGIONAL DE SONORA PRODUCTORES DE HORTALIZAS FRUTAS Y LEGUMBRES, CONFEDERACION NACIONAL DE PRODUCTORES DE HORTALIZAS, Defendant-Intervenors.

Before: Richard K. Eaton, Judge
Court No. 13–00148

[Plaintiff's motion to strike is denied.]

Dated: April 11, 2014

Terence P. Stewart, *Geert De Prest*, *Patrick J. McDonough*, and *Nicholas J. Birch*, Stewart and Stewart, of Washington, D.C., for plaintiff.

Mikki Cottet, Senior Trial Counsel, Commercial Litigation Branch, Civil Division, United States Department of Justice, of Washington D.C., for defendant. With her on the brief were *Stuart F. Delery*, Assistant Attorney General, *Jeanne E. Davidson*, Director, and *Franklin E. White, Jr.*, Assistant Director. Of counsel on the brief was

Rebecca Cantu, Senior Attorney, Office of the Chief Counsel for Trade Enforcement and Compliance, United States Department of Commerce, of Washington, D.C.

Thomas B. Wilner, *Robert S. LaRussa*, and *Bryan Dayton*, Shearman & Sterling LLP, of Washington, D.C., for defendant-intervenors.

OPINION AND ORDER

EATON, Judge:

This matter is before the court on plaintiff The Florida Tomato Exchange's ("plaintiff" or the "FTE") motion to strike certain exhibits and arguments from Defendant-Intervenors' Response to Plaintiff's Rule 56.2 Motion for Judgment on the Agency Record (ECF Dkt. No. 40). Pl.'s Mot. to Strike Portions of the Def.-Ints.' Br. 1 (ECF Dkt. No. 47) ("Pl.'s Mot. to Strike"); *see* Pl.'s Rule 56.2 Mot. for J. on the Agency R. (ECF Dkt. No. 30) ("Rule 56.2 Mot."). Plaintiff claims that, because the exhibits were not presented to the Department of Commerce ("Commerce" or the "Department") in the underlying administrative proceedings, they are not part of the administrative record, and as a consequence cannot be considered by the court. Pl.'s Mot. to Strike 1. Defendant-intervenors argue that the material plaintiff seeks to strike is needed in order for defendant-intervenors to make their judicial estoppel claim. Def.-Ints.' Resp. to Pl.'s Mot. to Strike 2–3 (ECF Dkt. No. 48). According to defendant-intervenors, plaintiff is making arguments before the court that are contrary to the positions it took in prior proceedings before Commerce and the ITC, and that the doctrine of judicial estoppel prohibits these arguments from being made. Def.-Ints.' Resp. to Pl.'s Mot. to Strike 1–3. Thus, because they insist that the material proves their judicial estoppel claim, defendant-intervenors oppose plaintiff's motion. For the reasons that follow, plaintiff's motion is denied.

BACKGROUND

On April 25, 1996, the Department initiated an antidumping investigation of imports of fresh tomatoes from Mexico. Fresh Tomatoes From Mexico, 61 Fed. Reg. 18,377, 18,377 (Dep't of Commerce Apr. 25, 1996) (initiation of antidumping duty investigation). On November 1, 1996, following a preliminary injury finding by the International Trade Commission ("ITC"), Commerce preliminarily determined that fresh tomatoes from Mexico were being, or were likely to be, sold in the United States at less than fair value. Fresh Tomatoes From Mexico, 61 Fed. Reg. 56,608, 56,608 (Dep't of Commerce Nov. 1, 1996) (notice of preliminary determination of sales at less than fair value and postponement of final determination).

That same day, pursuant to 19 U.S.C. § 1673c(c)(1) (1994), the Department concluded "that extraordinary circumstances [were] present," and executed a suspension agreement with growers and/or exporters of fresh tomatoes from Mexico who "accounted for substantially all . . . of the subject merchandise imported into the United States." Fresh Tomatoes From Mexico, 61 Fed. Reg. 56,618, 56,618 (Dep't of Commerce Nov. 1, 1996) (suspension of antidumping investigation). The agreement set forth an established "reference price," which was a minimum price at which the signatories could sell subject merchandise in the United States. Renewal agreements followed in 2002, 2008, and 2013, further suspending final determinations by the Department and the ITC. *See* Fresh Tomatoes From Mexico, 67 Fed. Reg. 77,044 (Dep't of Commerce Dec. 16, 2002) (suspension of antidumping investigation); Fresh Tomatoes From Mexico, 73 Fed. Reg. 4,831 (Dep't of Commerce Jan. 28, 2008) (suspension of antidumping investigation); Fresh Tomatoes From Mexico, 78 Fed. Reg. 14,967 (Dep't of Commerce Mar. 8, 2013) (suspension of antidumping investigation), and accompanying 2013 Suspension Agreement (collectively, "2013 Suspension Agreement").

With respect to the 2013 Suspension Agreement (the agreement now challenged by plaintiff pursuant to its Rule 56.2 Motion), the Department concluded "that the 2013 Suspension Agreement w[ould] eliminate completely the injurious effect of exports to the United States of the subject merchandise and prevent the suppression or undercutting of price levels of domestic fresh tomatoes by imports of that merchandise from Mexico." 2013 Suspension Agreement, 78 Fed. Reg. at 14,968. Commerce "also determined that the 2013 Suspension Agreement [was] in the public interest and [that the agreement could] be monitored effectively, as required under" 19 U.S.C. § 1673c(d)(2) (2006). 2013 Suspension Agreement, 78 Fed. Reg. at 14,968.

On April 5, 2013, the FTE, "a trade association representing growers and first handlers of the domestic like product" in the United States, commenced this action pursuant to 28 U.S.C. § 1581(c) (2006), challenging the Department's determination to suspend the antidumping investigation on fresh tomatoes from Mexico. Summons ¶¶ 1, 2 (ECF Dkt. No. 1). On August 30, 2013, plaintiff submitted its motion for judgment on the agency record. Rule 56.2 Mot. The Department opposes plaintiff's Rule 56.2 Motion and asks that its determination to suspend the investigation and enter into the 2013 Suspension Agreement be sustained. Def.'s Mem. in Opp'n to Pl.'s Rule 56.2 Mot. for J. on the Agency R. 1–2 (ECF Dkt. No. 42). Defendant-intervenors, CAADES Sinaloa, A.C., Consejo Agrícola de Baja California, A.C., Asociación Mexicana de Horticultura Protegida, A.C., Unión Agrícola Regional de Sonora Productores de Hortalizas

Frutas y Legumbres, and Confederación Nacional de Productores de Hortalizas (collectively, "defendant-intervenors"), which "are 'association[s,] a majority of the members of which are producers, exporters, or importers of' fresh tomatoes from Mexico," join in opposition to plaintiff's Rule 56.2 Motion. Consent Mot. to Intervene as of Right as Def.-Ints. 1 (ECF Dkt. No. 15) (quoting 19 U.S.C. § 1677(9)(A) (2006)).

Following the filing of the parties' respective response briefs to plaintiff's Rule 56.2 Motion, the FTE filed a motion to strike portions of defendant-intervenors' brief pursuant to USCIT Rules 12(f) and 81(m). Rule 12(f) directs that a motion to strike be granted when a party's pleading contains "an insufficient defense or any redundant, immaterial, impertinent, or scandalous matter." USCIT Rule 12(f) (2014). Rule 81(m) directs the court to disregard "[a] brief or memorandum [that contains] burdensome, irrelevant, immaterial, pejorative [or] scandalous matter." USCIT Rule 81(m) (2014). Plaintiff seeks to exclude from the record Exhibits 2, 3, 4, 5, 8, 13, 14, and 16 of defendant-intervenors' brief and the other related portions of the brief that are based on information contained within these exhibits. The exhibits and arguments that plaintiff seeks to exclude from the record all pertain to defendant-intervenors' contention that plaintiff is judicially estopped from offering arguments in this Court that are contrary to arguments it offered before Commerce and the ITC during earlier proceedings.

DISCUSSION

I. MOTION TO STRIKE

As a general rule, motions to strike are "disfavored" by courts and considered "extraordinary" remedies. *See, e.g.*, *Diamond Sawblades Mfrs. Coal. v. United States*, 31 CIT 1249, 1252 (2007); *United States v. UPS Customhouse Brokerage, Inc.*, 30 CIT 808, 820, 442 F. Supp. 2d 1290, 1302 (2006); *Elkem Metals Co. v. United States*, 27 CIT 1758, 1760, 297 F. Supp. 2d 1347, 1350 (2003); *Hynix Semiconductor, Inc. v. United States*, 27 CIT 1469, 1470 (2003); *Acciai Speciali Terni S.p.A. v. United States*, 24 CIT 1211, 1217, 120 F. Supp. 2d 1101, 1106 (2000); *Jimlar Corp. v. United States*, 10 CIT 671, 673, 647 F. Supp. 932, 934 (1986). Thus, such motions "should be granted only in cases where there has been a flagrant disregard of the rules of court." *Jimlar*, 10 CIT at 673, 647 F. Supp. at 934 (citing *Application of Harrington*, 392 F.2d 653, 655 (C.C.P.A. 1968)). As a result, "courts will not grant motions to strike unless the brief demonstrates a lack of good faith, or that the court would be prejudiced or misled by the inclusion in the brief of the improper material." *Id.* "[T]his Court has broad discretion in evaluating [whether to grant or deny] motions to strike." *Hynix Semiconductor*, 27 CIT at 1470. However,

> "[t]here is no occasion for a party to move to strike portions of an opponent's brief (unless they be scandalous or defamatory) merely because he thinks they contain material that is incorrect, inappropriate, or not a part of the record. The proper method of raising those issues is by so arguing, either in the brief or in a supplemental memorandum, but not by filing a motion to strike."

Acciai Speciali Terni, 24 CIT at 1217, 120 F. Supp. 2d at 1106 (quoting *Dillon v. United States*, 229 Ct. Cl. 631, 636 (Ct. Cl. 1981)).

Generally speaking, this Court's authority for judicial review is confined to the administrative record. *Kerr-McGee Chem. Corp. v. United States*, 21 CIT 1179, 1183, 985 F. Supp. 1162, 1165 (1997) (citation omitted) ("For purposes of judicial review, the Court may consider only materials contained in the administrative record."); *Neuweg Fertigung GmbH v. United States*, 16 CIT 724, 726, 797 F. Supp. 1020, 1022 (1992) ("The case law of this court is very clear that the administrative record 'is limited to the information that was presented to or obtained by the agency making the determination during the particular review proceeding for which section 1516 authorizes judicial review.'" (quoting *Beker Indus. Corp. v. United States*,7 CIT 313, 316 (1984)). A party is free, however, "'to offer whatever *legal* arguments it chooses.'" *Hynix Semiconductor*, 27 CIT at 1471 (quoting *Koyo Seiko Co. v. United States*,21 CIT 146, 158, 955 F. Supp. 1532, 1544 (1997)).

II. JUDICIAL ESTOPPEL

"[J]udicial estoppel 'is an equitable doctrine invoked by a court at its discretion.'" *New Hampshire v. Maine*, 532 U.S. 742, 750 (2001) (quoting *Russell v. Rolfs*, 893 F.2d 1033, 1037 (9th Cir. 1990)). The judicial estoppel doctrine has been set forth by the United States Supreme Court as follows: "'[w]here a party assumes a certain position in a legal proceeding, and succeeds in maintaining that position, he may not thereafter, simply because his interests have changed, assume a contrary position, especially if it be to the prejudice of the party who has acquiesced in the position formerly taken by him.'" *Id.* at 749 (quoting *Davis v. Wakelee*, 156 U.S. 680, 689 (1895)). In other words, the rule of "[j]udicial estoppel generally prevents a party from prevailing in one phase of a case on an argument and then relying on a contradictory argument to prevail in another phase." *Pegram v. Herdrich*, 530 U.S. 211, 227 n.8 (2000) (citing *Rissetto v. Plumbers & Steamfitters Local 343*, 94 F.3d 597, 605 (9th Cir. 1996)). This Court's analysis of whether judicial estoppel is available is guided by three factors identified by the Supreme Court, which should "typically inform the decision whether to apply the doctrine in a particular case": (1) whether the "party's later position [is] clearly inconsistent with its earlier position"; (2) "whether the party has succeeded in persuading a court to accept that party's earlier position, so that judicial acceptance of an inconsistent position in a later proceeding would create the perception that either the first or the second court was misled"; and (3) "whether the party seeking to assert an inconsistent position would derive an unfair advantage or impose an unfair detriment on the opposing party if not estopped." *New Hampshire*, 532 U.S. at 743, 750–51 (citations omitted) (internal quotation marks omitted). Further, "[j]udicial estoppel applies just as much when one of the tribunals is an administrative agency as it does when both tribunals are courts." *Trs. in Bankr. of N. Am. Rubber Thread Co., Inc. v. United States*, 593 F.3d 1346, 1354 (Fed. Cir. 2010) (citing *Lampi Corp. v. Am. Power Prods., Inc.*, 228 F.3d 1365, 1377 (Fed. Cir. 2000) ("The [judicial estoppel] doctrine also applies to administrative proceedings in which a party obtains a favorable order by making an argument that it seeks to repudiate in a subsequent judicial proceeding.")).

III. THE PARTIES'ARGUMENTS

By means of its motion to strike, plaintiff contends that "[j]udicial review is limited to the administrative record developed by the agency." Pl.'s Mot. to Strike 2 (citing 19 U.S.C. § 1516a(a)(2) (2006)). "Only in 'exceptional circumstances,'" plaintiff argues, "'such as where a document was considered by the agency and not included in the record,' [may the] Court consider information that was not included in the agency record filed with the [C]ourt." Pl.'s Mot. to Strike 2 (quoting *Kerr-McGee*, 21 CIT at 1183, 985 F. Supp. at 1165). The determination being challenged by plaintiff in the present action is the 2013 Suspension Agreement, and "[d]efendant-[i]ntervenors' submission contains several exhibits [and references to, or arguments based on those exhibits,] that were not listed in the index to the agency record as filed by the agency and that cannot fairly be considered part of the administrative record." Pl.'s Mot 3. Thus, plaintiff argues that, because "many of the exhibits attached to [d]efendant[i]ntervenors' [b]rief were not part of the agency record, and much of that brief relies on those exhibits and other information that was not part of the agency record," the court must exclude this material from defendant-intervenors' submission. Pl.'s Mot. to Strike 1.

For their part, defendant-intervenors object to plaintiff's motion to strike, and assert that the extra-record material it has presented to the court demonstrates that "[t]he positions [for which p]laintiff advocates in this proceeding are directly contrary to the positions [plaintiff] has consistently taken in all prior related proceedings," and plaintiff is thus, "barred from taking a contrary position now by the doctrine of judicial estoppel." Def.-Ints.' Resp. to Pl.'s Mot. to Strike 1. Defendant-intervenors argue that the exhibits and references thereto, that plaintiff seeks to strike, relate to the inconsistency of plaintiff's past positions which the court may consider in this proceeding. Def.-Ints.' Resp. to Pl.'s Mot. to Strike 1.

Commerce says that it "will rely on the [c]ourt's discretion as to whether [the] FTE's motion to strike should be denied." Def.'s Resp. to Pl.'s Mot. to Strike Portions of the Def.-Ints.' Br. 4 (ECF Dkt. No. 49) ("Def.'s Resp. Br. to Mot. to Strike"). Taking a middle-ground, however, defendant further argues that (1) the "FTE is not estopped from challenging the 2013 [S]uspension [A]greement solely because its current position differs from the position it adopted in related preceding segments of the proceeding covering fresh tomatoes from Mexico," and (2) "defendant-intervenors are not prohibited from referring to, or relying on, public information for purposes of making a judicial estoppel argument." Def.'s Resp. Br. to Mot. to Strike 3.

IV. ANALYSIS

The court finds that plaintiff's motion to strike lacks merit. Remarkably, although plaintiff seeks to strike exhibits and assertions from defendant-intervenors' brief related to the judicial estoppel argument, plaintiff's motion to strike contains no discussion or even reference to this argument. Aside from plaintiff's generalized assertions that certain exhibits and sentences must be stricken from defendant-intervenors' brief because they were not part of the administrative record, plaintiff sets forth no further basis as to why the claim of judicial estoppel is otherwise legally insupportable in this case based on any of the factors set forth by the Supreme Court in *New Hampshire v. Maine*.

Defendant-intervenors, however, contend that the present case is ripe for the application of judicial estoppel on the grounds that, the positions for which plaintiff advocates in this proceeding relating to the 2013 Suspension Agreement, are directly contrary to positions plaintiff has taken in prior proceedings with respect to the previous suspension agreements. In making their case, defendant-intervenors rely upon the material that plaintiff seeks to strike.

Although it may be true that defendant-intervenors' brief contains arguments about, and references to, information that is not part of the administrative record, that does not necessitate striking any portions of it from the record. First, plaintiff has failed to make any showing that it is entitled to have defendant-intervenors' material struck based on USCIT Rules 12(f) and 81(m). That is, plaintiff has failed to demonstrate that defendant-intervenors' submission was made in bad faith or includes material that is scandalous or inflammatory, "that the contested references are sufficiently irrelevant, [redundant, or] immaterial," or that the filing would prejudice or mislead the court in such a way that the drastic remedy requested of striking this material is warranted. *Jimlar Corp.*, 10 CIT at 673, 647 F. Supp. at 934; *see UPS Customhouse Brokerage*, 30 CIT at 821, 442 F. Supp. 2d at 1302; *Elkem Metals*, 27 CIT at 1760–61, 297 F. Supp. 2d at 1350.

More importantly, it is only by means of the documents plaintiff seeks to strike that the court will have the facts necessary to rule on defendant-intervenors' judicial estoppel argument. *See Global Computer Enters. v. United States*, 88 Fed. Cl. 52, 62 (Fed. Cl. 2009). The purpose of restricting a reviewing court to the record completed by an administrative agency is that the court's purpose is to decide the legality of an agency determination based on the facts before the agency when it made the determination. *See Kerr-McGee*, 21 CIT at 1181, 985 F. Supp. at 1163–64; S. REP.NO. 96–249 at 247–48 (1979), *reprinted in* 1979 U.S.C.C.A.N. 381, 633 (emphasis added) ("Judicial review of determinations . . . would proceed *upon the basis of information before the relevant decision-maker at the time the decision was rendered* including any information that has been compiled as part of the formal record."). Here, however, neither the ITC nor the Department engaged in a discussion, or made a determination, with respect to judicial estoppel. By its nature, defendant-intervenors' judicial estoppel argument is being made for the first time before this Court. Thus, neither the ITC nor Commerce has previously considered the parties' positions on the matter, nor have they considered any evidence relating to judicial estoppel arguments. That being the case, the general rule that this Court must only consider the record compiled by the agency has no application here. Moreover, although the court does not reach the merits of defendant-intervenors' judicial estoppel arguments at this time, the court recognizes that the challenged exhibits are precisely the type of evidence a party must produce in order to demonstrate that the doctrine of judicial estoppel prevents an adversary from making certain arguments. As an example, Exhibits 2, 4, and 5 that plaintiff seeks to strike, are comments submitted by plaintiff to the Department that include plaintiff's positions on the International Trade Administration's proposed suspension agreements on fresh tomatoes from Mexico in 1996, 2002, and 2008. Thus, if defendant-intervenors' judicial estoppel arguments are indeed legally valid, then those arguments can only be made by reference to the exhibits defendant-intervenors proffer. *See Acciai Speciali Terni*, 24 CIT at 1217, 120 F. Supp. 2d at 1107.

CONCLUSION AND ORDER

Based on the foregoing, plaintiff's motion to strike Exhibits 2, 3, 4, 5, 8, 13, 14, and 16 to defendant-intervenors' brief and the references thereto is denied. Further, as a result of the court's order, Defendant-Intervenors' Motion for Leave to File a Response to Defendant's Response to Plaintiff's Motion to Strike Portions of Defendant-Intervenors' Brief (ECF Dkt. No. 50) is also denied.

IT IS SO ORDERED.

Dated: April 11, 2014
New York, New York

/s/ Richard K. Eaton
RICHARD K. EATON

Slip Op. 14–41

DIAMOND SAWBLADES MANUFACTURERS' COALITION, Plaintiff, v. UNITED STATES DEPARTMENT OF COMMERCE and UNITED STATES INTERNATIONAL TRADE COMMISSION, Defendants.

Before: Richard K. Eaton, Judge
Court No. 13–00391

[Plaintiff's motion for a stay pending appeal is denied.]

Dated: April 14, 2014

Wiley Rein LLP (*Daniel B. Pickard* and *Maureen E. Thorson*), for plaintiff.

Stuart F. Delery, Assistant Attorney General; *Jeanne E. Davidson*, Director; *Franklin E. White, Jr.*, Assistant Director; *Alexander V. Sverdlov*, Trial Attorney, Civil Division, Commercial Litigation Branch, United States Department of Justice; Office of the Chief Counsel for Import Administration, United States Department of Commerce (*Nathaniel Halvorson*), of counsel, for defendant.

Neal J. Reynolds, Assistant General Counsel for Litigation; *David B. Fishberg*, Attorney-Advisor, Office of the General Counsel, United States International Trade Commission.

MEMORANDUM AND ORDER

Eaton, Judge:

Before the court is Diamond Sawblades Manufacturers' Coalition's ("plaintiff" or the "Coalition") motion to stay this court's March 13, 2014 order denying its motion for a preliminary injunction during its interlocutory appeal from that order. *See Diamond Sawblades Mfrs. Coal. v. U.S. Dep't of Commerce*, 38 CIT __, __, Slip Op. 14–29, at 9 (2014). By this motion, plaintiff seeks the reinstatement of the temporary restraining order entered on December 30, 2013 that was dissolved when the court issued its order denying the motion for a preliminary injunction. TRO Order (ECF Dkt. No. 11). Defendants the Department of Commerce (the "Department" or "Commerce") and the International Trade Commission (collectively, "defendants") oppose the motion. Plaintiff's motion for a preliminary injunction was denied because it failed to "demonstrate that it [would] be irreparably harmed in the absence of the issuance of the injunction it" sought. *Diamond Sawblades*, 38 CIT at __, Slip Op. 14–29, at 2. For that same reason, plaintiff's present motion is also denied.

BACKGROUND

This action concerns the timing of the initiation of the five-year, or "sunset," review of the antidumping duty order on diamond sawblades and parts thereof from the People's Republic of China which was initiated by the Department by publication of a notice in the Federal Register on December 2, 2012. On December 26, 2014 plaintiff moved for a preliminary injunction to prevent the Department from conducting the review until either November 4, 2014 or the resolution of this action. Pl.'s Mot. for Prelim. Inj. (ECF Dkt. No. 10). The court then entered a temporary restraining order, halting the review during the pendency of the motion for a preliminary injunction. TRO Order.

After briefing, the court issued an opinion and order, denying plaintiff's motion for a preliminary injunction and dissolving the temporary restraining order. *Diamond Sawblades*,38 CIT at __, Slip Op. 14–29, at 9. The court held that plaintiff failed to demonstrate that it would be irreparably injured if the requested injunction did not issue. *Id*. at __, Slip Op. 14–29, at 2. Because a showing of irreparable harm is required for the issuance of a preliminary injunction, the court denied plaintiff's motion. *Id*. at __, Slip Op. 14–29, at 5.

As part of its analysis, the court rejected three ways in which the plaintiff claimed it would be irreparably harmed. *Id*. at __, Slip Op. 14–29, at 6. First, the court held that the alleged expense incurred as a result of participation in an ultra vires proceeding was not irreparable harm. *Id*. Second, it held that under current precedent forced participation in the proceeding during the pendency of the action did not satisfy the injury requirement, even though avoiding the necessity of participation was part of the relief sought in the action. *Id*. at __, Slip Op. 14–29, at 6–8. Third, the court rejected plaintiff's argument that failure to issue an injunction would result in plaintiff's loss of several months of trade protection, because it was the ultimate resolution of the action, not the issuance of an injunction, that would determine whether that relief was appropriate. *Id*. at __, Slip Op. 14–29, at 8–9.

On March 18, 2014, plaintiff filed its notice of appeal to the United States Court of Appeals for the Federal Circuit of the denial of its motion and the appeal was docketed two days later. Notice of Appeal (ECF Dkt. No. 27); Plainitff's Appeal Docketed (ECF Dkt. No. 28). On March 21, plaintiff filed the motion currently before the court, and defendants filed briefs in opposition on April 9, 2014.

In its motion, plaintiff argues that it will be irreparably injured in the absence of a stay because (1) "forced participation in an unlawful proceeding is itself irreparable injury," and (2) "a subsequent decision on the merits that determines the agencies' sunset review is unauthorized will result in [plaintiff] having expended time, money, and effort on the premature review, [and] it will be forced to once again participate in a subsequent, lawfully-conducted review." Pl.'s Mot. to Stay 11, 14 (ECF Dkt. No. 29).

DISCUSSION

Although styled as a motion to stay, because it seeks the reinstatement of the temporary restraining order halting the sunset review, plaintiff's motion is properly governed by USCIT Rule 62(c) regarding injunctive relief while an interlocutory appeal is pending. USCIT Rule 62(c) ("While an appeal is pending from an interlocutory order . . . den[ying] an injunction, the court may suspend, modify, restore, or grant an injunction on terms for bond or other terms that secure the opposing party's rights."). Plaintiff's motion does not seek a stay alone, "which would merely 'operate upon the judicial proceeding itself,' but instead is an injunction that is 'directed at someone, and governs that party's conduct.'" *Furniture Brands Int'l, Inc. v. United States*, 36 CIT __, __, Slip Op. 12–20, at 7 (2012) (quoting *Nken v. Holder*, 556 U.S. 418, 428 (2009)). Here, the stay that plaintiff seeks operates in the same manner as an injunction because it would prevent defendants from conducting the sunset review.

Where a stay also operates as an injunction, the court must consider:

> (1) whether the stay the applicant has made a strong showing that he is likely to succeed on the merits; (2) whether the applicant will be irreparably injured absent a stay; (3) whether issuance of the stay will substantially injure the other parties interested in the proceeding; and (4) where the public interest lies.

Id. (quoting *Nken*, 556 U.S. at 426). The factor of irreparable injury in this context is treated the same way as the requirement of irreparable harm in the preliminary injunction context. *See Nken*, 556 U.S. at 434–35 (citing *Winter v. Natural Res. Def. Council, Inc.*, 555 U.S. 7, 22, 24 (2008) (discussing the "irreparable harm" requirement for preliminary injunctions)). In other words, to be entitled to a stay that also operates as an injunction, a party must make a sufficient showing of irreparable harm. *See Qingdao Tafia Grp. Co. v. United States*, 581 F.3d 1375, 1379 (Fed. Cir. 2009) ("A presently existing, actual threat *must* be shown." (quoting *Zenith Radio Corp. v. United States*, 710 F.2d 806, 809 (1983) (emphasis added and internal quotation marks omitted)).

Plaintiff has not offered a sufficient showing of irreparable injury. The Coalition's two alleged forms of injury are essentially identical to those it argued for, and the court rejected, in the order denying the preliminary injunction. *See Diamond Sawblades*, 38 CIT at __, Slip Op. 14–29, at 6–8. There, the court expressly rejected plaintiff's first alleged harm, that forced participation in an illegal proceeding is itself irreparable injury, and observed that "under the prevailing case law" participation in such a proceeding during the pendency of the Court of International Trade action "is not a sufficient harm to support a" finding of irreparable injury. *Id*. at __, Slip Op. 14–29, at 8. Plaintiff's second form of claimed injury, costs associated with its participation in allegedly unlawful proceedings, is similarly without merit. As this court observed when it denied the injunction, "'[m]ere litigation expense, even substantial and unrecouperable cost, does not constitute irreparable injury.'" *Id*. at __, Slip Op. 14–29, at 6 (quoting *Nippon Steel Corp. v. United States*, 219 F.3d 1348, 1353 (Fed. Cir. 2000) (alteration in original)). Accordingly, plaintiff's requested stay must be denied.[1]

[1] As with the denial of the preliminary injunction, because plaintiff has failed to make the requisite showing of irreparable injury, the court need not address the remaining requirements. *See Diamond Sawblades*, 38 CIT at __, Slip Op. 14–29, at 9 (citing *Dupont Teijin Films USA, LP v. United States*, 27 CIT 1754, 1757 n.2 (2003)).

CONCLUSION AND ORDER

For the foregoing reasons, plaintiff's motion is denied.

SO ORDERED

Dated: April 14, 2014
New York, New York

/s Richard K. Eaton
RICHARD K. EATON