U.S. Court of International Trade

Slip Op. 15–84

CHANGZHOU TRINA SOLAR ENERGY CO., LTD., TRINA SOLAR (U.S.) INC., WUXI SUNTECH POWER CO., LTD., SUNTECH AMERICA, INC., SUNTECH ARIZONA, INC., YINGLI GREEN ENERGY HOLDING COMPANY LIMITED, AND YINGLI GREEN ENERGY AMERICAS, INC., Plaintiffs, v. UNITED STATES INTERNATIONAL TRADE COMMISSION, DEFENDANT, AND SOLARWORLD AMERICAS INC., Defendant-Intervenor.

Before: Richard K. Eaton, Judge
Court No. 13–00014
PUBLIC VERSION

[United States International Trade Commission's Final Determination is sustained.]

Dated: August 7, 2015

Neil R. Ellis and *Rajib Pal*, Sidley Austin LLP, of Washington, DC, argued for plaintiffs. With them on the brief were *Richard Weiner*, *Brenda A. Jacobs*, *Lawrence R. Walders*, and *Raphaelle E. Monty*.

Mary Jane Alves, Attorney-Advisor, Office of General Counsel, United States International Trade Commission, of Washington, DC, argued for defendant. With her on the brief were *Dominic L. Bianchi*, General Counsel, and *Neal J. Reynolds*, Assistant General Counsel for Litigation.

Timothy C. Brightbill, Wiley Rein LLP, of Washington, DC, argued for defendant-intervenor.

OPINION

EATON, Judge:

Before the court is the motion for judgment on the agency record of plaintiffs Changzhou Trina Solar Energy Co., Ltd., Trina Solar (U.S.) Inc., Wuxi Suntech Power Co., Ltd., Suntech America, Inc., Suntech Arizona, Inc. ("Suntech Arizona"), Yingli Green Energy Holding Company Limited, and Yingli Green Energy Americas, Inc. (collectively, "plaintiffs") made pursuant to USCIT Rule 56.2. *See* Mot. for J. on the Agency R. (ECF Dkt. No. 31). By their motion, plaintiffs contest the final affirmative material injury determination of the United States International Trade Commission ("ITC" or the "Commission") in the antidumping and countervailing duty investigations concerning crystalline silicon photovoltaic ("CSPV") cells and modules from China.

See Crystalline Silicon Photovoltaic Cells and Modules From China (Final), USITC Pub. 4360, Inv. Nos. 701-TA-481 and 731-TA-1190 (Nov. 2012) (ECF Dkt. No. 20–1) ("Final Determination"); Crystalline Silicon Photovoltaic Cells and Modules From China, 77 Fed. Reg. 72,884 (ITC Dec. 6, 2012). Defendant, the ITC, opposes plaintiffs' motion and asks that its Final Determination be sustained. *See* Def. International Trade Commission's Opp'n to Pls.' Mot. for J. on the Agency R. 1 (ECF Dkt. No. 35). Defendant-intervenor, SolarWorld Americas Inc. ("defendant-intervenor" or "SolarWorld"), a domestic manufacturer of solar cells and modules, joins in opposition to plaintiffs' motion. *See* Def.-int. SolarWorld's Resp. to Pls.' Rule 56.2 Mot for J. on the Agency R. and Accompanying Mem. of P. & A. in Supp. 1–3 (ECF Dkt. No. 38). Jurisdiction lies pursuant to 28 U.S.C. § 1581(c) and 19 U.S.C. § 1516a(a)(2)(B)(i). For the reasons that follow, the ITC's Final Determination is sustained.

BACKGROUND

In October 2011, defendant-intervenor SolarWorld filed antidumping and countervailing duty petitions with the United States Department of Commerce ("Commerce" or the "Department") and the ITC covering imports of CSPV cells and modules from China.[1] Crystalline Silicon Photovoltaic Cells and Modules From China, 76 Fed. Reg. 66,748, 66,748–49 (ITC Oct. 27, 2011) (institution of antidumping and countervailing duty investigations and scheduling of preliminary phase investigations). The period of investigation was January 2009 through June 2012 ("POI"). In October 2012, following its investigations, the Department determined that imports from China were both being subsidized by the Chinese government and sold in the United States at less than fair value. Subsequently, in November 2012, following its own investigations, the ITC issued its Final Determination, whereby it determined that the CSPV industry in the United States was being materially injured by reason of imports of subject merchandise. Final Determination, 77 Fed. Reg. at 72,884.

[1] "CSPV cells typically measure 5 by 5 inches or 6 by 6 inches, have an output of 3 to 4.5 watts, and . . . use either monocrystalline silicon or multicrystalline silicon to convert sunlight into electricity." Final Determination at 6. These cells are strung together, sealed, laminated, and framed to produce CSPV modules, also known as solar panels. *See* Final Determination at 6–7. "CSPV modules are the main component of solar CSPV systems that use crystalline silicon to convert sunlight into electricity either for on-site use or for distribution through the electric grid." Final Determination at 7. "CSPV modules may be used in on-and off-grid applications for residential, non-residential, and utility purposes in ground-or roof-mounted systems." Final Determination at 7. CSPV products are manufactured "from refined polysilicon that is formed into ingots, sliced into wafers, converted into cells, and then assembled into modules." Final Determination at 12.

During the preliminary investigations, the Chinese Chamber of Commerce for Import and Export of Machinery and Electronic Products (the "Chinese Chamber"), an association of Chinese producers and exporters, and related U.S. importers of subject merchandise that opposed the petition, urged the ITC to define the domestic like product more broadly than was ultimately the case in the Final Determination. *See* Views of the Commission (Preliminary) at 9, CD 136 at Doc. No. 466545 (Dec. 13, 2011), ECF Dkt. No. 67–1 ("Preliminary Determination"). Specifically, the Chinese Chamber argued that the scope should include thin-film photovoltaic products ("thin-film products") in the definition of the domestic like product. Preliminary Determination at 9. At the conclusion of its investigations, however, the Commission excluded thin-film products from the scope of the domestic like product. Final Determination at 9.

In its Final Determination, the ITC also found that plaintiff Suntech Arizona should be excluded from the domestic industry as a related party because its interests rested primarily with importing CSPV products rather than their domestic production. Final Determination at 19, 22. As a result, the Commission defined the domestic industry of subject merchandise to include "all U.S. producers of CSPV cells and modules, except for Suntech [Arizona]." Final Determination at 24.

Also, during the course of the investigations, plaintiffs claimed that the ITC should take into account certain unique aspects of the CSPV marketplace before making its injury determination. *See, e.g.*, Post-Hearing Br. of China Chamber of Commerce for Import and Export of Machinery and Electronic Products (Volume I of II) at 4–14, CD 419 at Doc. No. 493162 (Oct. 11, 2012), ECF Dkt. No. 67–3. As shall be seen, the Commission takes the position that it took into account market conditions, as required by law.

In the end, in the Final Determination, the Commission issued its affirmative material injury determination, finding that the domestic industry was "'materially injured by reason of' unfairly traded imports." Final Determination at 25.

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).

DISCUSSION

I. LEGAL FRAMEWORK

"Under the unfair trade laws, Commerce determines whether foreign imports into the United States are either being dumped or subsidized (or both). It is for the ITC to determine whether these dumped or subsidized imports are causing material injury to a domestic industry in the United States." *Navneet Publ'ns (India) Ltd. v. United States*, 32 CIT 169, 171 (2008) (citing 19 U.S.C. §§ 1673(1), (2), 1671(a)(1), (2)).

Although Commerce determines the "class or kind of foreign merchandise [that] is being, or is likely to be, sold in the United States at less than its fair value" or has been subsidized, "the ITC is responsible for identifying the corresponding universe of items produced in the United States that are like[,] or in the absence of like, most similar in characteristics and uses with the items in the scope of the investigation." *See* 19 U.S.C. § 1673(i); 19 U.S.C. § 1671(a); *Int'l Imaging Materials, Inc. v. U.S. Int'l Trade Comm'n*, 30 CIT 1181, 1183 (2006) (alteration in original) (citation omitted) (internal quotation marks omitted) (citing 19 U.S.C. § 1677(10)). Thus, the ITC begins a material injury investigation by "determin[ing] the scope of the 'domestic industry' by defining the 'domestic like product' under investigation." *Cleo Inc. v. United States*, 30 CIT 1380, 1382–83 (2006) (citing 19 U.S.C. § 1677(4)(A)), *aff'd*, 501 F.3d 1291 (Fed. Cir. 2007); *see also Int'l Imaging*, 30 CIT at 1183.

Under certain conditions, the Commission's decision as to the companies that make up the domestic industry is guided by 19 U.S.C. § 1677(4)(B)(i). This subsection provides, in relevant part, "[i]f a producer of a domestic like product and an exporter or importer of the subject merchandise are related parties, or if a producer of the domestic like product is also an importer of the subject merchandise, the producer may, in appropriate circumstances, be excluded from the industry." 19 U.S.C. § 1677(4)(B)(i); *see also Allied Mineral Prods., Inc. v. United States*, 28 CIT 1861, 1863 (2004).

Following the Commission's determination as to what constitutes the domestic like product and its determination as to which companies qualify as members of the domestic industry, "it must next examine the volume of imports, their effect on prices for the domestic like product, and their impact on domestic producers of the domestic like product." *Int'l Imaging*, 30 CIT at 1183 (citation omitted) (internal quotation marks omitted) (citing 19 U.S.C. § 1677(7)(B)(i)(I)–(III)). As part of its analysis, "[t]he Commission may also consider 'such other economic factors as are relevant in the

determination.'" *JMC Steel Grp. v. United States*, 38 CIT __, __, Slip Op. 14–120, at 8 (2014) (quoting *Hynix Semiconductor, Inc. v. United States*, 30 CIT 1208, 1210, 431 F. Supp. 2d 1302, 1306 (2006)); *see also* 19 U.S.C. § 1677(7)(B)(ii). Upon completion of this analysis, should the ITC make a final affirmative material injury determination, and Commerce make an affirmative determination with respect to countervailing duties or dumping, an order will result.

II. THE COMMISSION'S DOMESTIC LIKE PRODUCT ANALYSIS IS SUPPORTED BY SUBSTANTIAL EVIDENCE

As part of its investigations, the Commission sought to define the domestic like product in order to determine whether a domestic industry was materially injured as a result of subject imports. Here, the Commission's domestic like product analysis balanced the six factors[2] typically used to determine whether a specific product should be included within the scope of the Commission's investigation. Upon completing this analysis, the Commission determined that thin-film products fell outside the scope of the domestic like product. Final Determination at 16. "The 'like product' determination is a factual issue that the Commission resolves by weighing six factors relating to the products in question." *Cleo Inc. v. United States*, 501 F.3d 1291, 1295 (Fed. Cir. 2007). Therefore, in order to establish the facts, the Commission relied, in part, on information obtained from a survey it conducted of domestic producers, importers, and purchasers of CSPV products regarding perceived similarities between the products based on each of the six factors.

Plaintiffs argue that the Commission's Final Determination, which excluded thin-film products from the scope of the domestic like product, was not supported by substantial evidence because thin-film products are sufficiently similar to the subject merchandise to be included within the scope for purposes of 19 U.S.C. § 1677(10). Mem. of P. & A. in Supp. of Mot. for J. on the Agency R. 7 (ECF Dkt. No. 31) ("Pls.' Br."). Plaintiffs claim that "the Commission erroneously focused on small technical distinctions that obscured the fundamental similarities between the two solar technologies." Pls.' Br. 7. Specifically, they point to evidence that indicates that CSPV and thin-film modules are made of glass, can be used in solar shingles, and compete

[2] As shall be seen, the ITC used its ordinary methodology, in which it weighed six factors as part of its evaluation of whether thin-film products should be included within the scope of the domestic like product: "(1) physical characteristics and uses; (2) common manufacturing facilities and production employees; (3) interchangeability; (4) customer perceptions; (5) channels of distribution; and, where appropriate, (6) price." *See Cleo Inc. v. United States*, 501 F.3d 1291, 1295 (Fed. Cir. 2007) (citations omitted); Final Determination at 9–16.

with each other. *See* Pls.' Br. 38–39. They also note, in support of their argument, that twelve of nineteen United States producers and thirty-four of forty-nine importers polled by the ITC reported that the two products share the same channels of distribution. Pls.' Br. 39. Therefore, for plaintiffs, the ITC's analysis makes clear that it found similarities in each of the six factors that it is directed to use in making its "like product" determination, except for "manufacturing facilities." Pls.' Br. 7. As such, plaintiffs reason that, despite the Commission's finding that the products differed in several respects, the similarities between them rendered it impossible to find any clear dividing line between the two. Pls.' Br. 7.

The court finds plaintiffs' arguments unconvincing and thus holds that the ITC's determination to exclude thin-film products from the scope of the domestic like product is supported by substantial evidence. In doing so, the court has reviewed the methodology employed by the ITC and the record evidence it considered.

As noted, the ITC normally resolves its "like product" determination "by weighing six factors relating to the products in question: (1) physical characteristics and uses; (2) common manufacturing facilities and production employees; (3) interchangeability; (4) customer perceptions; (5) channels of distribution; and, where appropriate, (6) price." *Cleo*, 501 F.3d at 1295 (citations omitted). No single factor is dispositive and the Commission is permitted to consider other relevant factors. *Cleo*, 30 CIT at 1384 & n.5 (citing S. REP. NO. 96–249, at 90–91 (1979), *reprinted in* 1979 U.S.C.C.A.N. at 476–77). "When weighing those factors, the Commission disregards minor differences [between the products] and focuses on whether there are any clear dividing lines between the products being examined." *Cleo*, 501 F.3d at 1295 (citing *Nippon Steel Corp. v. United States*, 19 CIT 450, 455 (1995)).

A. Physical Characteristics, Uses, and Interchangeability

As an initial matter, the court notes that the "physical characteristics and uses" and "interchangeability" factors are particularly relevant to the ITC's domestic like product determination, where, as here, these products' primary use is to create electricity. The respective capacities of CSPV cells and modules and thin-film products to produce electricity are naturally significant for determining whether the products are sufficiently similar to one another for thin-film products to be included within the scope of the investigations.

In its Final Determination, the Commission found a variety of important differences between the two products' physical characteristics, uses, and interchangeability, such as differences in physical

length, thickness, and rigidity of CSPV and thin-film products. *See* Final Determination at 9–11, 14–15. While plaintiffs maintain that the differences are insignificant, these variations create substantially different capabilities of CSPV and thin-film products. Indeed, eleven of nineteen U.S. producers of CSPV and/or thin-film products and twenty-seven of forty-nine importers that responded to the ITC's questionnaires stated that the two products were not interchangeable. Final Determination at 14. For example, the ITC found that thin-film products possess different balance of system[3] requirements, lower conversion efficiency, and lower wattage output than CSPV products and thus that more thin-film modules than CSPV modules are needed in order to produce the same amount of electricity. *See* Final Determination at 10, 14.

The Commission also found "significant differences in physical characteristics and capabilities between CSPV and thin-film products . . . related to differences in their underlying raw materials and production processes." Final Determination at 9. It observed that on-grid CSPV modules typically "consist of a 34-to 62-pound framed glass laminate that measures 62 to 78 inches long, 32 to 39 inches wide, and 1.2 to 2 inches thick and that is comprised of 60 to 72 cells," and "[o]ff-grid CSPV modules are often smaller." Final Determination at 9–10. On the other hand, the ITC found that "[t]hin-film modules consist of a glass or flexible substrate such as stainless steel or plastic with a surface layer of amorphous silicon ('a-Si'), cadmium telluride ('CdTe'), and/or copper indium (gallium) (di)selenide ('CIGS') . . ." and are generally smaller in dimension, thinner, and tend to weigh less. Final Determination at 10. Thus, it concluded that "the variety of substrates used to make thin-film modules provides more flexibility and a broader range of possible sizes, including some that are considerably longer than on-grid CSPV modules." Final Determination at 10. Overall, the ITC found that "thin-film products tend to have a considerably lower conversion rate, despite the fact that thin-film products are able to generate power in low-light conditions." Final Determination at 10. Indeed these findings were consistent with the questionnaire responses received from U.S. producers and importers, which "pointed to thin-film products' thinness and lighter weight, the fact that CSPV modules are silicon-based whereas thin-film products are chemical-based, . . . differences between the two products in terms

[3] The "balance of system" is used to refer to "[t]he other components of solar CSPV system installations," which "are items such as the inverter and the racking on which the system is installed as well as the labor costs, permitting fees, and other expenses associated with installing a photovoltaic . . . system." Final Determination at 7. In other words, the "balance of system" refers to the other materials that go into the installation of the merchandise. In addition to module costs, installers consider balance-of-system costs of the racking on which the systems are installed.

of sizes, proportion, voltage, conversion efficiency, and quality," and that "CSPV modules tend to be framed whereas thin-film modules tend to be frameless," as important differences. Final Determination at 11.

As a result of these physical differences and varying capabilities, thin-film products require a greater surface area of exposure to generate the same amount of electricity as CSPV modules. Final Determination at 14 ("Moreover, due to their lower conversion efficiencies and lower wattage output, thin-film products need more surface area to generate the same energy as CSPV modules, making thin-film products somewhat more attractive for projects in environments with high temperatures and significant amounts of sunlight."). Hence, the ITC found that physical characteristics and capabilities make thin-film products naturally more attractive for projects where there are fewer space constraints, higher temperatures, and significant amounts of sunlight, whereas CSPV products are better-suited for larger, standalone projects. *See* Final Determination at 11, 14.

Thus, the Commission found that CSPV modules are more attractive for "projects in the eastern United States, where land is more expensive and less available." Final Determination at 14–15. In addition, through the questionnaires, it was reported that CSPV products are more commonly used in residential and non-residential rooftops than thin-film products, and that thin-film products produce insufficient power for use in residential applications. *See* Final Determination at 14 n.82. Thus, it is hard to argue with the Commission's conclusion that thin-film products "may be more suitable for utility as opposed to residential and smaller nonresidential applications, except for those projects needing a lighter product for mounting on a lower-strength roof or a more flexible product." Final Determination at 14. Therefore, although both products are used to make electricity, the ITC supported with substantial evidence its conclusions that, while there is some overlap, each is particularly suited for different applications.

Accordingly, the ITC reasonably determined, based on record evidence, that the two products do not share similar physical characteristics and end uses. Indeed, the Commission found that the products' respective capacities to produce electricity were not comparable, and thus that both products were not consistently interchangeable for one another, thereby favoring exclusion of thin-film products from the scope of the domestic like product.

B. Common Manufacturing Facilities, Production Processes, and Production Employees

The ITC also found that there was little or no overlap in the manufacturing facilities, production processes, or employees used to manufacture thin-film and CSPV products. Final Determination at 11. Out of nineteen domestic "producers of CSPV and/or thin film products, eighteen reported that the production process of thin film solar products differed from that of CSPV cells and modules." Crystalline Silicon Photovoltaic Cells and Modules from China, Staff Report to the Commission on Inv. Nos. 701-TA-481 and 731-TA-1190 (Final) (Oct. 25, 2012) at I-36 (ECF Dkt. No. 20–2) ("Final Staff Report"). Additionally, "[o]f the forty-nine responding U.S. importers, thirty-seven reported that the production processes between the two product types differed substantially."[4] Final Staff Report at I-36.

The Commission further observed that

> CSPV products are made from refined polysilicon that is formed into ingots, sliced into wafers, converted into cells, and then assembled into modules. The cells in CSPV modules use either mono- or multi-crystalline silicon; when sunlight hits the modules, it knocks loose electrons that flow into the cells' thin metal "fingers" and conduct electricity to the busbars. The CSPV cells are soldered together in strings and arranged in a rectangular matrix, sealed with an EVA sheet, joined to a back sheet, laminated, framed, and then mounted to a junction box. In contrast, manufacturers generally make thin-film products by applying a layer of photosensitive material such as a-Si, CdTe, and/or CIGS to glass or to a flexible substrate such as stainless steel or plastic.

Final Determination at 12.

Based on the questionnaire responses and the clear differences in how they are manufactured, it is evident that the ITC reasonably reached the conclusion that thin-film and CSPV products do not overlap in manufacturing facilities, production processes, or employees. It is worth noting that plaintiffs do not dispute this finding, which tends to support the conclusion that CSPV cells and modules and thin-film products are not like products.

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[4] Further, the ITC noted that only one questionnaire respondent, [[
]], reported producing both CSPV and thin-film products, but even that respondent reported that "[[
]]." Final Determination at 12.

C. Customer Perceptions

Consistent with its findings related to physical characteristics, uses, and interchangeability, the Commission also found that consumers and producers perceive CSPV and thin-film modules as different products. Eleven of nineteen U.S. producers of CSPV and/or thin-film products and twenty-three of forty-nine importers that responded to the Commission's questionnaires, "reported that their customers perceive the products to have different physical characteristics, flexibility, efficiency, power outage, space requirements, bankability, environmental concerns, climate suitability, performance characteristics, reliability, durability, and established nature." Final Determination at 15.

In addition, it was reported to the ITC that, although thin-film is less expensive per watt than CSPV modules, it does not produce enough power for residential applications, whereas CSPV modules are commonly used for residential purposes. *See* Final Staff Report at II-23. Also, although a number of purchasers reported that they considered both CSPV and thin-film products for the same project, "many reported that they considered either CSPV or thin-film products but not both." *See* Final Determination at 15. For example, twenty-three of fifty-two responding purchasers reported evaluating only one of the two products for the same end use or project. *See* Final Staff Report at II-23. Thus, the ITC found that customers and producers perceive important and significant differences between CSPV and thin-film products, thereby supporting the Commission's exclusion of thin-film products from the scope of the domestic like product.

Plaintiffs maintain that the questionnaire responses indicate "that almost half of U.S. producers and a majority of importers did not agree that there were differences between the two technologies in these areas," and thus that this factor favored the inclusion of thin-film products as part of the scope of the domestic like product. *See* Pls.' Br. 39 n.10. At best, however, the questionnaire responses show that there is no clear consensus among consumers as to these products' interchangeability, and thus this evidence does not aid plaintiffs' case. Indeed, this disagreement among consumers and purchasers as to the substitutability of thin-film and CSPV products actually lends support to the ITC's determination that the products are not sufficiently similar to one another to be consistently directly competitive, thereby favoring exclusion of thin-film products from the scope of the domestic like product.

D. Channels of Distribution

Next, while hardly conclusive, the Commission found that CSPV products and thin-film products did not share the same channels of distribution during the POI because they were not sold into precisely the same markets. Specifically, "CSPV shipments to the residential segment in 2011 totaled 715 [megawatts] compared to 1,346 [megawatts] for non-residential shipments and 631 [megawatts] for utility shipments." Final Determination at 14 n.76. On the other hand, it found that shipments of thin-film products in 2011 to all three segments totaled 35 megawatts to the residential sector, 50 megawatts to the non-residential sector, and 86 megawatts to the utility sector. *See* Final Determination 14. Thus, the Commission observed that CSPV products were shipped primarily to the non-residential segment toward the end of the POI (i.e., in 2011), whereas thin-film products were primarily sold to the utility segment during the same time period.

Further, questionnaire responses also indicated "that 'CSPV modules are used more commonly in the space-and weight-constrained commercial and residential market segments than thin-film modules (thus requiring different distribution channels), while thin-film modules are used more commonly in the utility-scale market (and are thus dependent on the distribution channels serving that market).'"[5] *See* Final Determination at 14 (quoting Final Staff Report at App. E). Based on these findings, the Commission determined that there was evidence demonstrating that, at least toward the end of the POI, both products were primarily used in different market segments and by different segments of consumers, and thus concluded that this would require the use of different channels of distribution for thin-film modules and CSPV modules. This finding is consistent with the ITC's physical characteristics and interchangeability findings and its findings related to customer perceptions.

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[5] That CSPV modules are more commonly used in space- and weight-constrained commercial and residential market segments compared to thin-film modules, which are more commonly used in the utility-scale market segment, was reported to the ITC by [[ ]], in its questionnaire response. Final Determination at 14. Plaintiffs object to the ITC's reliance on [[ ]] responses because, in 2010, [[ ]] identified CSPV producers among its main competitors. *See* Pls.' Reply in Supp. of their Mot. for J. on the Agency R. 20–21 (ECF Dkt. No. 46). The ITC, however, did not rely solely on [[ ]] responses to its questionnaires to reach its conclusions. Rather, as is clear, the Commission relied on a number of sources on the record, among which included [[ ]] responses and the questionnaire data reported by other companies. Moreover, that [[ ]] competes with CSPV producers, on its own, is not grounds for the ITC to disregard its submission, nor can the court conclude that the Commission's reliance on this submission, in part, renders its determination unsupported by substantial evidence.

Taking all of the foregoing evidence into account, the ITC was not unreasonable in finding that, because there was evidence tending to demonstrate that both products were sold by different actors into different market segments, the channels of distribution factor, too, modestly supported a finding that thin-film products be excluded from the domestic like product's scope.

E. Price

Last, the ITC found that prices charged for CSPV and thin-film products also demonstrated important differences between the two products. A majority of domestic producers and importers of CSPV and/or thin-film products (twelve of nineteen U.S. producers and thirty-five of forty-nine importers) reported that CSPV products are generally priced higher on a per-watt basis than thin-film products. *See* Final Determination at 15. Further, the Commission noted that, although the price of CSPV products declined during the POI due to a decrease in raw material costs (i.e., for polysilicon), the price differential per watt between CSPV and thin-film products narrowed, but was not eliminated entirely. Final Determination at 15.

Thus, the ITC reasonably concluded that the price differential, particularly the price per watt, between CSPV and thin-film products, supported the conclusion that the products did not directly compete with one another. That is, because thin-film products tended to be less expensive per watt, some other factor such as incomplete interchangeability accounted for purchasers choosing to buy CSPV products at all. Thus, this factor favors the exclusion of thin-film products from the scope of the domestic like product.

F. Conclusion

When the six factors are considered as a whole, the differences between CSPV and thin-film products are evident, outweighing any broad similarities that the products might otherwise share. As the ITC observed,

> [t]he record demonstrates a number of differences between CSPV and thin-film products. Specifically, the two products are manufactured using different raw materials, manufacturing facilities, manufacturing processes, and production employees. Differences between the two products in terms of chemical composition, weight, size, conversion efficiency, output, inherent properties, and other factors limit their interchangeability after the design phase and in specific projects, and they also limit overlap in distribution channels, particularly for non-utility sales. A number of market participants reported viewing CSPV

> and thin-film products as sometimes competitive, but generally different products; they reported CSPV products to be generally higher-priced than thin-film products. On balance, we find that the differences between CSPV and thin-film products are more significant than their similarities in today's evolving marketplace and weigh in favor of a finding of a single domestic like product consisting of the CSPV products within the scope of the investigations.

Final Determination at 16. Thus, it is clear that the differences in physical characteristics and uses, interchangeability, manufacturing facilities, production processes, production employees, consumer and producer perceptions, channels of distribution, and price all supply the substantial evidence needed to support the ITC's determination to exclude thin-film products from the scope of the investigations. Accordingly, the ITC reasonably determined, based on record evidence, that the two products do not share similar physical characteristics and end uses. Importantly, the Commission found that the products' respective capacities to produce electricity were not comparable, and thus that both products were not consistently interchangeable for one another, thereby favoring exclusion of thin-film products from the scope of the domestic like product. Accordingly, the Commission's determination of the scope of the domestic like product, including its decision to exclude thin-film products from the scope of the domestic like product, is supported by substantial evidence and is sustained.

III. THE COMMISSION'S DOMESTIC INDUSTRY ANALYSIS IS SUPPORTED BY SUBSTANTIAL EVIDENCE

Where appropriate, in the course of its investigation, the ITC must determine whether to exclude certain companies from the domestic industry because they are related to an exporter or importer of subject merchandise, or because their interests lie primarily in importing merchandise rather than domestic merchandise production. This provision was enacted "so that domestic producers whose interests in the imports were strong enough to cause them to act against the domestic industry would be excluded from the ITC's consideration and investigation into material injury or threat thereof." *USEC, Inc. v. United States*, 25 CIT 49, 61, 132 F. Supp. 2d 1, 12 (2001) (citing *Empire Plow Co. Inc. v. United States*, 11 CIT 847, 852, 675 F. Supp. 1348, 1353 (1987)). Following the ITC's preliminary investigations, the Commis-

sion preliminarily determined that it would not be appropriate to exclude Suntech Arizona[6] or Motech Americas LLC("Motech")[7] from the domestic industry. *See* Preliminary Determination at 24; 19 U.S.C. § 1677(4)(B).

In the final investigations, however, SolarWorld urged the Commission to exclude Suntech Arizona and Motech from the domestic industry because their interests did not lie primarily in domestic production. Final Determination at 19 ("In these final investigations, Petitioner argues that two U.S. producers, Suntech and Motech, import subject merchandise from their affiliates in China and asks the Commission to exclude both from the domestic industry as related parties based on the claim that these firms' interests do not principally lie in domestic production.").

In its Final Determination, although the ITC found that both companies were related[8] to Chinese producers and/or exporters of subject merchandise, the Commission found that appropriate circumstances existed to exclude Suntech Arizona from the domestic industry but not Motech. *See* Final Determination at 22, 23, 24. Although the Commission found that Motech, a domestic assembler of CSPV modules, was a related party "because it [was] wholly owned by the same firm that wholly own[ed] a subject producer/exporter in China,"[9] it nonetheless concluded that Motech's primary interest was in domestic production, observing, for instance, that, in January 2010, Motech acquired a Delaware CSPV module manufacturing facility, in which it made significant investments in the same year.[10] Final Determination at 22, 23. The ITC further found that Motech should be included in the domestic industry based on the company's ratio of imports to

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[6] Plaintiff Suntech Arizona is a U.S. producer that does not manufacture CSPV cells in the United States, but is an assembler of CSPV modules. Final Determination at 21.

[7] Motech is a U.S. producer that does not manufacture CSPV cells in the United States, but is an assembler of CSPV modules. Final Determination at 22.

[8] Pursuant to 19 U.S.C. § 1677(4)(B)(ii),

> a producer and an exporter or importer shall be considered to be related parties, if—
>
> (I) the producer directly or indirectly controls the exporter or importer,
>
> (II) the exporter or importer directly or indirectly controls the producer,
>
> (III) a third party directly or indirectly controls the producer and the exporter or importer, or
>
> (IV) the producer and the exporter or importer directly or indirectly control a third party and there is reason to believe that the relationship causes the producer to act differently than a nonrelated producer.

19 U.S.C. § 1677(4)(B)(ii).

[9] "Motech reported sourcing the cells used in its U.S. CSPV module operations from [[ ]]." Final Determination at 23.

[10] Suntech invested [[ ]] in the U.S. facility in 2010. Final Determination at 22 n.122.

domestic production,[11] because it had invested in research anddevelopment in its U.S. facility,[12] and based on its performance relative to the industry average during the POI.[13] *See* Final Determination at 23. The ITC thus determined that, based on Motech's financial performance during the POI (i.e., whether the company benefitted from its importing activities), its capital expenditures, and research and development expenses, that it was not "appropriate to exclude Motech from the domestic industry as a related party." *See* Final Determination at 24.

As to Suntech Arizona, also a U.S. assembler of CSPV modules, however, the ITC reached a different conclusion and determined to exclude the company from the domestic industry. In doing so, the ITC found that the company was "a related party both by virtue of its imports of subject merchandise and because its corporate grandparent also wholly own[ed] four subsidiaries in China that produce[d]/export[ed] subject merchandise to the United States." Final Determination at 22. In addition to its close relationship with Chinese companies involved in the production and exportation of subject merchandise, the Commission excluded Suntech Arizona from the domestic industry because of the company's U.S. investment history and its financial performance.[14] *See* Final Determination at 22. To support these findings, the Commission pointed to several different factors, including Suntech Arizona's reported level of financial investment in research and development at its U.S. facility, its importing activities related to subject merchandise, and its overall financial performance during the POI in relation to the domestic industry.[15] *See* Final Determination at 21–22.

Plaintiffs argue that the Commission erred in its exclusion of Suntech Arizona from the domestic industry and that this error rendered

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[11] The Commission found that, "[a]s a ratio to domestic production, [Motech's] total subject imports from China were [[ ]] percent in 2009, [[ ]] percent in 2010, [[ ]] percent in 2011, [[ ]] percent in interim 2011, and [[ ]] percent in interim 2012." Final Determination at 23.

[12] The Commission found that Motech incurred [[ ]]. Final Determination at 23.

[13] The Commission found that Motech's operating performance was [[ ]], and [[ ]] the industry average [[ ]]. Final Determination at 23.

[14] That is, the ITC concluded that Suntech Arizona [[ ]]. *See* Final Determination 22.

[15] In addition, the Commission considered Suntech Arizona's [[ ]]. *See* Final Determination at 21. The Commission found that Suntech Arizona [[ ]] in the United States during the POI, was importing the cells used in its CSPV modules from [[ ]] imported a volume of subject imports that were [[ ]] and had [[ ]]. *See* Final Determination at 21, 22. In addition, the Commission found that Suntech Arizona's financial performance, [[ ]]. Final Determination at 22.

the ITC's Final Determination unsupported by substantial evidence. Plaintiffs contend that, except for one minor difference,[16] Suntech Arizona's activities were akin to those of other domestic producers, which the Commission did not exclude. *See* Pls.' Br. 44. Plaintiffs further maintain that the Commission applied the factors of its analysis inconsistently between Suntech Arizona and Motech, resulting in Motech's inclusion in, and Suntech Arizona's exclusion from, the domestic industry. *See* Pls.' Br. 44–45.

The court holds that the ITC's determination as to the composition of the domestic industry, including its decision to exclude Suntech Arizona from the domestic industry, is supported by substantial evidence.

"[A]lthough little legislative history behind the related parties provision exists, the provision's purpose is to exclude from the industry headcount domestic producers substantially benefitting from their relationships with foreign exporters." *USEC*, 25 CIT at 61, 132 F. Supp. 2d at 12. The statute defines "[t]he term 'industry' [to] mean[] the producers as a whole of a domestic like product, or those producers whose collective output of a domestic like product constitutes a major proportion of the total domestic production of the product." 19 U.S.C. § 1677(4)(A). According to the statute, "[i]f a producer of a domestic like product and an exporter or importer of the subject merchandise are related parties, or if a producer of the domestic like product is also an importer of the subject merchandise, the producer may, in appropriate circumstances, be excluded from the industry." *Id.*§ 1677(4)(B)(i).

The Commission will find that a producer and an exporter or importer are related parties if

> (I) the producer directly or indirectly controls the exporter or importer,
> (II) the exporter or importer directly or indirectly controls the producer,
> (III) a third party directly or indirectly controls the producer and the exporter or importer, or
> (IV) the producer and the exporter or importer directly or indirectly control a third party and there is reason to believe that the relationship causes the producer to act differently than a nonrelated producer.

[16] Plaintiffs insist that the only difference between Suntech Arizona and other companies, such as Motech, which the Commission determined not to exclude from the domestic industry, was that Suntech Arizona [[ ]]. *See* Pls.' Br. 44.

Id. § 1677(4)(B)(ii). Further, the Commission will find that a party "directly or indirectly control[s] another party if the party is legally or operationally in a position to exercise restraint or direction over the other party." *Id.* § 1677(4)(B).

In addition, "19 U.S.C. § 1677(4)(B) permits the Commission to exclude domestic producers who import subject merchandise from the definition of domestic industry, if it determines that appropriate circumstances exist for exclusion." *Allied Mineral*, 28 CIT at 1864. This Court has found that "[t]he most significant factor . . . in making the 'appropriate circumstances' determination is whether the domestic producer accrued a substantial benefit from its importation of the subject merchandise." *Id.* (citing *Empire Plow*, 11 CIT at 853, 675 F. Supp. at 1353). This Court has also repeatedly upheld the Commission's use of the particular factors as part of its determination as to whether to exclude producers who have accrued a substantial interest in the subject merchandise:

> (1) the percentage of domestic production attributable to the importing producer; (2) the reason the U.S. producer has decided to import the product subject to investigation (whether to benefit from unfair trade practice or to enable them to continue production and compete in the domestic market); (3) whether inclusion or exclusion of the importing producer will skew the data for the rest of the industry; (4) the ratio of import shipments to U.S. production for the importing producer; and (5) whether the primary interest of the importing producer lies in domestic production or importation. The Commission is not required to make findings as to each specific factor.

Id. at 1865 (citation omitted) (citing *Sandvik AB v. United States*, 13 CIT 738, 748, 721 F. Supp. 1322, 1332 (1989), *aff'd*, 904 F.2d 46 (Fed. Cir. 1990); *Torrington Co. v. United States*, 16 CIT 220, 224, 790 F. Supp. 1161, 1168 (1992)).

Here, the Commission considered the benefit the company received as a result of its relationship with exporters from China and reasonably determined that Suntech Arizona was enjoying substantial benefits from its importation of solar cells from China. *See* Final Determination at 22. To support its determination, the Commission relied on record evidence that indicated that Suntech Arizona's interests rested primarily with the importation of CSPV products rather than with domestic production of the domestic like product. For example, it evaluated Suntech Arizona's ratio of total subject imports from China to its domestic production (based on kilowatts) throughout the

POI.[17] *See* Final Determination at 21.

Although plaintiffs argue that the decrease in Suntech Arizona's ratio of subject imports to domestic production demonstrates that the company had developed a more substantial commitment to domestic production, even if true, this trend does not undermine the ITC's conclusion that, during the POI, based on the entire record before it, Suntech Arizona's interests did not lie primarily with the domestic industry. While the ratio of subject imports to domestic production decreased during the latter part of the POI, the Commission found that Suntech Arizona's importing activity remained substantial relative to its domestic production. Final Determination at 22.

In addition to its high ratio of imports to domestic production, the ITC also looked to Suntech Arizona's robust operating performance when compared to the industry average during the POI, particularly in the latter part of the POI.[18] *See* Final Determination at 21, 22. Also, the Commission examined the company's level of investment in research and development in its U.S. facilities during the POI[19] and reasonably concluded that these findings also supported its conclusion that Suntech Arizona's interests were primarily in importing rather than domestic production.[20] Final Determination at 21–22. Having reviewed these findings, the court finds that the ITC reasonably determined, based on substantial record evidence, that Suntech Arizona, although a "domestic producer[,] accrued a substantial benefit from its importation of the subject merchandise." *See Allied Mineral*, 28 CIT at 1864 (citing *Empire Plow*, 11 CIT at 853, 675 F. Supp. at 1353).

Next, the court finds plaintiffs' argument that the factors were not applied in a consistent manner to both Suntech Arizona and Motech unconvincing. This is because the facts that the Commission found were dramatically different for Suntech Arizona and Motech. For

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[17] The ITC found that Suntech Arizona imported [[ ]]. Specifically, the Commission found that the ratio of Suntech Arizona's total subject imports to its domestic production was [[ ]] percent in 2009, [[ ]] percent in 2010, [[ ]] percent in 2011, [[ ]] percent in the first six months of 2011, and [[ ]] percent in the first six months of 2012. Final Determination at 21.

[18] The Commission found that Suntech Arizona's operating performance [[ ]] the industry average [[ ]]. Final Determination at 21.

[19] The ITC found that Suntech Arizona invested [[ ]], but it did [[ ]] during the POI. Final Determination at 21.

[20] Although plaintiffs maintain that Suntech Arizona's U.S. capital expenditures of [[ ]] demonstrate that the company "was evolving from an importer to a committed domestic producer," the [[ ]] suggests that Suntech Arizona's interests were primarily with importing rather than with domestic production. *See* Pls.' Br. 43.

instance, the ITC observed differences[21] between the two companies during the POI, including (1) Motech's ratio of subject imports to domestic production,[22] (2) Motech's financial performance relative to the industry average,[23] and (3) Motech's levels of investment in research and development in its domestic facilities.[24] Each of these factors distinguished Motech from Suntech Arizona, supporting the ITC's finding that these two companies' experiences during the POI were not comparable to one another and thus that Motech and Suntech Arizona did not require similar treatment. Based on the foregoing, the Commission was reasonable in its decision to include Motech in the domestic industry and to exclude Suntech Arizona. Accordingly, the Commission's domestic industry analysis is sustained.

IV. THE COMMISSION'S AFFIRMATIVE MATERIAL INJURY DETERMINATION IS SUPPORTED BY SUBSTANTIAL EVIDENCE AND IN ACCORDANCE WITH LAW

At the conclusion of its investigations, the ITC sought to ascertain whether the domestic industry, which manufactured the domestic like product of the subject merchandise, was materially injured or threatened with material injury by reason of the subject imports. *See* 19 U.S.C. §§ 1673, 1671(a). The Commission considered the volume, price effects, impact of subject imports, and other external market factors, and determined that the domestic industry was being materially injured by reason of the entry of subject imports into the United States. *See* Final Determination at 3.

A. "By Reason of" and "But for" Causation Standard

Plaintiffs challenge the ITC's material injury determination, claiming that it failed to consider the special circumstances of the solar

[21] Suntech Arizona's [[ ]] in these investigations is also relevant record evidence on which the Commission reasonably relied, as plaintiffs have pointed to no precedent or law, and the court can find none, that would prohibit the ITC from considering a company's actions where it [[ ]]. Indeed, unlike Suntech Arizona, Motech [[ ]]. *See* Final Determination at 23.

[22] The ITC found that, "[a]s a ratio to domestic production, [Motech's] total subject imports from China were [[ ]] percent in 2009, [[ ]] percent in 2010, [[ ]] percent in 2011, [[ ]] percent in interim 2011, and [[ ]] percent in interim 2012." Final Determination at 23.

[23] The Commission observed that "Motech's ratio of operating income to net sales was [[ ]]." Final Determination at 23. In addition, the ITC found that Motech's "operating performance was [[ ]] the industry average [[ ]]." Final Determination at 23.

[24] The Commission found that, "[i]n terms of capital expenditures, Motech invested [[ ]]." Final Determination at 23.

panel industry and marketplace as part of its determination. *See* Pls.' Br. 12. Specifically, plaintiffs insist that the Commission should have undertaken a "but for" causation inquiry and that the failure to do so rendered its determination contrary to law. *See* Pls.' Br. 12 ("Plaintiffs submit that the Commission's determination that the U.S. CSPV industry 'is materially injured by reason of subject imports' was unsupported by substantial evidence, and therefore not in accordance with law. . . . That is, the Commission failed to undertake any analysis to consider whether, given these conditions of competition, subject imports could truly be the 'but for' cause of the injury suffered by the domestic industry." (citation omitted) (quoting Final Determination at 58)).

In making their argument, plaintiffs assert that three considerations demonstrate that the conditions of the domestic industry would have been the same irrespective of whether their products were available in the U.S. market because (1) the price and demand for CSPV products are tied to the need to achieve grid parity, (2) the government incentives that stimulated demand for CSPV products in the United States were being phased out during the POI, and (3) the fastest growth in demand during the POI was in the utility sector where grid parity and government incentives had the greatest effect. *See* Pls.' Br. 4–5. Thus, for plaintiffs, had the ITC undertaken a proper "but for" causation analysis, it would have determined that the domestic industry had suffered injury, not as a result of the sale of subject imports at low dumped prices (i.e., "but for" the imports of subject merchandise), but rather, as a result of other factors extant in the marketplace. Therefore, for plaintiffs, the ITC's chosen methodology was unreasonable and its conclusions unsupported by substantial evidence.

After considering plaintiffs' arguments, the court finds that it cannot agree with parts of plaintiffs' characterization of the ITC's legal obligation when making its material injury determination.

For an antidumping duty order to issue, in addition to Commerce's finding of sales at less than fair value, the Commission must make an affirmative injury determination, which "requires both (1) present material injury[25] and (2) a finding that the material injury is 'by reason of' the subject imports." *Gerald Metals, Inc. v. United States*, 132 F.3d 716, 719 (Fed. Cir. 1997) (citations omitted). "Material injury is defined as 'harm which is not inconsequential, immaterial, or

[25] [Although not relevant here, an antidumping duty order may also issue should the Commission find that "an industry in the United States is threatened with material injury by reason of imports . . . of the subject merchandise." *See* 19 U.S.C. § 1677(7)(F)(i).]

unimportant.'" *Nucor Corp. v. United States*, 414 F.3d 1331, 1335 (Fed. Cir. 2005) (quoting 19 U.S.C. § 1677(7)(A)). The ITC, when making a materiality determination, is directed by 19 U.S.C. § 1677(7)(B)(i) to weigh factors identified by the statute, including "the volume of imports, the price effects of those imports, and the impact of those imports on the affected domestic industry." *Caribbean Ispat Ltd. v. United States*, 450 F.3d 1336, 1337 (Fed. Cir. 2006) (citing 19 U.S.C. § 1677(7)(B)(i)). When making its "by reason of" determination, the ITC is also directed to "evaluate all relevant economic factors . . . within the context of the business cycle and conditions of competition that are distinctive to the affected industry." 19 U.S.C. § 1677(7)(C)(iii). "In addition to those factors, the Commission may consider 'such other economic factors as are relevant to the determination.'" *Caribbean Ispat*, 450 F.3d at 1337–38 (quoting 19 U.S.C. § 1677(7)(B)(ii)).

The Federal Circuit has explained that, at least in cases involving commodity products, i.e., merchandise that is "interchangeable regardless of its source," "in which non-[less-than-fair-value] imported goods are present in the market, the Commission must give consideration to the issue of 'but for' causation by considering whether the domestic industry would have been better off if the dumped goods had been absent from the market." *Bratsk Aluminium Smelter v. United States*, 444 F.3d 1369, 1371 (Fed. Cir. 2006); *Mittal Steel Point Lisas Ltd. v. United States*, 542 F.3d 867, 876 (Fed. Cir. 2008). Thus, in such instances, "where commodity products are at issue and fairly traded, price competitive, non-subject imports are in the market," "inquiry into 'but for' causation [is] a proper part of the Commission's responsibility to determine whether the injury to the domestic industry is 'by reason of' the subject imports." *Mittal Steel*, 542 F.3d at 877, 878 (quoting *Bratsk*, 444 F.3d at 1373) (internal quotation marks omitted).

In establishing this rule, the Federal Circuit was concerned that, when reviewing the conditions of a domestic industry for a commodity product, an overwhelming presence of price competitive and interchangeable non-subject imports in the market during the period of investigation might escape the ITC's proper consideration. That is, in such cases, the ITC might incorrectly attribute the domestic industry's injury to the subject imports when the industry's damaged condition was actually "by reason of" substantially similar non-subject imports. Hence, when presented with price competitive and highly substitutable non-subject imports of a commodity product, in order to

satisfy its statutory duty, *Mittal Steel* requires the ITC "to consider the 'but for' causation analysis . . . to determine whether the subject imports were a substantial factor in the injury to the domestic industry, as opposed to a merely 'incidental, tangential, or trivial' factor." *Id.* at 879 (quoting *Nippon Steel Corp. v. Int'l Trade Comm'n*, 345 F.3d 1379, 1381 (Fed. Cir. 2003)).

Here, plaintiffs urge the court to extend the application of the "but for" causation analysis to the facts of this case. Plaintiffs attempt to liken their case to that of *Mittal Steel* and its predecessors, arguing that, although their subject merchandise is not a commodity product, the marketplace in which it was sold presents analogous "unique circumstances" as those found by the Federal Circuit to be present in each of those cases. *See* Pls.' Br. 22 ("[T]he present case involves subject imports of *technology used to produce a commodity product*—i.e., electricity—which the Commission recognized competes with non-subject technologies used to produce the same commodity product in the U.S. market." (emphasis added)).

Although the Federal Circuit has limited the use of the "but for" test to injury determinations involving (1) commodity products and (2) where there were non-subject, price competitive imports in the domestic market during the period of investigation, this Court has found that, where, as here, the case does not involve a commodity product, the Commission, nevertheless, is not relieved of its responsibility to "consider potential alternate causes of harm in its . . . analysis." *See LG Electronics, Inc. v. U.S. Int'l Trade Comm'n*, 38 CIT __, __, 26 F. Supp. 3d 1338, 1351 (2014) (citing *Mittal Steel*, 542 F.3d at 878).

Moreover, although the Federal Circuit has used the phrase "but for" in several cases, it is apparent that the statutory "by reason of" standard, which applies to every injury determination, has not been materially altered. *See NSK Corp. v. United States*, 33 CIT 1185, 1189, 637 F. Supp. 2d 1311, 1317 (2009) ("[T]he Federal Circuit's opinion in *Mittal* did not constitute an intervening change in the controlling law." (citing *NSK Corp. v. United States*, 32 CIT 1497, 1508–16, 593 F. Supp. 2d 1355, 1367–72 (2008))); *see also Mittal Steel*, 542 F.3d at 879 n.2 ("Commissioners Pearson and Okun have noted that interpreting *Bratsk*[26] in that manner, i.e., as 'a reminder that the Commission, before it makes an affirmative determination, must satisfy itself that it has not attributed material injury to factors other

[26] [In *Bratsk*, the Federal Circuit vacated and remanded the ITC's material injury determination with respect to silicon metal imports from Russia, finding that the Commission had failed to "address whether the non-subject imports would have replaced subject imports during the period of investigation" and continued to cause injury to the domestic industry.

than subject imports,' is consistent with the Commission's obligation to 'analyze the effects of the unfairly traded imports and other relevant factors in a way that enables the Commission to conclude that it has not attributed the effects of other factors to the subject imports.'" (citation omitted)).

Thus, the words "but for" merely point out that, when making a material injury determination, the Commission must take into account all record evidence that has a bearing on the factors considered in reaching its determination. Therefore, if there is non-subject merchandise present in the market that competes with subject imports, or record evidence that might supply some other reason for the cause of injury to the domestic industry, the ITC must take it into account. *See Mittal Steel*, 542 F.3d at 878; *Nucor Corp. v. United States*, 32 CIT 1380, 1449, 594 F. Supp. 2d 1320, 1382, 1383 (2008) ("Nevertheless, this holding should not be read to provide the Commission license to unilaterally disregard data related to non-subject imports during a sunset review, if it finds that such imports are a 'relevant economic factor[]' to its determination. . . . To be sure, it would be an abuse of discretion for the ITC to ignore such important factors if they were relevant." (alteration in original) (footnote omitted) (citations omitted) (quoting 19 U.S.C. § 1675a(a)(2), (4) (2000))), *aff'd*, 601 F.3d 1291 (Fed. Cir. 2010); *NSK Corp. v. United States*, 32 CIT 966, 973, 577 F. Supp. 2d 1322, 1332–33 (2008) ("Moreover, application of *Bratsk* to sunset review causation analysis would compel the ITC to address significant increases in market share by non-subject imports and thereby examine the effectiveness of the underlying antidumping order in relation to fundamental changes in the marketplace that might be more likely to cause injury to the domestic industry than unrestrained subject imports. The court views this analysis as a necessary step in establishing causation under [19 U.S.C.] § 1675a(a)(1). To hold otherwise would permit the ITC to ignore a significant factor affecting the domestic industry when conducting a sunset review." (citation omitted)).

In this case, although it has chosen not to use the specific words "but for" in its Final Determination, the ITC has properly framed the

See Bratsk, 444 F.3d at 1376. The *Bratsk Court* explained that, "under *Gerald Metals*, the Commission is required to make a specific causation determination and in that connection to directly address whether non-subject imports would have replaced the subject imports without any beneficial effect on domestic producers." *Id.* at 1375. The Court further explained that "[t]he obligation under *Gerald Metals* is triggered whenever the antidumping investigation is centered on a commodity product, and price competitive non-subject imports are a significant factor in the market." *Id.*]

legal basis upon which to determine whether the material injury sustained by the domestic industry is "by reason of" subject imports. *See* Final Determination at 58 ("Based on the foregoing trends, we find that there is a causal nexus between subject imports and the poor condition of the domestic industry and that the domestic industry is materially injured by reason of subject imports."). Before the court, in addition to properly framing the legal basis of its determination, the ITC must support with substantial evidence any findings it makes about the conditions in the marketplace.

The court, in turn, must determine whether the Commission properly considered the impact of those factors present in the marketplace (i.e., grid parity, incentive programs, and utility sales) claimed by plaintiffs to have caused the injury to the domestic industry when reaching its determination that the material injury sustained by the domestic CSPV industry was "by reason of" subject imports. Here, it is apparent that the Commission properly took into account evidence demonstrating that the injury sustained by the domestic industry was "by reason of" subject imports and not caused by other claimed marketplace factors present in the United States during the POI.

B. The Commission Properly Considered the Claimed Conditions of Competition

"When evaluating challenges to the ITC's choice of methodology, the court will affirm the chosen methodology as long as it is reasonable." *JMC Steel*, 38 CIT at __, Slip Op. 14–120, at 13 (citations omitted). That is, "[w]hen presented with a challenge to the Commission's methodology, the court examines 'not what methodology [plaintiffs] would prefer, but . . . whether the methodology actually used by the Commission was reasonable.'" *Id.* (alteration in original) (citing *Shandong TTCA Biochemistry Co. v. United States*, 35 CIT __, __, 774 F. Supp. 2d 1317, 1329 (2011)). "While the Commission may not enter an affirmative determination unless it finds that a domestic industry is materially injured 'by reason of' subject imports, the Commission is not required to follow a single methodology for making that determination." *Mittal Steel*, 542 F.3d at 873. Thus, "[i]f the methodology is valid, then the question simply resolves to whether analysis of the substantiality of the evidence of record supports the conclusion drawn." *Swiff-Train Co. v. United States*, 38 CIT __, __, 999 F. Supp. 2d 1334, 1345 (2014).

As noted, plaintiffs insist that, had the Commission properly considered the roles of grid parity, declining incentive programs, and increased growth in demand in the utilities sector during the POI, it would have found that the condition of the domestic industry would have been the same even if subject imports were not present in the

U.S. market. *See* Pls.' Br. 26 ("Taken together, this means that even if subject imports had not been present in the U.S. market, the picture of the domestic industry would have been the same as the one observed by the Commission in its Views—i.e., domestic producers would have: (1) equally been unable to sell their products; (2) equally faced pressure to lower prices; (3) equally lost money throughout the POI; (4) equally experienced declines in many of its performance indicators; and (5) equally recognized asset write-offs and/or increased costs."). Plaintiffs contend that the ITC did not evaluate material injury "within the context of the business cycle and conditions of competition that are distinctive to the affected industry" as required by 19 U.S.C. § 1677(7)(C)(iii), and thus that "the Commission's evaluation of volume, price effects, impact, and causation, within the context of the relevant conditions of competition, is unsupported by substantial evidence." *See* Pls.' Br. 14–15; 19 U.S.C. § 1677(7)(C)(iii).

The court is unpersuaded by this argument and finds that the Commission adequately addressed the claimed conditions of competition that were present in the U.S. market in accordance with its obligations under the statute, and reasonably determined, based on substantial record evidence, that the material injury sustained by the domestic industry during the POI was "by reason of" subject imports. *See Mittal Steel*, 542 F.3d at 879.

As shall be seen, the Commission informed its analysis by evaluating a number of conditions of competition present in the U.S. CSPV market and the role that each played during the POI with respect to the injury sustained by the domestic CSPV industry: (1) the emergence of alternative energy technologies, such as the increased supply, and declining price, of natural gas; (2) the declining cost of polysilicon, a primary input used in the manufacture of CSPV products; (3) the availability of federal, state, and local government incentives to the CSPV domestic industry; (4) the supply and demand conditions for CSPV products in the United States, which were characterized by high demand and subject imports obtaining domestic market share at the expense of the domestic industry; (5) the growing demand for CSPV products in the utility sector; (6) the decline in market share of non-subject imports (i.e., imports of CSPV products from countries other than China); and (7) the impetus toward grid parity (i.e., CSPV products' ability to generate electricity at a price matching the cost of power from the electric grid and thus compete for electricity sales with other energy sources). Having reviewed its analysis, the court finds that the ITC reasonably reached its conclu-

sion with respect to injury and adequately took into account the "novel conditions of competition" with which plaintiffs claim it failed to "come to grips." *See* Pls.' Br. 12. Accordingly, its determination is sustained.

1. Alternative Energy Technologies and Polysilicon Prices

The first two conditions analyzed by the ITC were the impact of alternative energy technologies and the declining cost of polysilicon on the domestic CSPV industry. Although, importantly, plaintiffs do not challenge these aspects of the Final Determination, the ITC relied, in part, on its findings regarding the impact of alternative energy technologies and the decline in cost of polysilicon during the POI to reach its determination that the domestic industry was materially injured "by reason of" subject imports. Consequently, although the ITC's findings relating to these conditions of competition are not at issue in this case, they are nonetheless worthy of some examination in order to demonstrate that the ITC properly took into account record evidence bearing on the conditions in the marketplace during the POI.

With respect to energy technologies other than solar, the Commission observed that, "[d]uring the POI, increases in the use of 'fracking' technologies and shale drilling expanded the supply of natural gas in the United States." Final Determination at 32. It found that this increase in supply "caused natural gas prices to decline and stimulated demand for natural gas-fueled electricity for peak periods at the expense of other electricity sources such as CSPV products." Final Determination at 32. In addition, the Commission found that "[c]ompetition with renewable-energy electricity-generators such as thin-film solar systems . . . affect[ed] demand for CSPV solar systems and their components." Final Determination at 32. In other words, as to this latter consideration, the ITC found that electricity provided by CSPV products competed for sales in the United States with electricity generated from natural gas and renewable energy sources. Therefore, the ITC found that price competition between energy-producing technologies was present in the marketplace.

As to polysilicon, it is a key raw material input used in the manufacture of CSPV products, accounting for nearly one quarter of the production cost to manufacture a finished CSPV module, and thus, high prices for polysilicon can have adverse effects on the profit margins of manufacturers. *See* Final Determination at 42 n.247. Lower prices for polysilicon, on the other hand, would have a positive effect on the bottom line.

The ITC found that "[d]eclining polysilicon prices eroded the advantage thin-film products may have had over CSPV products in terms of price, but thin-film producers . . . continued to improve their efficiencies to stay competitive." Final Determination at 32. The Commission stated that, "as technology improved, the price of [photovoltaic products[27]] ha[d] trended downward since the 1990s, despite a period of increasing prices between 2003 and 2008." Final Determination at 51. Further, it found that, since 2003, "when global supply of polysilicon was inadequate to meet demand by both the semiconductor and CSPV industries, polysilicon prices rose substantially. Spot prices of polysilicon rose from $35/[kilogram] in 2003 to a high of $500/[kilogram] in 2008 (and contract prices rose from $25/[kilogram] to $85/[kilogram] in this period)." Final Determination at 51. The Commission also commented, though, that, "[b]y 2008, global supply [of polysilicon] exceeded global demand, and polysilicon spot and contract prices then fell substantially . . . in 2011 . . . and . . . 2012." *See* Final Determination at 51. Thus, the ITC observed that polysilicon costs began to decline well before the POI and continued to do so. Moreover, the Commission explained that, although "the price of solar modules sold in the United States also declined dramatically during the POI, by 50 percent in 2011, this decline (and the declines in prices of the domestic like product observed in the pricing data) exceeded declines in the cost of the polysilicon raw materials used to produce CSPV products."[28] Final Determination at 51. Hence, the Commission concluded that the declining cost of polysilicon and thus the declining cost to manufacture CSPV products, improved CSPV products' ability to compete with other products that generate electricity, such as thin-film. Indeed, as shall be seen, this increased capability to compete for sales as a result of declining production costs improved CSPV products' ability to compete for grid parity during the POI against other energy sources.

Accordingly, although it found that price competition from technologies that produced electric energy, such as electricity produced by natural gas, increased, CSPV products nonetheless were not priced

[27] Photovoltaic products encompass all electricity-producing devices "that use[] the basic properties of semiconductor materials to transform solar energy into electrical power," including those using CSPV and thin-film technologies. *See* Pre-Hearing Br. of China Chamber of Commerce for Import and Export of Machinery and Electronic Products (Volume I of I), Ex. 1 at 1, CD 396 at Doc. No. 491422 (Sept. 20, 2012), ECF Dkt. No. 67–2.

[28] Specifically, the ITC found that the cost of polysilicon raw materials used to produce CSPV products experienced declines of "up to [[ ]] percent between 2010 and 2011 based on published polysilicon pricing data or about [[ ]] percent based on reported domestic industry costs of polysilicon ingots and wafers." Final Determination at 51–52.

out of the market due, in large part, to the declining cost of polysilicon, a key input used in the manufacture of CSPV products.

2. Government Incentives

The ITC next examined the role of government incentives in the domestic CSPV industry during the POI. *See* Final Determination at 33 ("Changes in the availability and scope of Federal, state, and local government incentives . . . played an important role in demand for CSPV products during the POI."). Plaintiffs maintain that, although the ITC analyzed the role that government incentives played in stimulating demand for CSPV products in the United States, the Commission failed to appreciate that these incentives declined during the POI and thus that the domestic industry lost the ability to compete with subject imports and would not have obtained any additional sales even if there were no subject imports present in the U.S. market. *See* Pls.' Br. 4–5.

The Commission began its analysis of this market condition by explaining that, "[i]n order to help make solar a viable alternative energy source, Federal, state, and local governments created programs intended to reduce the cost of solar-generated electricity (and electricity generated by other renewable energy sources)" with the purpose of "assisting solar power developers to achieve sufficient economies of scale to become competitive with conventional energy sources." *See* Final Determination at 33. In addition, as plaintiffs point out, the ITC acknowledged that "[t]hese programs and their benefits were designed to decline over time, as the cost to generate solar-powered electricity declined." Final Determination at 33. Contrary to plaintiffs' assertions, however, the Commission found that, "[d]uring the POI, Federal, state, and local incentives successfully stimulated demand for CSPV products in the United States, with industry publications reporting that Federal incentives caused an 'application boom' and an 'installation boom' of solar projects." Final Determination at 33. Further, the ITC found that the questionnaire respondents confirmed this finding, as they "generally report[ed] that Federal, state, and local incentives increased demand for CSPV products since 2009."[29] Final Determination at 33. Put another way, the Commission found that these incentives increased the demand for CSPV products during the POI.

More specifically, with respect to federal incentives, the Commission found that, "during the POI, the United States had in place two

[29] Eleven of fourteen producers, thirty-six of forty-six importers, and twenty-seven of forty-four purchasers reported that state and local incentives had stimulated demand since January 2009. Final Determination at 33 n.185.

major tax incentives that provided benefits to systems owners (as opposed to manufacturers of solar products): the Federal Investment Tax Credit ('FITC') and the Grant in Lieu of Tax Credit, also known as the Section 1603 Treasury Program ('GLTC')." Final Determination at 33–34. The FITC program, which was established in 2005 and extended under the Emergency Economic Stabilization Act of 2008 ("EESA"), initially "provided a 30-percent investment tax credit to commercial and residential customers installing solar energy systems, but did not extend the credit to public utilities." Final Determination at 34. The EESA extended this tax credit through 2016, after which, the ITC found the credit was to decline to 10 percent. Final Determination at 34. Importantly, "[t]he EESA also waived the public utility exemption [after 2008], thereby allowing utilities to invest directly in solar facilities for the first time." Final Determination at 34.

In 2009, Congress passed the GLTC program as part of the American Recovery and Reinvestment Act, providing "30-percent cash grants for commercial solar facilities that were (1) placed in service in 2009 or 2010, or (2) placed in service between January 1, 2010 and January 1, 2017, so long as construction began in 2009 or 2010." Final Determination at 34. Although the GLTC program was set to expire at the end of 2010, "Congress extended it, allowing applicants to receive cash grants so long as construction of the commercial solar facilities commenced by the end of December 2011 and finished by December 2016." Final Determination at 34–35. Hence, the ITC found that there remained a favorable mix of federal subsidies in effect during the POI for producers and consumers of solar energy in both residential and commercial sectors.

As to the availability of state and local incentives, the Commission found that thirty-six states, the District of Columbia, Puerto Rico, and various local governments stimulated the use of renewable energy sources through renewable energy programs of various scopes and durations across the United States during the POI. *See* Final Determination at 35. The Commission found that "[t]hese programs generally require[d] retail electricity suppliers to procure a minimum amount of renewable energy, such as wind and solar, usually as a percentage of their total energy generation by a given date, or suffer a non-compliance penalty." Final Determination at 35.

As to plaintiffs' claim that the Commission failed to appreciate the phasing out of these incentives, the ITC acknowledged the phase-out or partial termination of certain government incentive programs but found "that, during much of the POI, the overall mix of incentives was [nonetheless] very favorable and stimulated demand substantially."

Final Determination at 52. It also observed that various federal, state, and local incentives remained available at the end of the POI and that "apparent U.S. consumption continued to increase." Final Determination at 52–53. Moreover, the Commission concluded that there was nothing on the record to suggest that any partial termination or phase-out of incentives during the POI "led to any significant imbalance in supply and demand that would have caused the observed declines in prices of the domestic like product." Final Determination at 53. Thus, although plaintiffs claim otherwise, the ITC considered the presence of government incentives in the marketplace and found that federal, state, and local government incentives remained widely available throughout the POI and that, as a result, U.S. demand for, and consumption of, CSPV products during the POI continued to increase. That is, the Commission concluded that any effect the availability of government incentives had on the domestic industry during the POI could not explain the injury that they sustained during this time period.

3. Supply and Demand Conditions

The Commission next examined the volume of CSPV products available in the United States. It found that the U.S. market had available shipments of CSPV products from the domestic industry, subject imports (i.e., from China), and non-subject imports (i.e., from foreign countries other than China). Final Determination at 37. While plaintiffs do not question the ITC's findings directly with respect to the conditions of supply and demand, they renew their claim that the Commission's findings regarding the impact of government incentives was unsupported by the evidence and thus that the Commission's failure to appreciate the significance of this condition caused the ITC to reach mistaken conclusions regarding the conditions of supply and demand present in the CSPV market in the United States during the POI. *See* Pls.' Br. 33–34.

With respect to the conditions of supply and demand, the ITC found that both the domestic industry *and* non-subject imports (i.e., imports of CSPV products from countries other than China) lost significant market share during the POI, while subject imports from China gained significant market share during the same period.[30] Final De-

[30] The ITC found that "[t]he domestic industry's share of the U.S. market declined from [[ ]] percent in 2009 to [[ ]] percent in 2011; its share of the market was [[ ]] percent in interim 2011 and [[ ]] percent in interim 2012." Final Determination at 37. It also found that "the market share of non-subject imports declined from [[ ]] percent in 2009 to [[ ]] percent in 2011." Final Determination at 37. It further found that Chinese subject imports' market share rose from [[ ]] percent in 2009 to [[ ]] percent in 2011, and that, "in interim 2011, subject imports' market share was [[ ]] percent compared

termination at 37–38. The ITC found that domestic demand for CSPV products grew at a rapid rate during the POI, but that the volume of subject imports grew at a substantially faster rate than U.S. consumption and surpassed the domestic industry's U.S. shipments by 2010.[31] *See* Final Determination at 42–43. The ITC thus concluded "that subject imports had a significant adverse impact on the domestic industry during the POI" and that "the domestic industry's financial performance was very poor and deteriorating because of the significant volume and adverse price effects of subject imports." Final Determination at 54.

In addition, the ITC found that subject imports increased their market share significantly during the POI at the expense of the domestic industry and non-subject imports in each of the major U.S. market segments (i.e., residential, non-residential, and utility).[32] Final Determination at 43 & n.256, 44. The ITC found that "the domestic industry progressively increased capacity and had available production capacity throughout the POI," which indicated that, contrary to plaintiffs' assertions, the domestic CSPV industry "was capable of supplying additional demand." Final Determination at 44. The Commission further noted that "the ratio of subject imports to domestic production grew significantly over the period" and the domestic industry's net sales quantities even began to fall toward the end of the POI.[33] Final Determination at 44, 54. Relatedly, the Commission also found that "a substantial number of domestic producers shuttered facilities and/or declared bankruptcy" during the POI and "additional producers continued to fail even after the end of the POI." *See* Final Determination at 54–55. In other words, "[d]espite remarkable de-

to [[ ]] percent for non-subject imports, and by interim 2012, subject imports' share was [[ ]] percent," as compared to non-subject imports, whose market share was [[ ]] percent. Final Determination at 37–38.

[31] The ITC found that subject imports experienced growth of [[ ]] percent between 2009 and 2011, more than doubling the [[ ]] percent growth of U.S. consumption during this period. Final Determination at 43.

[32] The ITC found that subject imports increased their market share by [[ ]] percent between 2009 and 2011, and that, in interim 2012, their market share was [[ ]] percent higher than in interim 2011. Final Determination at 43. The Commission also found that, between 2009 and 2011, the domestic industry lost [[ ]] percent of market share and lost an additional [[ ]] percent of market share between interim 2011 and interim 2012. Final Determination at 43.

[33] The ITC found that the ratio of subject imports to domestic production increased from [[ ]] percent in 2008 to [[ ]] percent in 2011, and [[ ]] percent in interim 2012. Final Determination at 44.
The domestic industry's net sales were [[ ]] megawatts in 2009, [[ ]] megawatts in 2010, [[ ]] megawatts in 2011, [[ ]] megawatts in interim 2011, and [[ ]] megawatts in interim 2012. Final Determination at 54 n.323. The domestic industry's average production capacity was [[ ]] megawatts in 2009, [[ ]] megawatts in 2010, [[ ]] megawatts in 2011, [[ ]] megawatts in interim 2011, and [[ ]] megawatts in interim 2012. Final Determination at 54 n.325.

mand increases throughout the [POI], the domestic industry's financial condition was not strong at the beginning of the period and continued to deteriorate throughout the POI, with the domestic industry incurring operating losses during the entire POI" and experiencing declining net sales during the latter part of the POI.[34] *See* Final Determination at 55. Thus, the ITC "conclude[d] that the volume [(i.e., supply)] of subject CSPV products imported into the United States from China [was] significant, absolutely and relative to consumption [(i.e., consumer demand)] and production in the United States." Final Determination at 44. It reached this conclusion based on its finding that, despite plaintiffs' claim to the contrary, the domestic industry possessed the capacity during the POI to meet the significant increase in demand, and thus determined that, absent subject imports, the domestic industry would have increased its own sales volume.

4. Utility Market

Next, the Commission examined the condition of the utility segment of the U.S. market. Here, plaintiffs insist that "the domestic industry failed to compete effectively" for utility sales, where subject imports were the largest supplier, because the domestic industry was unable to meet the increasingly high demand for CSPV products as a result of other external conditions of competition that were present in the U.S. market during the POI. *See* Pls.' Br. 20. Specifically, plaintiffs contend that demand for CSPV products grew rapidly during the POI, particularly "in the utility sector, which . . . is where grid parity and declining incentives had the greatest impact." Pls.' Br. 5. According to plaintiffs, because "subject imports were the predominant source of CSPV modules in the utility segment," this confirmed that the domestic industry, which "w[as] not poised to take advantage of the surge in utility sector demand[,] . . . failed to compete effectively in this segment." *See* Pls.' Br. 5, 20.

Plaintiffs' claims notwithstanding, the ITC concluded that (1) the domestic industry possessed the capacity to meet the increased demand that resulted from the significant growth in the utility sector during the POI and (2) that the special conditions presented in the utility segment did not account for significant underselling in that segment and did not explain the domestic industry's injury sustained

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[34] The domestic industry reported operating losses of [[ ]] in 2009, [[ ]] in 2010, [[ ]] in 2011, [[ ]] in interim 2011, and [[ ]] in interim 2012. Final Determination at 55 n.332. The domestic industry's net sales were [[ ]] in 2009, [[ ]] in 2010, [[ ]] in 2011, [[ ]] in interim 2011, and [[ ]] in interim 2012. Final Determination at 55 n.333.

in the other consumer segments. The Commission began by examining the three grid-connected market segments, residential, non-residential, and utility applications, and found, based on questionnaire data, that, "between January 2009 and June 2011, the largest share of U.S. commercial shipments (up to 45.3 percent) were to commercial installers, after which time the largest share (42.3 percent) were to utility co-developers." Final Determination at 37. The Commission found that "[t]he share of shipments from all sources to utility co-developers increased [during the POI] from 5.2 percent in 2009 to 12.3 percent in 2010, and 29.8 percent in 2011, and was 17.6 percent in interim 2011 and 42.3 percent in interim 2012, driven in large part by the availability of incentive programs." Final Determination at 37. It also found that, "[a]fter increasing 1,977.4 percent between 2009 and 2011, utilities [were] projected to account for 54 percent of total installations by the end of 2012." Final Determination at 37. Therefore, as maintained by plaintiffs, the ITC observed that purchases by the utility sector experienced the most growth of any sector during the POI, growing "from the smallest segment of the U.S. market in 2009 to the largest by interim 2012." Final Determination at 44 n.258.

The Commission further found that "[t]he domestic industry participated in all segments of the U.S. market (including the residential, non-residential, and utilities segments)" and "supplied a variety of modules to purchasers in the market," i.e., both lower-and higher-wattage CSPV modules. *See* Final Determination at 39. In addition, it observed that "industry participants in all market segments purchased CSPV modules of varying types, meaning that products of particular wattage or cell-type or size were not limited to specific segments of the U.S. market." Final Determination at 39–40. Further, "responding purchasers reported that the U.S. product was comparable to [the] product made in China for all characteristics except for price, for which the product from China was rated as superior ([i.e.], lower-priced)." Final Determination at 41.

Moreover, as part of its investigations, the Commission collected quarterly net U.S. free on board[35] selling price data for five CSPV

[35] "Free on board" "is a standardized shipping term 'mean[ing] that the seller delivers the goods on board the vessel nominated by the buyer at the named port of shipment or procures the goods already so delivered. The risk of loss of or damage to the goods passes when the goods are on board the vessel, and the buyer bears all costs from that moment onwards.'" *Beijing Tianhai Indus. v. United States*, 39 CIT __, __, 52 F. Supp. 3d 1351, 1356 n.10 (2015) (alteration in original) (quoting *Cutter & Buck, Inc. v. United States*, 37 CIT __, __ n.1, Slip Op. 13–45, at 2 n.1 (2013)).

module products[36] during the POI, which it obtained from eight U.S. producers and twenty-three importers of subject merchandise. Final Determination at 46. Based on the questionnaire responses, the ITC found that the higher-wattage pricing products (i.e., crystalline silicon module, with a peak power wattage of 260 to 279, and crystalline silicon module, with a peak power wattage of 280 and above) were "not necessarily sold to the utility segment any more than [the] lower-wattage [pricing] products" (i.e., crystalline silicon module, with a peak power wattage of 220 to 219, crystalline silicon module, with a peak power wattage of 220 to 239, and crystalline silicon module, with a peak power wattage of 240 to 259), which "are necessarily sold to non-utility customers." Final Determination at 48. In other words, higher wattage modules were sold to other market segments that were not as dominated by subject imports. Therefore, despite plaintiffs' claim during the administrative proceeding that the utility segment demanded predominantly higher-wattage products during the POI and that the domestic industry failed to offer or manufacture this merchandise during this time period, the ITC found that this was not the case. Rather, it determined that higher-wattage products were sold frequently by both Chinese exporters and the domestic industry to not only the utility segment but to the other segments as well.

Moreover, contrary to plaintiffs' assertions, the Commission found that "the[] data indicate[d that] the domestic industry offered and sold higher-wattage products during the POI." Final Determination at 47. The Commission further found that the record showed that imports of the two higher-wattage pricing products were sold in all market segments. Final Determination at 48. Thus, the Commission determined that there was "a high degree of substitutability between CSPV products made in the United States and imported from China," and further "reject[ed] the notion that the pricing data illustrate[d] a lack of competition between subject imports and the domestic like product in the utility or any other segment of the U.S. market." Final Determination at 42, 48.

In addition, the ITC found that, "[d]espite numerous closures of U.S. manufacturing facilities, the domestic industry progressively increased capacity and had available production capacity throughout the POI, indicating that it was capable of supplying additional de-

[36] The five pricing products were "(1) crystalline silicon module, with a peak power wattage of 220 to 219, inclusive, P-max or Wp," "(2) crystalline silicon module, with a peak power wattage of 220 to 239, inclusive, P-max or Wp," "(3) crystalline silicon module, with a peak power wattage of 240 to 259, inclusive, P-max or Wp," "(4) crystalline silicon module, with a peak power wattage of 260 to 279, inclusive, P-max or Wp," and "(5) crystalline silicon module, with a peak power wattage of 280 and above, P-max or Wp." Final Determination at 46 n.273.

mand." Final Determination at 44. It thus concluded that, "given the high substitutability between the domestic like product and subject imports, . . . competition in the U.S. CSPV market primarily depend[ed] on price." Final Determination at 45. In other words, the Commission determined that the domestic CSPV industry (1) produced the types of CSPV modules that were being demanded by purchasers in the utility segment, (2) possessed the capacity to meet the growing demand in this consumer segment, and (3) manufactured CSPV products that were highly substitutable for subject imports aside from their price. Therefore, the ITC concluded that the domestic like product would have possessed the ability to compete effectively with subject imports in all three consumer segments, including for utility sales, had subject imports not been sold at dumped prices.

In this connection, the Commission found that "subject imports of both lower- and higher-wattage products pervasively undersold the domestic like product at wide margins in sales to all segments of the U.S. market" (i.e., residential, non-residential, and utility). Final Determination at 48. It observed that any growth in shipments of U.S. merchandise to the utilities sector "pale[d] in comparison to the growth of subject imports," which were the predominant source of CSPV modules in the utility segment, and that the volume of subject imports drastically increased in every sector, not just in utilities. *See* Final Determination at 44 & n.258. In evaluating the selling price data for the five CSPV module pricing products during the POI, as reported by U.S. producers and importers of subject merchandise, the Commission found that "subject imports pervasively undersold the domestic like product at sizeable margins throughout the POI." Final Determination at 46. Specifically, it found that "subject imports from China undersold the domestic like product in [thirty-five] of [forty-six] possible quarterly comparisons, or 76.0 percent of the time."[37] Final Determination at 46. The Commission thus concluded that "[t]he record . . . reflect[ed] that domestic producers were forced to lower prices to compete with low-priced subject imports from China." Final Determination at 49.

Moreover, it found that "record evidence indicate[d] not only that subject imports increased their sales to utilities[,] . . . but also that subject imports were able to do so using lower prices," and "that domestic producers lost sales and revenues due to competition from low-priced subject imports." Final Determination at 49. It thus concluded, based on this evidence, "that there ha[d] been significant

[37] The Commission found that subject imports undersold the domestic like product 76 percent of the time "at margins ranging as high as [[ ]] percent." Final Determination at 46.

underselling of the domestic like product by subject imports from China," and that "[t]his underselling enabled subject importers to gain market share at the expense of the domestic industry." Final Determination at 49. In other words, the ITC found that, as a result of significant underselling and increased volumes of sales of low-priced subject imports, the domestic industry lost sales in all segments during the POI, not just the utility sector.

A review of this evidence confirms that the Commission reasonably concluded that the condition of the utility market (i.e., the high demand for CSPV products in this segment during the POI and the domestic industry's ability to adequately supply the growing demand) demonstrated that the growth in shipments of subject imports relative to U.S. shipments of the domestic like product in the utility sector was not the result of other external conditions of competition in the U.S. market, but rather the result of the low price of the dumped Chinese product. Relatedly, the Commission reasonably found that the condition of the utility segment (i.e., the growth in shipments of subject imports relative to U.S. shipments of the domestic like product in the utility sector) failed to account for the significant growth of subject imports and accumulation of market share in other consumer sectors at the expense of the domestic CSPV industry. Therefore, the Commission supported with substantial evidence its determination that the domestic industry possessed the ability to compete for sales in the growing utility segment during the POI, but was unable to do so because subject merchandise was being offered at dumped prices.

5. The Role of Non-subject Imports During the POI

Next, the Commission reached conclusions after having "closely examined the role of non-subject imports in these investigations" (i.e., imports of CSPV cells and modules in the U.S. market from countries other than China). Final Determination at 57. It found that "[n]on-subject sources supplying CSPV cells to the U.S. market included Taiwan, Korea, Japan, and Germany, and non-subject sources supplying the U.S. market with CSPV modules included Taiwan, Korea, Mexico, Canada, Singapore, and Japan." Final Determination at 57. The ITC further found that, despite the large volume of subject imports from China during the POI, "non-subject imports were considerably smaller in magnitude, and their volume declined overall during the POI, both in absolute and relative terms," and "frequently oversold the domestic like product."[38] *See* Final Determination at 57, 58. Thus, the ITC concluded that, like the domestic industry, non-

[38] The ITC found that, "[a]s a share of apparent U.S. consumption, non-subject imports declined from [[ ]] percent in 2009 to [[ ]] percent in 2010, and [[ ]]

subject imports[39] experienced declines in U.S. market share and price underselling by subject imports. For the Commission and the court, these facts further support the ITC's determination that the domestic industry was injured "by reason of" subject imports and not "by reason of some" other external factor, and that the condition of the domestic industry would not, in fact, have been the same absent the presence of low-priced subject imports from the China in the U.S. market.

6. Grid Parity

Last, the Commission considered plaintiffs' grid parity argument. Plaintiffs insist that, although the ITC recognized the goal of solar-power producers, and thus producers of CSPV products, to attain grid parity (i.e., that taking into account their cost, CSPV products' ability to generate electricity at a price matching the cost of power produced by other means to supply the electric grid and thus compete for electricity sales with other electricity-generating sources such as natural gas), the ITC failed to consider the impact of seeking to attain this goal on the condition of the domestic CSPV industry during the POI. According to plaintiffs, the Commission's analysis was lacking because the ITC failed to observe that the domestic industry sustained its injury, not as a result of the presence of low-priced subject imports present in the U.S. market, but rather, "by reason of" the declining cost of other energy-producing technologies with which it was unable to compete during the POI. *See* Pls.' Br. 6 ("In the present case, despite the conditions of competition it found to exist, the Commission erred in failing to consider the issue of 'but for' causation in its causation, impact, price effects, or volume inquiries. . . . [S]ubject CSPV imports were merely selling at the prices that the U.S. market would bear for CSPV products in light of the exogenous forces of grid parity and declining government incentives. That is, subject CSPV producers were willing and able to compete with the rapidly declining [levelized cost of electricity] set by electricity generated from natural gas during the POI, and therefore they were successful in making sales in the U.S. market. Meanwhile, domestic CSPV producers were not willing and able to compete with that price, and that situation would be no different in the absence of subject imports. In these

percent in 2011, and were [[ ]] percent in interim 2011 and [[ ]] percent in interim 2012." Final Determination at 57 n.350. The ITC further observed that, "[a]s a share of total imports, imports of non-subject merchandise decreased from 67.7 percent of total imports in kilowatts in 2009 to 42.9 percent in 2010, and 29.2 percent in 2011, and they were 37.4 percent in interim 2011 and 41.9 percent in interim 2012." Final Determination at 57 n.350.

[39] Indeed, this consideration of non-subject imports satisfied the "but for" requirement found in *Mittal Steel*, *Bratsk*, and *Gerald Metals*.

circumstances, the Commission could not reasonably have attributed the domestic industry's injury to the subject imports. For this reason this Court should reverse the Commission's material injury determination, including its determinations of causation, impact, price effects, and volume."). Put another way, plaintiffs' argument is that the domestic industry lost no sales to subject imports because purchasers, particularly utility purchasers, would have turned to technology that produced lower-priced electricity (i.e., natural gas), rather than purchase the domestic industry's products.

While plaintiffs assert that the ITC erred by failing to properly take their grid parity arguments into account, the ITC specifically rejected these claims in the Final Determination. It "recognize[d] the goal for CSPV products to attain grid parity," and went on to explain that "grid parity" is "the point at which the levelized cost of electricity generated from renewable sources [(e.g., solar)] equals the cost of conventional electricity from the grid." Final Determination at 32, 52. The "levelized cost of electricity," it stated, is "the sum of all costs over the life of an energy system divided by the quantity of electricity that system would be expected to generate during the period the system is financed." Final Determination at 32 n.171. According to the ITC, "[d]uring periods of non-peak electricity demand in the United States, only lowest-cost 'baseload' generators (traditionally coal and nuclear plants) will be able to sell electricity to the grid, whereas during peak electricity demand periods, even generators with somewhat higher costs may be able to sell electricity into the transmission or distribution grid." Final Determination at 32.

Inexpensive natural gas was indeed affecting the price of electricity. During "peak periods, natural-gas generated electricity sets the levelized cost of electricity that CSPV solar systems and other renewable systems must seek to meet, especially for sales to the utility segment." Final Determination at 32. In other words, buyers will demand the lowest-priced electricity available at any given time. Thus, CSPV products will be purchased only if the cost of the resulting electricity is price-competitive with the source of electricity that is least expensive during non-peak demand. As a result, electricity producers using CSPV technology will only be able to sell into the grid so long as they possess the ability to remain price-competitive with electricity that is generated from other technologies at any given time. As noted, here, the Commission found that natural gas-generated electricity set the levelized cost of electricity, due, in large part, to an increase in the supply of natural gas, which resulted from fracking and shale drilling, thereby lowering the cost of natural gas.

See Final Determination at 32. Consequently, the grid parity price with which CSPV products competed during the POI fell as well.

The story, however, does not end there. The Commission considered record evidence that included a September 2010 publication from Barclays Capital regarding equity research related to solar energy. *See* Pre-Hearing Br. of China Chamber of Commerce for Import and Export of Machinery and Electronic Products (Volume I of I), Ex. 22 ("Solar Energy Handbook"), CD 396 at Doc. No. 491422 (Sept. 20, 2012), ECF Dkt. No. 67–2. This source explained that there are two different grid parity price points, one at the utility level and one at the residential level. Solar Energy Handbook at 56. The publication noted that the utility price point was likely to be lower than the residential price point because it was expected that "residential markets [would] have a much higher solar energy price point due to elimination of transmission and distribution costs." *See* Solar Energy Handbook at 56.

As to the utility level, the Commission further relied on evidence indicating that it was "expect[ed that] grid parity [for solar electricity] at the utility level [would] be reached in the [United States during the] 2010–12 time frame depending on the development of fossil fuel generated electricity prices." Solar Energy Handbook at 56. This source also indicated "that solar electricity [was] already competitive with peak power generation capacity in a number of regions" in the United States, and it observed that, "[i]n the United States, several utilities [had already] announced deployment of large-scale solar panels beginning" in 2010, which would be competitive with intermediate and peak load generation capacities. *See* Solar Energy Handbook at 56. Further, the Barclays Capital publication stated that commercial solar energy projects would generate competitive returns in 2010 in several states. *See* Solar Energy Handbook at 60.

Moreover, the publication anticipated that, due to favorable federal, state, and local government legislation and incentive programs in place to stimulate the demand for solar energy in the United States, and an increased supply of lower-priced solar panels, the United States solar photovoltaic market would triple between 2011 and 2012 and that solar energy would achieve grid parity in several states in the year 2011. *See* Solar Energy Handbook at 125. Indeed, the publication stated that "statewide solar programs [were] likely to make the U.S. one of the fastest-growing markets over the next three to five years." Solar Energy Handbook at 125.

This evidence thus suggested that plaintiffs' claim, that "domestic CSPV producers were not willing and able to compete with [the rapidly declining levelized cost of electricity] . . . set by electricity

generated from natural gas during the POI" as compared to "subject CSPV producers [that] were willing and able to compete with the rapidly declining" cost, was not the case. *See* Pls.' Br. 6. Rather, this record evidence indicated that the domestic industry, in some parts of the United States, had achieved grid parity during the POI, as a result of favorable government incentive programs and legislation, and thus, in some cases, was able to compete with the lower levelized cost of electricity. In addition, this evidence indicated that, by 2011, grid parity would be achieved in several states. Based on this trend, the Commission thus found that the conditions of grid parity could not explain the injury sustained by the domestic industry, which was expected to enjoy considerable growth during the POI. *See* Final Determination at 52 ("We further recognize the goal for CSPV products to attain grid parity, which largely means matching the levelized cost of natural-gas-generated electricity provided to the grid during peak periods, as discussed above. Nevertheless, the impetus toward grid parity fails to explain the significant underselling by subject imports demonstrated on this record.").

Moreover, as part of its analysis, the ITC also relied on the questionnaire responses[40] it solicited from the domestic industry during the investigations directed at purchasers, producers, and importers of

[40] Plaintiffs, in their reply brief, argue that the questionnaire responses solicited by the ITC are misleading because the questions posed by the Commission were phrased in a way that failed to distinguish the impact of grid parity from the impact of subject imports. *See* Pls.' Reply in Supp. of their Mot. for J. on the Agency R. 14 (ECF Dkt. No. 46) ("Pls.' Reply Br."). That is, for plaintiffs, the questions posed by the ITC in the questionnaires were not sufficiently probative of the domestic purchasers' preferences for domestic CSPV products at higher prices in the absence of subject imports, given the decline in prices of competing conventional energy sources. Despite plaintiffs' citation to their initial brief before the court, this argument was, in fact, raised for the first time in their reply brief. *See* Pls.' Reply Br. 14 (citing Pls.' Br. 30–33). It is well-settled that, where, as here, an argument is not raised in a plaintiff's opening brief, it is waived. *See Amoco Oil Co. v. United States*, 234 F.3d 1374, 1377 (Fed. Cir. 2000) ("[A] reply brief should 'reply to the brief of the appellee' and 'is not the appropriate place to raise, for the first time, an issue for appellate review.' . . . Because these . . . arguments were not raised in Amoco's opening brief, we decline to address them." (quoting *Carbino v. West*, 168 F.3d 32, 34 (Fed. Cir. 1999))). Because plaintiffs failed to raise their argument until their reply brief, it is deemed waived, and will not be considered by the court. *See id.*

The court also finds that this claim was improperly raised by plaintiffs because they failed to exhaust their administrative remedies. A court "shall, where appropriate, require the exhaustion of administrative remedies." 28 U.S.C. § 2637(d); *Yangzhou Bestpak Gifts & Crafts Co. v. United States*, 716 F.3d 1370, 1381 (Fed. Cir. 2013). "As a general matter, '[t]he exhaustion doctrine requires a party to present its claims to the relevant administrative agency for the agency's consideration before raising these claims to the Court.'" *Hebei Metals & Minerals Imp. & Exp. Corp. v. United States*, 28 CIT 1185, 1195 (2004) (alteration in original) (quoting *Timken Co. v. United States*, 26 CIT 434, 459, 201 F. Supp. 2d 1316, 1340 (2002)). Generally, where, as here, a party "fail[s] to present [an] issue during the applicable comment period," it is "precluded from raising this issue *de novo* before the

CSPV products. The ITC found that twenty-one firms reported that price per watt was the most important factor in making purchasing decisions. *See* Final Determination at 45. Twelve of thirteen respondent producers, thirty-seven of forty-five respondent importers, and thirty-seven of forty-two respondent purchasers indicated that the domestic like product was either always or frequently interchangeable with imports of subject merchandise. Final Determination at 45. Moreover, the ITC found that "most responding purchasers reported that CSPV products made in the United States [were] comparable to subject imports from China for all characteristics except for price, for which the product from China was rated as superior (that is, lower-priced)." Final Determination at 45. Thus, "given the high substitutability between the domestic like product and subject imports," the ITC found that competition between the two products depended primarily on price. Final Determination at 45.

The ITC further found that the "subject imports [substantially] undersold the domestic like product . . . 76.0 percent of the time, at [high] margins."[41] Final Determination at 46. The ITC determined the effects of this underselling to be significant because survey results of domestic producers indicated that purchasers of CSPV products "reported initially choosing or switching to imports from China based on price." Final Determination at 49. With respect to price suppression, the ITC also found that the domestic industry had to lower its prices significantly[42] to keep up with the major decline in price of the subject imports. Final Determination at 49–50. Thus, the ITC determined that the large and growing volume of undersold subject imports depressed and suppressed the domestic prices to a significant degree. Final Determination at 53.

court." *AIMCOR v. United States*, 141 F.3d 1098, 1111 (Fed. Cir. 1998) (citations omitted). Here, during the Commission's investigations, plaintiffs were given the opportunity to comment on the proposed questions to be included in the questionnaires prior to being sent to domestic and foreign producers, and importers and purchasers of CSPV cells and modules. *See* Comments on Draft Questionnaires, PD 95 at Doc. No. 483863 (June 26, 2012), ECF Dkt. No. 68–4 ("Comments on Draft Questionnaires"); Pls.' Br. 9. Indeed, plaintiffs played an active role in assisting the Commission in drafting the questions posed in the questionnaires. *See* Comments on Draft Questionnaires. If plaintiffs had concerns regarding the ambiguity or phrasing of certain questions, they could have raised them with the Commission during the comment period. Because they failed to do so, and instead attempt to raise this argument, now, for the first time, the court holds that they failed to exhaust their administrative remedies.

[41] These margins, at which the domestic like product was undersold 76 percent of the time, ranged as high as [[ ]] percent. Final Determination at 46.

[42] The ITC found that the domestic industry had to lower its prices by [[ ]] percent in order to keep up with the [[ ]] percent decline in price of the subject imports. *See* Final Determination at 49.

Relatedly, the Commission observed that, despite the decline in natural gas prices during the POI, "when asked about the role of conventional energy sources such as natural gas and coal on changes in demand during the POI, the majority of questionnaire respondents either reported 'no change' in demand for CSPV products related to changes in the price of conventional energy sources or that CSPV product 'demand increased.'" Final Determination at 52. These questionnaire respondents also reported that the domestic industry lost sales and lowered its prices in order to compete with low-priced subject imports. *See* Final Determination at 50. In other words, the majority of responding U.S. purchasers of CSPV products confirmed that their purchasing decisions were not affected by the price of conventionally-produced electricity but instead by cheap foreign imports. That is, for a majority of the questionnaire respondents doing business in CSPV products, the availability of lower-priced alternative energy-producing technologies, such as natural gas, had no effect on the desirability of solar-producing technology (i.e., CSPV products). Thus, based on the input received from the domestic industry participants, the ITC found that the role of lower natural gas prices and thus grid parity could not explain the decline in subject import prices in the U.S. market during the POI. *See* Final Determination at 52 ("[T]he impetus toward grid parity fail[ed] to explain the significant underselling by subject imports demonstrated on this record.").

It is apparent that the ITC adequately addressed plaintiffs' primary grid parity argument and found it wanting. The ITC found that the suppression in domestic CSPV producers' prices and lost sales were not caused by the availability of lower-cost means of electrical production in the marketplace. Rather, it found that these injurious effects resulted from the presence of low-priced subject imports in the U.S. market. Hence, the Commission reasonably determined, based on (1) evidence that CSPV products had achieved or would soon achieve grid parity and (2) considerable input received from the domestic industry participants, that the push for grid parity could not explain the underselling and price depression of the domestic like product that occurred during the POI. This conclusion was supported by substantial evidence and disposes of plaintiffs' primary claim related to their argument that the injury to the domestic industry was caused by unique aspects of the CSPV marketplace.

7. Conclusion

Based on the foregoing discussions of the ITC's methodology and the record evidence, the court holds that the Commission's determination that the injury to the domestic industry was "by reason of"

sales of subject merchandise is supported by substantial evidence on the record and is in accordance with law. Thus, the ITC's injury determination is sustained.

CONCLUSION

Based on the foregoing, it is hereby

ORDERED that the International Trade Commission's Final Determination is sustained. Plaintiffs' motion for judgment upon the agency record is denied. Judgment will be entered accordingly.

Dated: August 7, 2015
New York, New York

/s/ Richard K. Eaton
RICHARD K. EATON

Slip Op. 15–88

UNITED STATES, Plaintiff, v. AMERICAN HOME ASSURANCE CO., Defendant.

Before: Leo M. Gordon, Judge
Consol. Court No. 09–00403

[Summary judgment granted in part and denied in part for Plaintiff; summary judgment granted in part and denied in part for Defendant.]

Dated: August 19, 2015

Beverly A. Farrell, Trial Attorney, Commercial Litigation Branch, Civil Division, U.S. Department of Justice, of New York, NY, argued for Plaintiff, United States. With her on the briefs were *Stuart F. Delery*, Acting Assistant Attorney General, *Barbara S. Williams*, Attorney-in-Charge, *Amy M. Rubin*, Acting Assistant Director, *Aimee Lee*, Senior Trial Counsel, *Edward F. Kenny*, Trial Attorney, and *Alexander Vanderweide*, Trial Attorney. Of counsel on the briefs were *Paula S. Smith*, U.S. Customs and Border Protection, Office of Assistant Chief Counsel, of New York, NY, and *Brandon T. Rodgers*, U.S. Customs and Border Protection, Office of Assistant Chief Counsel, of Indianapolis, IN

Herbert C. Shelley, and *Mark F. Horning*, Steptoe & Johnson LLP, of Washington, DC, argued for Defendant, American Home Assurance Company.

OPINION

Gordon, Judge:

This consolidated collection action[1] is before the court on cross-motions for summary judgment. *See* Def.'s Mot. for Summ. J., Consol. Court No. 09–00403, ECF No. 59 ("Def.'s Br."); Pl.'s Mot. for Summ. J., Consol. Court No. 09–00403, ECF No. 61 ("Pl.'s Br."). Plaintiff United

[1] This action consists of four separate actions - Court Numbers 09–00403, 10–00125, 10–00175, and 10–00343, consolidated under the lead case, Consol. Court No. 09–00403.

States ("Government") seeks to recover unpaid antidumping duties from Defendant American Home Assurance Company ("AHAC"), a surety, along with statutory and equitable pre-judgment interest, and post-judgment interest. Payment of duties was secured by numerous single transaction bonds ("STBs") and continuous entry bonds ("CBs") issued by AHAC during the period March 2001 to February 2002. AHAC's liability for the principal amounts of antidumping duties owed on these bonds is not in issue.

For entries in which antidumping duties do not exceed the face value of the bonds (Court Nos. 09–00403 and 10–00343), the Government is seeking statutory pre-judgment interest under 19 U.S.C. § 1505(d) ("post-liquidation interest" or "1505(d) interest") for non-payment of the duties. Over and above any antidumping duties and 1505(d) interest owed, the Government claims statutory pre-judgment interest as an exaction pursuant to 19 U.S.C. § 580 ("580 interest") for having to commence these four collection actions. The Government also seeks equitable pre-judgment interest on any amounts in excess of the face amounts of the relevant bonds to compensate the Government for the loss of the time value of the funds owed. Finally, the Government maintains that it is entitled to post-judgment interest under 28 U.S.C. § 1961.

The court has jurisdiction pursuant to 28 U.S.C. § 1582(2) (suit on a bond) and 1582(3) (suit for collection of unpaid duties)[2] (2012). For the reasons set forth below, the Government's motion for summary judgment is granted in part and denied in part, and AHAC's cross-motion is granted in part and denied in part.

I. Background

The subject bonds covered entries of preserved mushrooms and fresh water crawfish tail meat from the People's Republic of China, with each product subject to an antidumping duty order. Declaration of Mark Pessolano in Support of Def.'s Mot. for Summ. J. ("Pessolano Decl."), Consol. Court No. 09–00403, ECF No. 59–1. These bonds secured the importation of the subject merchandise during the period May 4, 2001 through August 6, 2002 by three different importers (American Jianglin, Y & Z International Inc., and JH Brain Trading Inc.). *Id.* In Court No. 09–00403, AHAC issued both CBs and STBs for the relevant entries. *Id.* In the other three actions, AHAC issued only CBs for the relevant entries.

In the consolidated actions, AHAC secured the importation of the subject merchandise by issuing the underlying STBs and CBs. The

[2] 28 U.S.C. § 1582(2) is the basis for jurisdiction in all four of the actions, whereas 28 U.S.C. § 1582(3) is an additional basis for jurisdiction in Court No. 10–00175.

bonds obligated the importers and AHAC to pay, up to the face amounts of the bonds, "any duty, tax or charge and compliance with law or regulations" resulting from activity covered by those bonds. *See* Compl., Exs. C & L, Court No. 09–00403, ECF No. 4; Compl., Ex. A (copy of printout from Customs' Automated Commercial System reflecting Bond No. 100175644 as bond destroyed at the World Trade Center site on Sept. 11, 2001), Court No. 10–00125, ECF No. 4; Compl., Ex. A, Court No. 10–00175, ECF No. 4; Compl., Ex. A, Court No. 10–00343, ECF No. 4.

U.S. Customs and Border Protection ("Customs" or "CBP") liquidated the entries secured by these bonds and assessed antidumping duties on the subject merchandise. For each of those entries, the respective importer received a bill from Customs and failed to pay the duties owed. Because of the importers' defaults, Customs issued demands[3] to AHAC, as the surety, for payment under its bonds. AHAC protested the demands for payment, which Customs ultimately denied. Since AHAC refused to make payment, the Government commenced these actions for the collection of unpaid duties and interest.

AHAC conceded liability for duties on the subject bonds, except for the CB related to Count III in Court No. 10–00343. The parties agree that the principal amounts owed in Court Nos. 10–00125 and 10–00175 are $1,400,000 and $800,000 respectively. The parties disagree as to the principal amounts owed in the other two actions. The Government claims that $4,989,085.89 is the principal amount owed in Court No. 0900403, while AHAC maintains that $4,489,085.89 is owed. The disagreement centers on Customs' treatment of a partial payment of $500,000. Customs intends to allocate that payment in accordance with 19 C.F.R. § 24.3a, which directs that any late payment received first be applied, on an entry by entry basis, to interest charges, *i.e.*, 1505(d) interest, equitable pre-judgment interest, and 580 interest, and then finally to the delinquent principal itself. AHAC does not dispute that the $4,989,085.89 was the original amount owed, but maintains that the partial payment should be fully credited against principal, not applied to any interest that may be owed.

With respect to the CB related to Count III in Court No. 10–00343, the parties reached an understanding that "$50,000 . . . would be the number used in determining the applicable amount of interest, if any, to be awarded." Jt. Letter, Court No. 10–00343, ECF No. 17. Subsequently, AHAC sent Customs a check for $50,000 in payment for the moneys related to Count III. *See* Pl.'s Resp. to Court's Request for Information, Confid. Att. at 29, ECF No. 113–2. The Government

[3] Customs appears to have made demands on AHAC for payment (across the four consolidated actions) beginning in December 2003 and ending in December 2009.

claims that $70,645.34 is the principal amount owed in Court No. 10–00343, whereas AHAC maintains that $20,645.34 is owed. The disagreement again centers on the allocation, interest first or principal first, of the $50,000 paid by AHAC with respect to Count III in the 10–00343 action. In both instances Customs is holding the payments in suspense accounts awaiting resolution of the pre-judgment interest issues.

II. Standard of Review

USCIT Rule 56 permits summary judgment when "there is no genuine issue as to any material fact." USCIT R. 56(c); *see also Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). In considering whether material facts are in dispute, the evidence must be considered in the light most favorable to the non-moving party, drawing all reasonable inferences in its favor. *See Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 157 (1970); *Anderson*, 477 U.S. at 261 n.2. Because the dispositive issues are solely legal and the material facts are uncontroverted, summary judgment is appropriate. *See* 10A Charles Alan Wright, Arthur R. Miller, Mary Kay Kane, Richard L. Marcus & Adam N. Steinman, Federal Practice & Procedure § 2725 (3d ed. 2015); *see also Dal-Tile Corp. v. United States*, 24 CIT 939, 944, 116 F. Supp. 2d 1309, 1314 (2000) (citing *Marathon Oil Co. v. United States*, 24 CIT 211, 214, 93 F. Supp. 2d 1277, 1279–80 (2000)).

III. Discussion

This consolidated action involves whether pre- and post-judgment interest, if any, are due in a collection action by the Government for non-payment of antidumping duties on underlying import transactions that were secured by basic importation and entry bonds. The court begins with the issue of statutory pre-judgment interest under 19 U.S.C. § 1505(d) and 19 U.S.C § 580. The court then examines the appropriateness of an award of equitable pre-judgment interest in addition to statutory pre-judgment interest. The court next addresses the effect of AHAC's prior payments. Lastly, the court considers if an award of post-judgment interest is warranted.

A. 1505(d) Interest

An importer is required to pay antidumping duties assessed by the United States pursuant to 19 U.S.C. § 1673. A surety who underwrites a customs bond agrees to joint and several liability with the importer for any duties, fees, and charges (including interest) owed, capped at the face amount of the bond. 19 C.F.R. § 113.62(a) (2015) (principal and surety jointly and severally agree to pay all "duties, taxes, and charges . . . legally fixed and imposed on any entry" secured

by an STB or CB); *see also United States v. Washington Int'l Ins. Co.*, 25 CIT 1239, 1241–42, 177 F. Supp. 2d 1313, 1316 (2001) ("Normally, a surety is liable for any duties, fees, and interest owed up to the face amount of the surety bond and any further liability for increased payment usually arises in a litigation context."). A surety's obligation arises at the time of the importer's breach, unless the parties agree otherwise. *See United States v. Cocoa Berkau, Inc.*, 990 F.2d 610, 614 (Fed. Cir. 1993).

19 U.S.C § 1505 governs the payment of duties and fees on entries of imported merchandise. Once Customs liquidates or reliquidates an entry, any duties and fees (including pre-liquidation interest) due and owing are payable 30 days after Customs issues a bill. 19 U.S.C. § 1505(b). If a bill is not paid in full within the 30-day grace period, the unpaid balance is considered delinquent and subject to "post-liquidation interest." *Id.* § 1505(d). Post-liquidation interest accrues in 30-day periods from the date of liquidation or reliquidation until the balance is paid in full, excluding the 30-day period in which the bill is paid. *Id.*

Here, CBP liquidated the entries secured by AHAC's bonds and assessed antidumping duties on the subject merchandise. When the importers failed to pay the dumping duties owed, CBP made multiple demands on AHAC for payment. On each occasion, CBP notified AHAC of the Government's intent to seek post-liquidation interest. *See* Pl.'s Compl. Ex. 4, Court No. 09–00403, ECF No. 4 (citing *Washington Int'l Ins. Co.*, 25 CIT at 1241–42, 177 F. Supp. 2d at 1316). AHAC filed protests on Customs' demands for payment of the duties and any attendant interest, all of which CBP subsequently denied. AHAC then had the option to challenge those demands, including the charge for post-liquidation interest, by commencing an action under 28 U.S.C. § 1581(a). AHAC chose not to commence suit.

In Court Nos. 09–00403 and 10–00343, the duties owed do not exceed the face amounts of the relevant bonds. The Government contends that, under these circumstances, 1505(d) interest continues to accrue and constitutes part of the unpaid balance for which the individual importer, and in turn AHAC, as surety, are liable. The Government also argues that CBP's demands (including payment of post-liquidation interest) became final and conclusive in accordance with 19 U.S.C. § 1514 when AHAC failed to contest its denied protests. Thus, the question before the court is whether the final and conclusive language of § 1514 precludes AHAC from asserting an affirmative defense in a Government enforcement action to collect post-liquidation interest under § 1505(d).

Section 1514 provides that any Customs decision (enumerated in one of the seven categories in § 1514) must be protested or it becomes "final and conclusive upon all persons (including the United States and any officer thereof)." 19 U.S.C. § 1514(a). Section 1514 further provides that if a protest is filed, and Customs denies the protest, the protesting party may challenge the denial in the U.S. Court of International Trade, under 28 U.S.C. § 1581(a). *Id.* Failure to commence a 1581(a) action after a protest is denied also renders Customs' decision "final and conclusive." *Id.*

It is well established that all decisions by CBP relating to an entry merge into the liquidation, which, in turn, becomes final and conclusive unless challenged in accordance with § 1514. *See Volkswagen of America, Inc. v. United States*, 532 F.3d 1365, 1370 (Fed. Cir. 2008) (citations omitted). The finality of those decisions applies to both importer duty recovery suits and to Government enforcement actions. *See United States v. Cherry Hill Textiles, Inc.*, 112 F.3d 1550 (Fed. Cir. 1997). This action, however, does not raise issues related to the liquidation of the subject entries. Rather, it involves CBP's *post-liquidation* decision to charge 1505(d) interest on unpaid antidumping duties pursuant to a demand for payment on a bond.

AHAC maintains that the bond language does not commit it to pay post-liquidation interest. *See* Def.'s Resp. Br. In Opp. to Pl.'s Mot. for Summ. J. 7, ECF No. 69. In this regard, AHAC maintains that "a surety's concession of liability for the principal amount owed [(the duties)] does not waive any defenses to the government's claim for interest which is made on statutory, not contractual grounds." *Id.* 7–8. As to § 1514, AHAC contends that the final and conclusive language does not preclude it from asserting defenses as a shield in a collection action for 1505(d) interest. AHAC argues that CBP's decision to seek 1505(d) interest was made post-liquidation, and therefore is not protestable under § 1514. The court disagrees.

Among the protestable decisions set forth in § 1514 are CBP decisions that involve "charges or exactions of whatever character within the jurisdiction of the Secretary of the Treasury." 19 U.S.C. § 1514(a). It is generally viewed that interest on duties comes within the description of a charge or exaction. *See Castelazo & Assocs. v. United States*, 126 F.3d 1460, 1462 (Fed. Cir. 1997); *Syva Co. v. United States*, 12 CIT 199, 202–03, 681 F. Supp. 885, 888 (1988) (interest on delinquent payment of liquidated regular Customs' duties protestable as charge or exaction); *American Hi-Fi Int'l, Inc. v. United States*, 19 CIT 1340, 1341–45 (1995) (19 U.S.C. § 1677g pre-liquidation interest on underpayments of antidumping duties constitutes charge or exaction protestable under § 1514). The statute does not contain an exception

for "charges or exactions" arising after liquidation, nor "charges or exactions" arising on particular kinds of duties. The distinctions drawn by AHAC do not appear in § 1514's broad "charges or exactions of whatever character" language. *See* 19 U.S.C. § 1514(a).

Furthermore, the basic importation and entry bonds at issue statutorily and contractually secure the payment of "duties" and any attendant interest. They do not distinguish between interest on a delinquent payment of regular customs duties and interest on a delinquent payment of other duties, such as antidumping duties. They also do not distinguish between pre-liquidation and post-liquidation interest. *See* Compl., Exs. C & L, Court No. 09–00403, ECF No. 4; Compl., Ex. A (copy of printout from Customs' Automated Commercial System reflecting Bond No. 100175644 as bond destroyed at the World Trade Center site on Sept. 11, 2001), Court No. 10–00125, ECF No. 4; Compl., Ex. A, Court No. 10–00175, ECF No. 4; Compl., Ex. A, Court No. 10–00343, ECF No. 4. The consequence for non-payment of those "other duties" is the same here as it would be for the non-payment of regular customs duties – the obligation to pay post-liquidation interest. Because there is no distinction in the statute or the bond agreements, as AHAC contends, 1505(d) interest constitutes a "charge or exaction" protestable under § 1514.

AHAC also contends that a Customs' decision must be substantive in nature for it to be protestable. Since 1505(d) interest is determined by using "'an automatic interest calculation model,'" Def.'s Reply in Supp. of Def.'s Mot. for Summ. J. 13 & Att. D, ECF No. 74, AHAC argues that CBP did not engage in any substantive decision-making. Consequently, a demand for 1505(d) interest is not a protestable event, and falls outside the scope of § 1514's final and conclusive language.[4] Once again, the court disagrees.

This is not a circumstance where CBP took "no active role whatsoever." *U.S. Shoe Corp. v. United States*, 114 F.3d 1564, 1569 (Fed. Cir. 1997). Here, CBP made a substantive determination that involved "the application of pertinent law and precedent to a set of facts" as opposed to taking a passive role where "no analysis" was performed, "no directives or decisions" were issued, or "no liability" was imposed. *Id*. CBP had to determine that the importers on the underlying entries failed to pay the duties owed. CBP then needed to (1) identify the applicable bonds, (2) determine whether the duties owed exceeded the face amount of the bonds, (3) determine if 1505(d) interest was applicable, and (4) then make a demand on the surety for non-

[4] The implicit assumption in AHAC's argument is that 1505(d) interest is a charge or exaction, and that but for the automatic nature of the calculation of 1505(d) interest would be protestable under § 1514.

payment of the duties by the importers, plus any applicable interest, including 1505(d) interest. AHAC is correct that there is an automatic aspect to 1505(d) interest. However, that automaticity occurred only after Customs had undertaken an analysis and made the substantive decisions that supported its demands for payment. *Cf. Dart Export Corp. v. United States*, 43 CCPA 64, 69–70 (1956) (describing substantive decision-making relating to the assessment of duties and charges in the context of CBP's prior organizational structure).

Since AHAC failed to contest its denied protests, CBP's charge of 1505(d) interest is final and conclusive pursuant to § 1514. As a result, AHAC is precluded from asserting any defenses to its liability for 1505(d) interest. Accordingly, AHAC shall pay the Government interest pursuant to 19 U.S.C. § 1505(d) on certain entries in Court No. 09–00403 and all entries in Court No. 10–00343 up to the face amount of the bonds covering those entries.

B. 580 Pre-Judgment Interest

The Government requests an award of statutory pre-judgment interest under 19 U.S.C. § 580. Section 580 provides that, in suits brought by the Government on a bond for the recovery of duties, "interest shall be allowed, at a rate of 6 per centum a year, from the time when said bond[] became due." 19 U.S.C. § 580. AHAC disputes the Government's entitlement to 580 interest arguing, among other things, that the statute applies to only regular duties and not antidumping duties.

The U.S. Court of Appeals for the Federal Circuit recently resolved the issue of whether the Government may recover 580 interest on dumping duties in a companion case involving the same litigants, but different bonds. *See United States v. Am. Home Assurance Co.*, 789 F.3d 1313, 1324–28 (2015) ("*Am. Home Assurance I*"). There the Federal Circuit held, "as a matter of law, that 19 U.S.C. § 580 provides for interest on bonds securing both traditional customs duties and antidumping duties." *Id.* at 1324.

There are no issues involving § 580 that distinguish this action from *American Home Assurance I*. Given that binding precedent, AHAC is liable for statutory prejudgment interest on the unpaid antidumping duties secured by the subject bonds. In accordance with § 580, that interest will run at a rate of 6% per annum from the date the subject bonds became due, which is the date of the Government's first formal demand for payment. *See* 19 C.F.R § 113.62(a)(ii) (2014).

C. Equitable Pre-Judgment Interest

The Government also seeks an award of equitable pre-judgment interest on the unpaid duties. Generally, pre-judgment interest "com-

pensate[s] for the loss of use of money due as damages from the time the claim accrues until judgment is entered, thereby achieving full compensation for the injury those damages are intended to redress." *West Virginia v. United States*, 479 U.S. 305, 310 n.2 (1987); *see United States v. Goodman*, 6 CIT 132, 140, 572 F. Supp. 1284, 1289 (1983) (Pre-judgment interest "is awarded to make the wronged party whole."). An award of pre-judgment interest is not limited by the face amount of the subject bond. *See United States v. U.S. Fid. & Guar. Co.*, 236 U.S. 512, 530–31 (1915).

Here, there is a statute, 19 U.S.C § 580, providing for pre-judgment interest in a Government enforcement action on a bond. *Am. Home Assurance I*, 789 F.3d at 1324–28. That would appear to resolve the matter because equity operates in the absence of a statute governing an award of pre-judgment interest, thereby resulting in the denial of the Government's request for equitable relief. However, the Federal Circuit has suggested that an award under § 580 may "alter[] the landscape" in this type of action. *Id.* at 1330. The Court stated that the Court of International Trade, as the trial court, should have "the opportunity to consider the effect of an award of § 580 interest and whether dual sources of interest are proper," with "full compensation [for the injured party, the Government,] being the court's overriding concern." *Id.* (quoting *United States v. Am. Home Assurance Co.*, 38 CIT ___, ___, 964 F. Supp. 2d 1342, 1356 (2014) ("*Am. Home Assurance II*")) (internal quotation marks omitted).

In determining whether to award equitable pre-judgment interest, the court is to exercise its discretion, *United States v. Imperial Food Imps.*, 834 F.2d 1013, 1016 (Fed. Cir. 1987), guided "by traditional judge-made principles." *City of Milwaukee v. Cement Div., Nat'l Gypsum Co.*, 515 U.S. 189, 194 (1995). When bonds secure the Government in the payment of antidumping duties, considerations that affect an award of equitable pre-judgment interest include: "[1] the degree of personal wrongdoing on the part of the defendant, [2] the availability of alternative investment opportunities to the plaintiff, [3] whether the plaintiff delayed in bringing or prosecuting the action, and [4] other fundamental considerations of fairness." *United States v. Great Am. Ins. Co. of N.Y.*, 738 F.3d 1320, 1326 (Fed. Cir. 2013) (quoting *Osterneck v. Ernst & Whitney*, 489 U.S. 169, 175–76 (1989)) (internal quotation marks omitted). Since the court has awarded the Government statutory pre-judgment interest under 19 U.S.C. § 580, it must also "consider the effect" of that award and "whether dual sources of interest are proper." *Am. Home Assurance I*, 789 F.3d at 1338 (quoting *Am. Home Assurance II*, 38 CIT at ___ 964 F. Supp. 2d at 1356 (internal quotation marks omitted) (citations omitted)).

AHAC contends that equitable considerations do not favor an award of prejudgment interest in this action. In particular, AHAC maintains that it did not engage in dilatory conduct by "unjustly withhold[ing] payment [of the dumping duties] after being notified of the default of the [bond] principal[s]." Def.'s Resp. Br. in Opp. to Pl.'s Mot. for Summ. J. 9 (quoting *U.S. Fid. & Guar. Co.*, 236 U.S. at 530–31 (emphasis in original), ECF No. 69. It also argues that the Government engaged in unnecessary delay by waiting until a few days prior to the expiration of the applicable statute of limitations to commence this action, and that its factual and legal positions in defending this action were reasonable. Lastly, AHAC argues that any award of equitable pre-judgment interest is precluded by the Continued Dumping and Subsidy Offset Act of 2000, 19 U.S.C. § 1675c (2000) ("CDSOA").[5] Specifically, AHAC contends that the subject antidumping duties once collected are deposited into special non-interest bearing accounts for the benefit of affected domestic producers and not into the general Treasury of the United States. Consequently, the Government did not lose the use of any money and is not entitled to additional compensation in the form of equitable pre-judgment interest.

The Government did not unreasonably delay bringing or prosecuting this action. The Government filed its complaints in the four consolidated actions from September 2009 through November 2010. These filings ranged approximately from 6 to 27 months after the Government's final demands for payment and from 3 to 14 months prior to running of the applicable six-year statute of limitations under 28 U.S.C. § 2415. Although the Government may appear lax in commencing these actions from Defendant's perspective, each of them was nonetheless commenced within the applicable statute of limitations. *See United States v. Millenium Lumber Distribution Co.*, 36 CIT ___, ___, 899 F. Supp. 2d 1340, 1344 n.6 (2012) (quoting 28 U.S.C. § 2415(a) ("A complaint to recover liquidated damages must be filed 'within six years after the right of action accrues or within one year after final decisions have been rendered in applicable administrative proceedings required by contract or by law, whichever is later.'"). Even though the Government's timing may not have been optimal, the court cannot say that the Government unreasonably delayed the bringing of this action. Additionally, the docket of the consolidated lead action, Court No. 09–00403, reveals a long and involved litigation with many filings and numerous requests for extensions of time,

[5] Pub. L. No. 106–387, § 1001–03, 114 Stat. 1549, 1549A-72–75, 19 U.S.C. § 1675c (2000), *repealed by* Deficit Reduction Act of 2005, Pub. L. No. 109–171, § 7601(a), 120 Stat. 4, 154 (Feb. 8, 2006; effective Oct. 1, 2007).

but does not reflect that the Government was the source of any unreasonable delay. Lastly, AHAC has never paid the outstanding duties, with one exception, despite Customs' numerous requests.

While those factors may favor an award of equitable interest, the Government's entitlement to statutory pre-judgment interest under 19 U.S.C. § 580 outweighs those considerations. Customs' demands for payment apparently began in December 2003 and ended in December 2009. Equitable pre-judgment interest, if applicable, would run at the rate provided in 28 U.S.C. § 2644 and in accordance with 26 U.S.C. § 6621. *See United States v. Golden Gate Petroleum Co.*, 30 CIT 174, 182–83 (2006) (citing *Goodman*, 6 CIT at 140, 572 F. Supp. at 1290). With December 2003 as a starting point and ending with the date of issuance of the judgment in this action, the range of applicable Federal short term funds rates under 26 U.S.C. § 6621 is 0.16% to 5.16%, with an average rate of 1.70%, and a median rate of 0.74%.

The 6% rate under § 580 far exceeds the applicable rates at which the Government would receive equitable interest. Section 580 interest more than fairly compensates the Government for the time value of the unpaid duties. To award equitable pre-judgment interest in these circumstances would overcompensate the Government. The court therefore declines to award equitable pre-judgment interest to the Government in addition to § 580 interest.[6]

D. Effect of AHAC's Partial Duty Payments

AHAC maintains that Customs should apply AHAC's payments of $500,000 in Court No. 09–00403 and $50,000 in Court No. 10–00343 first towards the principal amounts owed, and then interest. AHAC anticipates an appeal of the judgment in this action as there was in the companion case, so AHAC is seeking to minimize the impact of any interest that may continue to accrue during that period. *See* Reply in Supp. of Def.'s Mot. for Permission to Make Deposit and for Entry of Final J. 1–4 (Apr. 11, 2014), ECF No. 90.

Unfortunately for AHAC, Customs by regulation must apply AHAC's payments to interest before principal. Specifically, "[i]n the case of *any* late payment, the payment received will first be applied to the interest charge on the delinquent principal amount and then to the payment of the delinquent principal amount." 19 C.F.R. § 24.3a(c)(4). AHAC identifies no legal basis for the court to issue a judgment contrary to the express terms of this regulation. Accordingly, in awarding statutory interest to the Government the court will

[6] Because equitable pre-judgment interest is not warranted here, the court does not reach the issue of the effect of the CDSOA on the award of that interest.

not direct Customs to allocate AHAC's payments differently than that provided for in 19 C.F.R. § 24.3a(c)(4).

E. Post-Judgment Interest

Lastly, the Government seeks an award of post-judgment interest. 28 U.S.C. § 1961(a) provides that post-judgment "[i]nterest shall be allowed on any money judgment in a civil case recovered in a district court." Section 1961 does not directly apply to judgments rendered by this Court. *See* 28 U.S.C. § 1961(c)(4). However, the award of post-judgment interest by the Court of International Trade is predicated on 28 U.S.C. § 1585, which states that the Court "posses[es] all the powers in law and equity of, or as conferred by statute upon, a district court of the United States." *United States v. Great Am. Ins. Co. of New York*, 738 F.3d 1320, 1326 (Fed. Cir. 2013) (extending power to award post-judgment interest under 28 U.S.C. § 1961 to Court of International Trade pursuant to 28 U.S.C. § 1585).

Post-judgment interest is not discretionary, but rather is available as a matter of right to prevailing parties. *United States v. Servitex, Inc.*, 3 CIT 67, 68 n.5, 535 F. Supp. 695, 696 n.5 (1982); *see also Great Am. Ins. Co.*, 738 F.3d at 1326. Under § 1961(a) post-judgment interest is calculated from the date of entry of the judgment. This is a civil case – a suit on a bond for the collection of unpaid duties – that has resulted in a money judgment against AHAC. Accordingly, the Government is entitled to post-judgment interest at the rate provided for in § 1961.

IV. Conclusion

Based on the foregoing reasons, Plaintiff's motion for summary judgment is granted in part and denied in part, and Defendant's motion for summary judgment is granted in part and denied in part. Judgment will enter accordingly.

Dated: August 19, 2015
New York, New York

/s/ Leo M. Gordon
JUDGE LEO M. GORDON

Slip Op. 15–89

GOLDEN DRAGON PRECISE COPPER TUBE GROUP, INC., HONG KONG GD TRADING CO., LTD., GOLDEN DRAGON HOLDING (HONG KONG) INTERNATIONAL, LTD., and GD COPPER (U.S.A.) INC., Plaintiffs, v. UNITED STATES, Defendant, and CERRO FLOW PRODS., LLC, WIELAND COPPER PRODUCTS, LLC, MUELLER COPPER TUBE PRODUCTS, INC, and MUELLER COPPER TUBE CO., INC., Intervenor-Defendants.

Before: R. Kenton Musgrave, Senior Judge
Consol. Court No. 14–00116

[Remanding second (2011–2012) administrative review of antidumping duty order on seamless copper pipe and tube from the People's Republic of China for further proceedings.]

Dated: August 19, 2015

Kevin M. O'Brien and *Yi Fang*, Baker & McKenzie, LLP, of Washington DC, for the plaintiffs.

Jennifer E. LaGrange, Trial Attorney, Commercial Litigation Branch, Civil Division, U.S. 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 *Claudia Burke*, Assistant Director. Of Counsel on the brief was *Daniel J. Calhoun*, Senior Attorney, Office of the Chief Counsel for Trade Enforcement and Compliance, U.S. Department of Commerce, of Washington, D.C.

Thomas M. Beline, *Jack A. Levy*, and *Jonathan M. Zielinski*, Cassidy Levy Kent (USA) LLP, of Washington DC, for the defendant-intervenors.

OPINION AND ORDER

Musgrave, Senior Judge:

This consolidated case represents separate actions filed by nominal plaintiffs ("Golden Dragon" or "GD") and nominal intervenor-defendants ("Mueller") challenging aspects of the second (2011–2012) administrative review compiled by the defendant United States Department of Commerce, International Trade Administration ("Commerce" or "the Department") *sub nom. Seamless Refined Copper Pipe and Tube From the People's Republic of China* ("PRC"), 79 Fed. Reg. 23324 (Apr. 28, 2014), subsequently amended, 79 Fed. Reg. 47091 (Aug. 12, 2014). In addressing Golden Dragon and Mueller's separate motions for judgment, the court concludes that remand is necessary in accordance with the following.

I. *Jurisdiction and Standard of Review*

Jurisdiction is here pursuant to 28 U.S.C. §1581(c) and 19 U.S.C. §1516a(a)(2)(B)(iii), as previously alluded.[1] The court will uphold an

[1] *See* Slip Op. 14–85 at 9–10 (July 18, 2014).

administrative determination unless it is "unsupported by substantial evidence on the record, or otherwise not in accordance with law." 19 U.S.C. §1516a(b)(1)(B)(i). This standard requires that Commerce thoroughly examine the record and "articulate a satisfactory explanation for its action including a rational connection between the facts found and the choice made." *Motor Vehicle Manufacturers Association of the United States, Inc. v. State Farm Mutual Automobile Insurance Co.*, 463 U.S. 29, 43 (1983) (internal quotation omitted).

II. *Golden Dragon's USCIT Rule 56.2 Motion*

A. Background

Further to *Seamless Refined Copper Pipe and Tube From Mexico and the PRC*, 75 Fed. Reg. 71070 (Nov. 22, 2010) (antidumping duty order), Commerce initiated the second administrative review of the antidumping duty order. *Initiation of Antidumping and Countervailing Duty Administrative Reviews and Request for Revocation in Part*, 77 Fed. Reg. 77017, 77025 (Dec. 31, 2012). Commerce selected Golden Dragon as a mandatory respondent. PDoc 13 at 5.

Via *Seamless Refined Copper Pipe and Tube from the PRC*, 78 Fed. Reg. 69820 (Nov. 21, 2013) (*inter alia* preliminary rev. results) and an accompanying preliminary decision memorandum ("*PDM*"), PDoc 126, (together, "*Preliminary Results*"), for its primary surrogate country, Commerce preliminarily selected Thailand because: (1) it met both criteria set forth in section 1677b(c)(4) above; (2) it provided the most specific, contemporaneous, and high-quality data of all potential surrogate countries; and (3) it offered financial statements that conformed to criteria that Commerce uses when choosing the best information available -- *i.e.*, "financial statements that are complete, publicly available, and contemporaneous with the [period of review ("POR")]." *Id*.; *see also* Prelim. Surrogate Country Memo at 6–10, PDoc 134. Commerce did not opt for the Ukraine because Golden Dragon did "not provide[ ] sufficient information to demonstrate that Ukraine [was] a reliable source of publicly available surrogate data," and the record "contain[ed] no Ukrainian data to value copper slag and ash." PDoc 134 at 9.

Commerce calculated a preliminary weighted-average dumping margin of 3.55 percent for Golden Dragon using the average-to-average (A-A) comparison methodology for Golden Dragon's U.S. sales. *See Preliminary Results*, 78 Fed. Reg. at 69821; *PDM* at 12–14. In deciding whether to use the default A-A methodology or an alternative methodology, *e.g.*, average-to-transaction (A-T), to calculate Golden Dragon's dumping margin, Commerce conducted its differen-

tial pricing analysis across quarterly periods of the POR. *Id*.

The differential pricing analysis involved two stages. *Id*. at 13. In the first stage, Commerce determined whether there was a pattern of prices that differed significantly by purchaser, region, or time period by: (1) applying the "Cohen's *d*" test to compare the mean of a test group of net prices (*e.g.*, Golden Dragon's net prices in one quarter) and the mean of a comparison group of net prices (*e.g.*, the export prices or constructed export prices of comparable merchandise in the other quarters) and (2) applying the ratio test to assess the extent of the significant price differences for all sales as measured by the Cohen's *d* test. *Id*. Because both tests together demonstrated the existence of a pattern of prices that differed significantly by time period, Commerce proceeded to the second stage. *Id*. at 14.

In the second stage, Commerce determined whether the A-A methodology could account for such price differences by testing whether application of the alternative A-T methodology, as opposed to the A-A methodology, yielded a meaningful difference in the weighted-average dumping margin. *Id*. Commerce concluded that: (1) "38.9 percent of Golden Dragon's export sales pass the Cohen's *d* test"; and (2) this value of total sales supported consideration of applying the alternative average-to-transaction (A-T) method to those sales identified as passing the Cohen's *d* test; but (3) after comparing the weighted-average dumping margins calculated using the A-A and alternative methods, "there was not a meaningful difference." *Id*. Thus, for its preliminary determination, Commerce used the default A-A methodology. *Id*.

Because the PRC is a non-market economy country, Commerce was required to base normal value on the value of factors of production used in producing the merchandise, referencing the best information available in surrogate market economy countries that were: (1) at a level of economic development comparable to that of the PRC and (2) significant producers of comparable merchandise. *See PDM* at 11, discussing 19 U.S.C. § 1677b(c)(1) & (4). For this matter, Commerce selected Thailand as the primary surrogate country to value the factors of production. *Id*., citing 19 C.F.R. §351.408(c)(2).

Both Golden Dragon and Mueller submitted case and rebuttal briefs addressing the preliminary results. PDocs 148–50, 151. Relevant here, Golden Dragon argued that: (1) Commerce should have selected Ukraine, rather than Thailand, and the surrogate value country; (2) Commerce's differential pricing analysis was flawed because the primary elements of Golden Dragon's U.S. prices (the fabrication charge and metal pricing formula) were fixed by contract, Golden Dragon did not intend to engage in targeted dumping, and

Commerce should have inquired into the "underlying reasons" or "causes" for price fluctuations rather than simply apply the differential pricing analysis; and (3) Commerce should have used monthly prices, rather than quarterly prices, in its differential pricing analysis because Golden Dragon priced its products based on monthly London Metal Exchange prices. PDocs 148–50 at 4–19. For its part, Mueller challenged the ocean freight surrogate values selected by Commerce. PDoc 151 at 8–10.

Commerce published the final results in April 2014. 79 Fed. Reg. at 23324–26; PDoc 176. Commerce continued to find that Thailand was the appropriate surrogate value country. Issues and Decision Memorandum for the Final Results ("*IDM* ") at 14–16, PDoc 162. Commerce observed that Golden Dragon had corrected the deficiencies with the Ukrainian data that had been identified in the preliminary decision, but then Commerce noted several other defects with the Ukrainian financial statements, concluding that Thailand is a more appropriate selection. *Id*. at 15.

Concerning the issue of targeted dumping, Commerce agreed with Golden Dragon that the "contractually-determined monthly fluctuation in copper prices" created "a logical basis for grouping sales by month when examining whether there are prices that differ significantly by time periods." *Id* at 13–14. Commerce did not, however, agree that it was required to consider the reasons for price fluctuations. Commerce thus again applied its differential pricing analysis, this time on a monthly basis, and concluded that: (1) "51.2 percent of Golden Dragon's export sales pass the Cohen's *d* test"; (2) this value of total sales supported consideration of applying the A-T method to those sales identified as passing the Cohen's *d* test; and (3) after comparing the weighted-average dumping margins calculated using both the A-A and this alternative method, "the change in the two results exceed[ed] the 25 percent threshold which the Department considers meaningful." *Id*. at 3. Commerce then used the mixed alternative method, in which it applied the A-T method for U.S. sales that passed the Cohen's *d* test and the A-A method for U.S. sales that did not pass the Cohen's *d* test. Final Results Analysis Memo, PDoc 161 at 2–3. Using this alternative method, Commerce calculated a dumping margin of 4.50 percent for Golden Dragon. *Id*.; *see also* 79 Fed. Reg. at 23325.

After Golden Dragon and Mueller filed their separate complaints in this court and the cases were consolidated, Commerce's motion to for voluntary remand in order to evaluate and correct for ministerial errors was granted. Order of July 18, 2014, ECF No. 34. Commerce published amended final result on August 12, 2014, concluding that it

had inadvertently miscalculated Golden Dragon's freight distances. 79 Fed. Reg. at 47091–92, PDoc 173. After making corrections, Commerce calculated a final dumping margin for Golden Dragon of 4.48 percent. PDoc 171 at 5.

B. Analysis

Golden Dragon challenges (1) Commerce's selection of Thailand as the surrogate country based on the data therefor, and (2) Commerce's determination that Golden Dragon engaged in targeted dumping and the determination to apply "mixed" alternative methodology in calculating Golden Dragon's weighted-average dumping margin.[2]

1. Selection of Thailand as Surrogate Country

Before Commerce, Golden Dragon argued that the Ukraine provides the most complete and product-specific data of record, in particular on the basis of the annual report of Joint Stock Company Artemivskyy Plant Treated Colored Metals " ("JSC Artemivskyy"), which produces copper tubes that are identical in function and dimension to the copper tubes produced by Golden Dragon. Prelim. Surrogate Country Memo at 3, PDoc 134. Golden Dragon also argued the record contained complete data for Thailand, including data it apparently submitted for Furukawa Metal (Thailand) Public Company Limited ("Furukawa"), a Thai producer of merchandise identical to the subject merchandise. *Id*. at 4. Mueller argued for South Africa and against the Furukawa Metals financial statement on the ground that it is Commerce's policy not to give more weight to financial statements with a greater similarity of production experience if those financial statements shows evidence of countervailable subsidies. *Id*.

For the *Final Results*, Commerce selected Thailand as the primary surrogate country and t valued SG&A and profit using the audited financial statements for Furukawa for the year ending December 2011. Commerce found from those statements that Furukawa was granted certain "promotional privileges" by the Thai government under its Investment Promotion Act ("IPA") and Commerce acknowledged that the IPA has been found countervailable, but it found that the language in the Furukawa financial statements "only suggest that such privileges were available to Furukawa", that "[t]here is no indication in the Furukawa financial statements that Furukawa received a countervailable benefit during the fiscal year", and that this was not a sufficient basis for excluding the financial statement as a

[2] Golden Dragon's reply brief does not address Commerce's response to Golden Dragon's original challenges to Commerce's calculation of Thai financial ratios and labor rates; accordingly, for purposes of this opinion the court will treat those challenges as abandoned. *See, e.g., NMB Singapore Ltd. v. United States*, 557 F.3d 1316 1326 n.13 (Fed. Cir. 2009).

source for calculating financial ratios. *IDM* at 10. *Id*.

In a bit of a role reversal, Golden Dragon now argues Commerce's selection of Thailand is erroneous, that the Ukraine data on the record are complete, untainted by countervailable subsidization, and more contemporaneous with the period of review than that of the Thai selected data, while Mueller argues in support of the Furukawa Metals financial statement.

a. The Furukawa (Thai) Financial Statement

With respect to Commerce's selection of the Thai data as preferable to the Ukrainian data, Golden Dragon argues that Commerce and Mueller point to "immaterial" aspects of the JSC Artemivskyy financial statement, *see infra*, that should be regarded in the context of the fact that the Furukawa financial statement covers only two months of the POR (versus the JSC Artemivskyy financial statement covering 10 months of the POR) and in the context of the fact that the Furukawa financial statement shows "significant evidence of subsidization" as argued by Mueller before Commerce.

First, pointing to Import Administration Policy Bulletin 04.1, "Non-Market Economy Surrogate Country Selection Process" (Mar. 1, 2004), which states that "period-wide price averages . . . that are contemporaneous with the period of investigation or review" should be utilized, while Golden Dragon admits that the Thai data "may satisfy this criteria", it argues that the Ukraine data are more contemporaneous and thus the best available information. For support, Golden Dragon points to *Sebacic Acid From the PRC*, 65 Fed. Reg. 49537 (Aug. 14, 2000) (final rev. results), and accompanying issues and decision memorandum ("I&D Memo") at cmt. 10 (castor oil and seed valuation) as one (among unspecified other) determinations that have found that a larger coverage range is preferable for surrogate value analysis. In that determination, Commerce "indicated its preference for using data that covered a ten-month period instead of a three-month period." GD Reply at 11, referencing *id*.

Second, Golden Dragon argues that the agency's finding that the Furukawa financial statement does not indicate receipt of a countervailable benefit during the fiscal year is inconsistent with the agency's preference for using financial statements that have not benefitted from countervailable subsidies in surrogate value analysis. *Id*. at 12, referencing *Chlorinated Isocyanurates From the PRC*, 75 Fed. Reg. 70212 (Nov. 17, 2010) (final 2008–2009 rev. results) ("*Chlor-Isos*"), and accompanying I & D Memo at cmt. 3.

Commerce acknowledged in *Chlor-Isos* that "it is . . . the Department's practice to reject the financial statements of a company that

we have reason to believe or suspect may have benefitted from countervailable subsidies, particularly when other sufficient, reliable, and representative data are available for calculating surrogate financial ratios", *id*., and the Indian financial statement considered in that case provided clear indication of countervailable subsidies (specifically, a clear explanation of how "Capital Subsidy" funds are accounted for among the relevant company's financial statements), and Commerce indicated that it has found "Capital Subsidy" to be a countervailable benefit program. *See Clearon Corp. v. United States*, 35 CIT ___, ___, 800 F. Supp. 2d 1355, 1360–61 (2011).

In the matter at bar, Golden Dragon points out that the financial statements for Furukawa indicate that the company "has been granted privileges by the Board of Investment relating to the manufacturing of seamless copper tube". GD's SV Cmts (Mar. 29, 2013), PDoc 42 at Ex. 13, p. 35. Commerce seems to have agreed that such privileges would amount to a countervailable subsidy, but it concluded that while "such benefits were available to Furukawa...[t]here is no indication in the Furukawa financial statements that Furukawa *received* a countervailable benefit during the fiscal year", Prelim. Surrogate Country Memo at 10 (italics added), however Furukawa's financial statements further provide that the company "has been granted additional promotional privileges to extend a period of exemption from payment of import duty on raw materials and equipment *necessary for the Company's operation for export* until January 2013." GD's SV Cmts at Ex. 13, p. 35 (Note 25) (italics added).

That statement seems plain enough. Commerce's conclusion, above, is therefore in apparent contrast with Golden Dragon's observation on the Furukawa statement, also above, which therefore requires remand for further explanation or reconsideration, as appropriate.

b. The JSC Artemivskyy (Ukraine) Financial Statement

Golden Dragon also argues the JSC Artemivskyy financial statements are free of indication of countervailable subsidies and provide better contemporaneity than the Furukawa financial statement. *See* GD's SV Submission (Dec. 11, 2013), PDocs 142–144 at Ex. 1 (JSC Artemivskyy 2012 Financial Statement); *IDM* at 15. Commerce and Mueller maintain it is unclear whether JSC Artemivskyy is a producer of comparable merchandise. Def. Resp. at 23; Def-Ints. Resp. at 25; *IDM* at 14–15. Specifically, Commerce found that "[t]he JSC Artemivskyy Plant financial statements indicate only that the JSC Artemivskyy Plant engages in "copper production'[3]" and that it

[3] Gold Dragon would have better assisted its case if it had simply presented copies of JSC Artemivskyy's own description of itself, *e.g.*, from its website, if any. Be that as it may, as

cannot "speculate on the precise meaning of this description of the company's commercial activity." *IDM* at 15.

The court does not understand what level of precision is required here. Apart from the translated name(s) of the relevant Ukrainian company, indicated as "Artyomovsk Non-Ferrous Metals Processing" or "Artemivskyy plant-treated ferrous metals", a financial statement Note plainly describes inventory amounts for "finished products in ingots, round and flat rolled products, sanitary fittings and other". The *IDM* does not address this, and therefore there is no apparent consideration of it. Whether it can be concluded therefrom that JSC Artemivskyy is not a producer of comparable merchandise there is no indication in the *IDM*, and therefore to that extent the court is unable to determine whether substantial evidence supports Commerce's conclusion.

According to Golden Dragon, Commerce "routinely" relies on financial statements of companies that produce similar or comparable merchandise when those financial statements represent the best available information. GD Reply at 14, referencing Policy Bulletin 04.1. Nonetheless, Commerce and Mueller argue that concerns remain with respect to the JSC Artemivskyy financial statement. Def. Resp. at 23–24; Def-Int. Resp. at 24–26.

Mueller, for example, highlights the fact that the company's own auditors stated they could not vouchsafe the integrity of the statements. Golden Dragon disagrees, arguing that Commerce does not require audited financial statements for surrogate value calculations or unqualified auditor opinions. GD Reply at 14, referencing *Final Determination of Sales at Less Than Fair Value: Hot-Rolled Flat-Rolled Carbon-Quality Steel Products from the Russian Federation*, 64 Fed. Reg. 38626 (Jul. 19, 1999) ("it is not required that the financial statements be audited.").

More concretely, Golden Dragon argues that the auditor's report qualified its opinion with a note stating that it "was not able to observe the inventory of existing fixed assets, reserves, other non-current assets and liabilities since the inventory took place before the appointment of our auditors" but that the report adds that the auditors "performed procedures to obtain alternative and appropriate audit evidence regarding the quantity of fixed assets." *Id.*, referencing PDocs 142–44 at Ex. 1. In other words, according to Golden Dragon, the report concludes that while the auditors were not able to observe

Commerce indicated, the only instance of "copper production" appears on the document's first page of the English translation, but this appears to be the general economic activity class into which SMIDA (*i.e.*, Agency for Ukraine's Stock Market Infrastructure Development) classifies JSC Artemivskyy, not a declaration by JSC Artemivskyy as to its economic activity.

the inventory, they were still able to perform an appropriate audit using alternative evidence, and that at most the report provides that "certain minor [deviations] may exist in quantities of fixed assets." *Id*. As such, Golden Dragon argues, JSC Artemivskyy's qualified audit opinion is preferable to the subsidized Thailand financial data not render the Ukrainian data deficient and does not impact concluding that it is the best available information.

Similarly, with respect to Commerce's and Mueller's argument that the Ukraine data is deficient because the information used to value copper ash and slag predated the period of review by four years (Def Resp. at 24; Def-Int. Resp. at 26–27), Golden Dragon argues it is "clear" from the underlying record that copper slag and ash are "minor" inputs to the manufacturing of copper tubes, with minimal effect on the calculation of total manufacturing cost compared to the main inputs -- raw copper, labor, electricity, and water -- and that the copper ash and slag data do not constitute a credible deficiency in the Ukraine data.

Golden Dragon's rebuttal directly addresses only three of the four "deficiencies" Commerce identifies, the fourth being that the auditor stated it was unable to perform alternative procedures on all qualified balance sheet areas because of "the nature of the accounting records" and Commerce relies on its inability to seek clarification from the Ukrainian producer about these concerns. Def. Resp. at 24. Whether that concern is subsumed in and addressed by Golden Dragon's points, above, the court is not in a position to discern, but in view of the foregoing matters, requiring further consideration or explanation on which financial statement provides the "best" data, Golden Dragon is capable of commenting further on the issue on remand.

2. Application of "Mixed" Alternative Methodology

Golden Dragon also argues Commerce unlawfully considered only price variance as sufficient to trigger the exceptional methodology and ignored that the variances measured by Cohen's *d* had nothing to do with targeted dumping. Golden Dragon argues that the pricing differences here had nothing to do with targeted dumping; that where a respondent takes no steps to adjust, revise, or in any way alter its prices during the period of review, a finding of targeted or masked dumping is unsupported by the record; that it is unlawful for Commerce to take the position that the contractually-set pricing tracks spot prices on the London Metals Exchange is "irrelevant" to the selection of the A-A or A-T comparison methodology; and that the record is "devoid" of an explanation as to how a pattern of price

differences could not be accounted for with the A-A methodology, as required by 19 U.S.C. §1677f-1(d)(1)(B)(ii).

For support, Golden Dragon points to *Borden, Inc. v. United States*, 22 CIT 233, 4 F. Supp. 2d 1221, 1228 (1998), *rev'd on other grounds*, 7 Fed. Appx. 938 (Fed. Cir. 2001), wherein the court stated that "not all price variation, not even all statistically significant variation, results from targeted dumping." Whether this court could agree with that statement, the Court of Appeals for the Federal Circuit recently confirmed that 19 U.S.C. §1677f-1(d)(1)(B) "does not require Commerce to determine the reasons why there is a pattern of export prices for comparable merchandise that differs significantly among purchasers, regions, or time periods, nor does it mandate which comparison methods Commerce must use in administrative reviews." *JBF RAK LLC v. United States*, 790 F.3d 1358 (Fed. Cir. 2015). *See also Borusan Mannesmann Boru Sanayi ve Ticaret A.S. v. United States*, ___ Fed. App'x ___, No. 2014–1744, 2015 WL 3875488 (Fed. Cir. June 24, 2015) (finding Commerce's interpretation of section 1677f-1(d)(1)(B) "is based on a permissible construction of the statute", quoting *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 843 (1984)).

Golden Dragon argues it is not requesting that Commerce consider intent in setting U.S. prices but should weigh the fact that it, Golden Dragon, did not "set" or "adjust" its U.S. sale prices during the POR. And yet, it would seem inescapable that for Commerce to consider that prices were *not* "set pursuant to a targeted dumping strategy"[4] would involve consideration of intent, *i.e.*, of "strategy". The lion's share of Golden Dragon's U.S. prices that were "established" by the externality of the published London Metals Exchange (LME) spot prices according to formula(s) to which Golden Dragon contractually agreed, on what appears to be requirements contract(s), resulted in a "pattern" of price fluctuations over the course of the POR that "differ[ed] significantly among purchasers, regions, or periods of time". Unfortunately, this fulfills the first requirement of resorting to the alternative A-T price-comparison methodology. *See* 19 U.S.C. §1677f-1(d)(1)(B)(i).

Regarding Golden Dragon's argument that absent from the record is an explanation as to why the price differences on its contract cannot be accounted for utilizing A-A methodology as required by the targeted dumping statute, the court must disagree. If the underlying picture is one of targeted dumping, then the significance of the "effect size" of that circumstance, as analyzed using a standardized statis-

[4] Golden Dragon Reply at 2.

tical interpretive tool such as Cohen's *d*, in and of itself "explains why such differences cannot be taken into account" using A-A methodology. 19 U.S.C. §1677f-1(d)(1)(B)(ii).

The problem Golden Dragon faces, at this stage, is due to the fact that insofar as the trade laws are concerned, agreed-upon prices are always a matter of one's own choosing. In this instance, although each contractually-obligated price was indeterminate until each LME-indexed spot price contingency occurred, that circumstance does not translate to an unanticipatable, uncontrollable, or unhedgeable pricing event. The problem is rather akin to that of shifting exchange rates,[5] in that a price that is settled (determined) on the basis of an external event does not absolve an exporter of responsibility for "the date that all material terms of sale are established" with respect to the price that is thereby and thereon established. *See* 19 U.S.C. §§ 1677a & 1677b; 19 C.F.R. § §351.401(i) & 351.414.

Given precedent that precludes adjudication to the contrary, the court cannot conclude that Commerce's targeted dumping determination and its application of mixed alternative comparison methodology to analyze normal value and U.S. sales was unreasonable or not in accordance with law.

III. *Mueller's USCIT Rule 56.2 Motion*

A. Background

The trade statutes specify that a respondent's U.S. price is to be reduced by the costs, charges, expenses or duties of bringing the subject merchandise from the factory to the United States. 19 U.S.C. § 1677a(c)(2). One such movement expense is ocean freight. *See* Antidumping Manual, Ch. 7 (2009). Where the respondent does not incur ocean freight expenses from a market economy supplier, Commerce will use the best available information from market economy sources in accordance with its surrogate values methodology. *See, e.g., Freshwater Crawfish Tail Meat from the PRC*, 78 Fed. Reg. 61331 (Oct. 3, 2013) (prelim. admin. rev. results) unchanged in 79 Fed. Reg. 22947 (Apr. 25, 2014) (final admin. rev. results).

With respect to the administrative review at bar, Golden Dragon did not incur ocean freight expenses from a market economy supplier. Prelim. SV Memo (Nov. 15, 2013) at 5, PDocs 127–28. Accordingly, for

[5] *See* 19 U.S.C. §1677b-1; 19 C.F.R. §351.415; *see also*, *e.g.*, *Union Steel Mfg. Co., Ltd. v. United States*, 36 CIT ___, 837 F. Supp. 2d 1307, 1321 (2012); *USEC, Inc. v. United States*, 31 CIT 1049, 498 F. Supp. 2d 1337 (2007); *Thyssen Stahl AG v. United States*, 19 CIT 605, 610, 886 F. Supp. 23, 28 (1995); *Torrington Co. v. United States*, 17 CIT 922, 936, 832 F. Supp. 379, 390–91 (1993).

the *Preliminary Results* Commerce relied upon data that it acquired "from the Descartes Carrier Rate Retrieval Database," which is a database of ocean freight rates that Commerce has used in numerous antidumping duty administrative reviews. *Id*.; *see*, *e.g.*, *Welded Stainless Pressure Pipe From the Socialist Republic of Vietnam*, 79 Fed. Reg. 806 (Jan. 7, 2014) (prelim. determ. invest.), unchanged in 79 Fed. Reg. 31092 (May 30, 2014) (final determ. invest.) and accompanying I&D Memo.

The Federal Maritime Commission ("FMC") regulations define "tariff" as "a publication containing the actual rates, charges, classifications, rules, regulations and practices of a common carrier or a conference of common carriers" and "the term 'practices' refers to those usages, customs or modes of operation which in any way affect, determine or change the transportation rates, charges or services provided by a common carrier . . .." 46 C.F.R. §520.2. According to Mueller, the freight rates at issue are included in such tariffs, and that the FMC's regulations require all maritime common carriers to "keep open for public inspection, in automated tariff systems, tariffs showing all rates, charges, classifications, rules, and practices between all points or ports on their own routes and on any through transportation route that has been established."[6] 46 C.F.R. §520.3.

Mueller contends that Descartes is a repository of such information, and that Commerce used Descartes to download two different rate tariffs for base ocean freight from Qingdao to Los Angeles/Long Beach. Both tariffs specified a 20 foot container. The first was from "Round-The-World Logistics" for $1,650.00 filed on August 3, 2004. PDoc 127–8 at Ex. 8 at 1. This tariff specified that the commodity shipped was "hardware and hardware supplies, not otherwise specified." *Id*., at 3. The second was from "Seamodal Transport Corporation" for $2,100.00 filed on April 22, 2011. *Id*. Commerce divided those figures by the maximum weight for a 20-foot container to acquire a per pound rate. *Id*. Commerce then averaged the two rates and used the surrogate value of $0.03016 per pound for ocean freight. PDoc 127–8 at Ex. 1.

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[6] Further, according to FMC's "Automated Tariff Registration System (Form-1) User Manual (Aug. 2007), the purpose of that system is (italics added) to "facilitate[ ] the registration of *tariff publication locations* by vessel-operating ocean common carriers (VOCCs), non-vessel-operating common carriers (NVOCCs), conferences, and marine terminal operators (MTOs) as required by Section 8 of the Shipping Act of 1984. The Federal Maritime Commission (FMC) uses Form-1 to permit shippers and other members of the public to obtain reliable and useful information concerning the rates and charges that will be assessed by common carriers and conferences for their transportation services; to ensure that carrier tariff publications are accurate and accessible; to protect the public from violations by carriers; and to review and monitor the activities of controlled carriers."

Mueller states that after issuance of the *Preliminary Results* and in accordance with 19 C.F.R. § 351.408(c), it provided for the record ten different ocean freight tariffs acquired from the same Descartes website, from five different common carriers, effective on the first day and last day of the POR, and covering transportation from Qingdao, PRC, to Los Angeles/Long Beach, California, United States of America. *See* Mueller Post-Prelim. SV Submission (Dec. 11, 2013), PDoc 141. Two of these carriers are VOCCs and the other three are NVOCCs.[7] Mueller states it also provided the organization number assigned by the FMC and the "Applicable Tariff Code" for the VOCC and the NVOCC, *see id*., and that for each of the five tariff codes, it provided the complete "Commodity List" relevant to the port of departure (Qingdao) and port of destination (Los Angeles/Long Beach) for the specified shipping date. *See id.* For each of the tariffs from the five common carriers, Mueller provided printouts of the "Calculation Results" for each shipping date, which show the base freight rate as well as fees and charges such as "PEAK SEASON SURCHARGE (PSS)," "BUNKER CHARGE (BC)," and "COST RECOVERY SURCHARGE (CRS)." *See* PDoc 141 at Ex. 6.

For the *Final Results*, Commerce continued to rely on the two ocean freight tariffs from two common carriers used in the preliminary determination and it rejected Mueller's proposed tariffs. *IDM* at 7–8. Commerce found that the rates that it acquired from the Descartes database were the best available information. *Id*. First, Commerce found that although its preferred ocean freight rates were filed prior to the beginning of the period, they "contain no indication that they have expired" and therefore, "can be considered to be contemporaneous with all months of the [period of review]." *Id*. at 7. Second, Commerce found that its rates were superior to Mueller's rates because "there is no information on the record to determine whether [Mueller's] rates were obtained from a market or NME source." *Id*. Third, Commerce expressed concern about the specificity regarding the type of cargo for which Mueller's rates were applicable. *Id*. at 8.

B. Analysis

Substantial evidence supports Commerce's finding that the two ocean freight rates upon which it relied come from "market" economy sources: both offices that issued the rates were located in the United

[7] *See id*.

States,[8] which, for the time being, is presumed to be a "market" economy. *Cf*. Import Administration Policy Bulletin 03.1 (Feb. 28, 2003) ("[u]nder the U.S. antidumping law, countries receive market-economy treatment unless they have been formally designated as a NME country").

Mueller argues its submitted rates are the preferred best available information under Commerce's standard methodology for selecting among surrogate values, because Commerce's selected rates indicate they were effective on August 3, 2004 and from February 23–24, 2008, and that its submitted tariffs were effective on November 1, 2011 and October 31, 2012, or the dates corresponding with the beginning and ending dates of the period of review, and were published by the identical common carriers Commerce relied on that. *See* PDoc 141 at Ex. 1, 2, 7, and 8. Mueller argues its proposed tariffs, moreover, include all applicable charges and fees that an exporter like Golden Dragon would have incurred to bring its goods from the port of export to the United States, whereas the tariff excerpts relied upon by Commerce only contained the applicable base freight rate. Mueller argues that there should have been no contest between the potential surrogate values and that its "superior" proposed values should have been used.

Mueller's argument here focuses on contrasting the reliability of the rates chosen by Commerce to the ten tariffs it submitted. Mueller contends it demonstrated that its proffered data were from Commerce's usual market economy-surrogate value source, generated using Commerce's preferred methodology, included all associated fees and surcharges applicable in the marketplace, and were contemporaneous with the POR. In its reply brief, Mueller also argues that Commerce and Golden Dragon have "concede[d] that four of the ten ocean freight tariffs on the record are from the same two common carriers that Commerce used in the Final Results." Mueller Reply at 2, referencing Def. Resp. at 30; GD Resp. at 6; PDocs 127–28 at Ex. 8; PDoc 141. Mueller thus contends from this that the four tariffs it submitted are thus market economy sources, notwithstanding Commerce's contrary conclusion in the *Final Results*. *Id*.

The court fails to discern that Commerce's and Golden Dragon's "concession" leads to the conclusion Mueller advances. Commerce

[8] *IDM* at 7–8. *See* Prelim. SV Memo (Nov. 15, 2013) at Ex. 8, PDocs 127–28 (showing issuing office for one rate is Round-The-World Logistics (U.S.A.) Corp. located in Dallas, Texas, and issuing office for other rate is Seamodal Transport Corporation located in Hayward, California).

found that in contrast to the two ocean freight rates it selected, the quotes submitted by Mueller did not include "filing information, and specifically, the issuing office location that is the source of the rate." *IDM* at 7–8. *See* PDoc 141 at Exs. 1–10. Commerce thus maintains that it lacked sufficient information to prove that Mueller's quotes came from market economy sources, and reasonably rejected them. The record documentation of the two tariffs Commerce selected provides pages headed "Rate Detail" and "Tariff Detail" under which the "organization" and "tariff" are clearly indicated as pertaining to "ROUND-THE-WORLD LOGISTICS (U.S.A.) CORP." and "SEAMODAL TRANSPORT CORPORATION", respectively. The "Tariff Detail" pages have sections for "Parent Organization", "Tariff Information", "Filing Information" (date of filing, effective date, expiration date -- which is left blank on both tariffs -- and other matters), "Publishing Office", "Issuing Office" and "Origin Scope" (a list of countries of origin covered by the tariff).

The record documentation of the four tariffs Mueller claims as issued by the "same" common carriers, by contrast, is far different. Although they appear to derive from the Descartes database, as they bear the same appearance (logo, typeface, sectional layout, *et cetera*), they differ in that the pages are headed "Calculation Results" and "Commodity List", sections describing such matters as commodity, origin (Qingdao), destination (Long Beach), base freight, currency date, shipping date, and other matters. Mueller argues that the fact that the freight rates at issue are tariffs published by maritime common carriers in accordance with Federal Maritime Commission regulations "establishes the bona fides of their validity as market economy sources."[9] However, the only "link" on Mueller's preferred tariffs is to the identity of the organization that maintains the tariff via the tariff code,[10] and the "location" of the tariff, as maintained by the organization to which the organization code is assigned, is not necessarily the location of the issuing office of the tariff rate. In other

[9] More precisely, Mueller argues those regulations provide for all maritime common carriers to "keep open for public inspection, in automated tariff systems, tariffs showing all rates, charges, classifications, rules, and practices between all points or ports on their own routes and on any through transportation route that has been established." 46 C.F.R. § 520.3. Descartes is a publicly available repository of such information, and therefore "the fact that these tariffs come from the Federal Maritime Commission establishes the bona fides of their validity as market economy sources." Mueller Reply at 9.

[10] 46 C.F.R. §520.3(e) provides: "Location of tariffs. The Commission will publish on its website, www.fmc.gov, a list of the locations of all carrier and conference tariffs." Handwritten under the Descartes logo on Mueller's proposed tariffs are notations such as "Round the World", "Round the World Logistics", "Sea Modal", "Seamodal Transport" *et cetera*, and the court takes judicial notice of the fact that "Round-the-World Logistics (U.S.A.) Corp." and "Seamodal Transport Corporation" have been assigned FMC organization numbers "018255" and "005030", respectively.

words, it is not inconceivable that a particular tariff rate has been issued by an office located in a non-market economy country but is maintained, for purposes of tariff "location," by its parent company, thus rendering the tariff rate suspect for purposes of antidumping duty calculation, and the court cannot discern from the record whether the "issuing offices" of Round-The-World Logistics and Seamodal Transport are only located in the United States. The other six tariffs for which Mueller argues also suffer from the same lack of precision with respect to the exact identity and location of their respective issuing offices.

Whether the court might reach a different result, *de novo*, it must conclude that substantial evidence supports Commerce's conclusion, and the parties' remaining arguments on the issue therefore need not be addressed.

IV. *Conclusion*

Consistent with the foregoing, this matter must be, and hereby is, remanded for further proceedings before Commerce. Results of remand shall be due November 19, 2015. Within five business days of filing thereof, the parties shall confer and submit a joint status report governing further proceedings. **So ordered**.

Dated: August 19, 2015
New York, New York

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

Slip Op. 15–90

UNITED STATES, Plaintiff, v. SELECTA CORPORATION, LLC, D/B/A/ DICKIES MEDICAL UNIFORMS, Defendant.

Before: Timothy C. Stanceu, Chief Judge
Court No. 11–00089

[Denying plaintiff's application for a judgment by default against defendant in the amount of $51,102]

Dated: August 20, 2015

Franklin E. White, Jr., Assistant Director, and *Antonia R. Soares*, Trial Attorney, Commercial Litigation Branch, Civil Division, U.S. Department of Justice, of Washington, D.C., for plaintiff United States. With them on the brief were *Joyce R. Branda*, Acting Assistant Attorney General, and *Jeanne E. Davidson*, Director. Of counsel on the brief was *Patricia L. Makin*, Senior Attorney, Office of Associate Chief Counsel, U.S. Customs and Border Protection.

OPINION AND ORDER

Stanceu, Chief Judge:

Plaintiff United States seeks to recover a civil penalty under section 592 of the Tariff Act of 1930, as amended, 19 U.S.C. § 1592 (2006) ("section 592") from Selecta Corporation, LLC, d/b/a/ Dickies Medical Uniforms ("Selecta") following the entry of Selecta's default. Before the court is plaintiff's application for a judgment by default seeking a civil penalty of $51,102, which plaintiff submits is the interest on the amount of lawful duties, taxes, and fees of which the United States was deprived, and also seeking additional, prejudgment interest and costs. Pl.'s Mot. for Default J. 1 (Oct. 31, 2014), ECF No. 11 ("Pl.'s Mot."); App. to Pl.'s Mot. for Default J. (Oct. 31, 2014), ECF No. 12 ("Pl.'s App."). Upon review of the complaint and plaintiff's application, the court holds that plaintiff has not established its entitlement to the default judgment it seeks against Selecta. Unable to conclude from the complaint that the penalty claim has been set forth sufficiently with well-pled facts, the court is denying, without prejudice, plaintiff's application for a default judgment.

I. BACKGROUND

The following circumstances are those alleged in the complaint and addressed in plaintiff's application for a judgment by default.

In 2009, Selecta filed, and later supplemented, a prior disclosure with U.S. Customs and Border Protection ("Customs") pursuant to section 592(c)(4), 19 U.S.C. § 1592(c)(4) (2006),[1] informing Customs that Selecta incorrectly had classified and undervalued certain wearing apparel (chiefly, medical scrubs and lab coats), and made certain other errors, on 1,458 entries of merchandise occurring between April 17, 2004 and April 17, 2009 at various ports of entry. *See* Compl. ¶ 4 (Apr. 8, 2011), ECF No. 3 ("Compl."); *Decl. of Debbie M. Nichols* (Oct. 30, 2014) ("*Nichols Decl*."), Pl.'s App. Ex. 1 at Attachs. A (initial prior disclosure), B (supplemental disclosure); *Waiver of Statute of Limitations by Selecta Corp., LLC* (Apr. 21, 2009), ECF No. 13. To perfect the prior disclosure, Selecta tendered to Customs $839,694.38, an amount determined by Customs to constitute the underpayment of duties and fees on the entries. *Nichols Decl*. at Attachs. C, E, H.

On July 12, 2010, counsel for Selecta stated that the firm had ceased to represent the company and that, to the best of counsel's knowledge, "Selecta is no longer in business" though "still in good standing with the State of Texas." *Nichols Decl*. at Attach. G. On

[1] Unless otherwise noted, all statutory citations are to the 2006 edition of the United States Code.

August 27, 2010, Customs issued a pre-penalty notice to Selecta, *id.* at Attach. J, and, on October 14, 2010, after receiving no response from the company, Customs issued a notice of penalty in the amount of $51,102, which it said represented the interest calculated from the dates of liquidation of the various entries to the date Selecta filed its supplemental disclosure with payment of duties, taxes, and fees, pursuant to 19 U.S.C. § 1592(c)(4)(B). *Id.* at Attach. K.

On April 8, 2011, plaintiff commenced this action by filing a summons and complaint seeking to recover a civil penalty of $51,102. Summons, ECF. No. 1; Compl. ¶¶ 11–14. On June 24, 2011, plaintiff served the summons and complaint on Selecta's registered agent, CT Corporation. Aff. of Serv. (Aug. 2, 2011), ECF No. 6; *Nichols Decl*. at Attach. G (letter from Selecta's counsel to Customs listing CT Corporation as Selecta's agent). On August 15, 2011, CT Corporation replied that it had been unsuccessful in sending the documents to Selecta's last-known address and that its attempts to locate a new address for the company had been fruitless. Letter from CT Corp. to Customs, ECF No. 7.

Selecta failed to file any responsive documents in this action and, on September 5, 2013, plaintiff moved for default, which was entered by the Clerk of Court on the same day. Pl.'s Req. for Entry of Default, ECF No. 9; Entry of Default, ECF No. 10. On October 31, 2014, plaintiff filed its motion for a default judgment pursuant to USCIT Rule 55(b). Pl.'s Mot. 1. Selecta has not filed any papers in response.

II. DISCUSSION

Based on the facts alleged in the complaint, the court concludes that it has subject matter jurisdiction over this action according to section 201 of the Customs Courts Act of 1980, as amended, 28 U.S.C. § 1582(1) (2006). Additionally, plaintiff has obtained personal jurisdiction over defendant.[2]

In evaluating an application for judgment by default, the court accepts as true all well-pled facts in the complaint but must reach its

[2] Plaintiff served process on Selecta's duly-authorized agent and mailed Selecta copies of the summons and complaint. *See* USCIT R. 4(g)(1)(B) (permitting service of a corporation "by delivering a copy of the summons and the complaint to . . . any . . agent authorized by appointment or by law to receive service of process and–if the agent is one authorized by statute and the statute so requires–by also mailing a copy of each to the defendant"); Aff. of Serv. (Aug. 2, 2011), ECF No. 6; *Letter to Selecta from Customs Requesting Waiver* (June 13, 2011), ECF No. 12–1; Tex. Bus. Orgs. Code Ann. § 5.201 (2013) ("the registered agent is an agent of the entity on whom may be served any process, notice, or demand required or permitted by law to be served on the entity"). Because CT Corporation is an agent authorized to accept service by Texas statute, plaintiff's service on CT Corporation was proper here. *See PNS Stores, Inc. v. Rivera*, 379 S.W.3d 267, 274 (Tex. 2012) ("[S]ervice effected on a registered agent within the scope of its agency is imputed to the litigant").

own legal conclusions. *Nishimatsu Constr. Co., Ltd. v. Houston Nat'l Bank*, 515 F.2d 1200, 1206 (5th Cir. 1975) ("*Nishimatsu Constr. Co.*") (citing *Thomson v. Wooster*, 114 U.S. 104, 113 (1885) (other citations omitted)); 10A Charles Allan Wright et al., *Federal Practice and Procedure* § 2688 (3d ed. 1998). Even after an entry of default, "it remains for the court to consider whether the unchallenged facts constitute a legitimate cause of action, since a party in default does not admit mere conclusions of law." Wright, *supra*, § 2688; *see also Nishimatsu Constr. Co.*, 515 F.2d at 1206–08 (vacating a district court's entry of default judgment because the pleadings were insufficient to support the judgment). "There must be a sufficient basis in the pleadings for the judgment entered." *Nishimatsu Constr. Co.*, 515 F.2d at 1206 (footnote omitted).

Under section 592(a), it is unlawful for any person, by fraud, gross negligence, or negligence, to "enter, introduce, or attempt to enter or introduce any merchandise into the commerce of the United States" by means of documents, statements, or acts that are material and false or by material omissions. 19 U.S.C. § 1592(a)(1)(A). Here, the court considers whether the complaint sets forth well-pled facts that, when deemed to be admitted by Selecta as a result of the entry of default, are sufficient to establish the defendant's liability under section 592 for a civil penalty in the amount being sought.

Paragraph 5 of the complaint alleges that Selecta entered the merchandise on the identified entries "by means of material false statements and/or omissions" and that "[s]pecifically, inaccurate classifications and values were stated for the merchandise." Compl. ¶ 5. The paragraph alleges further that "[t]hese material false statements constituted negligent violations of 19 U.S.C. § 1592(a) because Selecta failed to exercise reasonable care and competence to ensure that the statements were correct." *Id*. The paragraph concludes by stating that "[t]he violations resulted in a loss of duties totaling $834,879.98." *Id*. Paragraph 12 of the complaint identifies the merchandise as "certain wearing apparel, consisting mostly of medical scrubs and lab coats . . . ." *Id.*¶ 12.

The allegations that the complaint directs to the question of section 592 violations are conclusory in nature, incorporating conclusions of law as well as statements of fact. The complaint lacks specific, well-pled facts sufficient to allow the court to conclude that classifications and valuations of the merchandise were in violation of section 592 and together resulted in a loss of revenue to the United States of $834,879.98, the amount on which plaintiff based its penalty claim. As an exhibit to the complaint, plaintiff filed a chart listing Selecta's entries during the relevant period with entry dates, ports of entry,

dates of liquidation, and certain other information. *See* Compl., Ex. A. Like the complaint, the chart fails to allege factual circumstances from which the court could conclude that Selecta committed violations of section 592 that stemmed from negligent misclassifications and undervaluations.[3]

III. CONCLUSION AND ORDER

The complaint fails to allege well-pled facts from which the court can conclude that plaintiff is entitled by law to a judgment by default against defendant Selecta for a civil penalty of $51,102 incurred for violations of 19 U.S.C. § 1592. Therefore, upon consideration of all papers and proceedings herein, it is hereby

ORDERED that plaintiff's application for judgment by default against defendant Selecta be, and hereby is, denied without prejudice; and it is further

ORDERED that unless plaintiff moves within sixty (60) days of the date of this Opinion and Order for leave to file an amended complaint and lodges its proposed complaint with that motion, plaintiff, upon entry of a further order, shall be required to show cause why this action should not be dismissed.

Dated: August 20, 2015
New York, New York

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

[3] In its application for default judgment, plaintiff attached as an exhibit the documentation constituting Selecta's prior disclosure. App. to Pl.'s Mot. for Default J. (Oct. 31, 2014), ECF No. 12 ("Pl.'s App."), Ex. 1, at Attachs. A (initial prior disclosure), B (supplemental disclosure). Plaintiff neither attached the prior disclosure documentation as an exhibit to the complaint nor incorporated the documentation into the complaint by reference. Even were it before the court as a part of a pleading, the prior disclosure would not necessarily cure the defects in the complaint. From the complaint, the court is vaguely informed that the loss of $834,879.98 in revenue resulted entirely from negligent misclassifications and undervaluations of the merchandise on the various entries. *See* Compl. ¶¶ 5, 12 (Apr. 8, 2011), ECF No. 3. According to the prior disclosure documentation, one of Selecta's brokers underpaid U.S. Customs and Border Protection by the amount of $123,756.28. Pl.'s App. Ex. 1, at Attach. B, at 4. The prior disclosure documentation also identifies a loss of revenue of $281,769.44 due to "ITRAC errors." *Id.* The complaint makes no mention of the broker's underpayments or the ITRAC errors and thus does not explain whether, or how, these matters affected the alleged loss of revenue to the United States.

Slip Op. 15–91

CLEARON CORP., AND OCCIDENTAL CHEMICAL CORP., Plaintiffs, v. UNITED STATES, Defendant, and ARCH CHEMICALS, INC., AND HEBEI JIHENG CHEMICAL CO., LTD., Defendant-Intervenors, and JUANCHENG KANGTAI CHEMICAL CO., LTD., Defendant-Intervenor.

Before: R. Kenton Musgrave, Senior Judge
Consol. Court No. 13–00073

[Remanding sixth (2010–2011) review of antidumping duty order on chlorinated isocyanurates from the People's Republic of China a second time.]

Dated: August 20, 2015

James R. Cannon, Jr. and *Thomas M. Beline* of Cassidy Levy Kent (USA) LLP, of Washington, DC, for the plaintiffs.

Gregory S. Menegaz, *J. Kevin Horgan*, *John J. Kenkel*, and *Alexandra H. Salzman*, DeKieffer & Horgan, of Washington, DC, for the consolidated-plaintiff and defendant-intervenor Juancheng Kangtai Chemical Co., Ltd.

Peggy A. Clarke, Law Offices of Peggy A. Clarke, of Washington, DC, for the consolidated-plaintiff Hebei Jiheng Chemical Co., Ltd. and the consolidated-plaintiff and defendant-intervenor Arch Chemical Co., Ltd.

Jane C. Dempsey, Trial Attorney, Commercial Litigation Branch, Civil Division, U.S. Department of Justice, of Washington, DC, for the defendant. On the brief were *Benjamin C. Mizer*, Principal Deputy Assistant Attorney General, *Jeanne E. Davidson*, Director, and *Patricia M. McCarthy*, Assistant Director. Of counsel on the brief was *David W. Richardson*, Senior Counsel, Office of the Chief Counsel for Trade Enforcement and Compliance, U.S. Department of Commerce, of Washington DC.

OPINION AND ORDER

Musgrave, Senior Judge:

Before the court are the *Final Results of Redetermination Pursuant to Court Remand*, *Clearon Corp. and Occidental Chemical Corp., et. al., v. United States* ("Remand" or "RR"), Court No. 13–0018, RR-PDoc 69 (Dec. 11, 2014) submitted from the defendant's International Trade Administration of the U.S. Department of Commerce ("Commerce" or "Department"). The matter covers the sixth (2010–2011) administrative review of the antidumping duty order on chlorinated isocyanurates ("chlor-isos") from the People's Republic of China ("PRC"). Familiarity with *Clearon Corp. v. United States*, 38 CIT ___, Slip Op. 14–88 (July 24, 2014) ("Opinion") and the basis of that remand is presumed.

The defendant-intervenors Arch Chemicals, Inc. and Hebei Jiheng Chemical Co., Ltd. ("Jiheng") (together "Arch") and Juancheng Kangtai Chemical Co., Ltd. ("Kangtai") argue for further remand. Plaintiffs Clearon Corp. and Occidental Chemical Corp. (together,

"Clearon") argue for sustaining the remand results. For the following reasons, remand is again necessary.

I. *Background*

Briefly summarizing: after *Chlor-Isos from the PRC*, 78 Fed. Reg. 4386 (Jan. 22, 2013) (final 2010–2011 admin. review results), PDoc 169, and accompanying issues and decision memorandum ("*IDM*"), PDoc 164 (together, "*Final Results*") were summonsed here, the case was voluntarily remanded on issues related to the determinations of surrogate factors of production ("FOPs"), namely: (1) whether certain identified labor, retirement, and employee benefit expense items among the selling, general and administrative ("SG&A") items of a financial statement, upon which Commerce relied for its financial ratios are inadvertently double-counted as a result of Commerce's recent change in policy to rely upon International Labor Organization ("ILO") Chapter 6A data for valuing labor; (2) change in methodology for calculating intra-company transportation costs; and (3) changes in the methodology employed for determining respondent's by-product offsets. Because the selection of the surrogate country was also remanded due to certain flaws in that process, consideration of the parties' further challenges to the surrogate valuation ("SV") of urea, hydrogen gas, chlorine, sodium hydroxide, and electricity was therefore deferred.

Upon remand, Commerce placed additional information on the record for comment and issued questionnaires to Arch and Kangtai requesting further information on intra-company transport of goods and on the by-product offset claims for ammonium gas and sulfuric acid.[1] During remand, Commerce again selected the Philippines as the primary surrogate country. RR at 31. Commerce states that during remand it adjusted the normal value ("NV") calculation by recalculating the transportation cost of intermediate goods between factories for Jiheng, and by recalculating the by-product offset using company specific information for Jiheng and Kangtai. Commerce also states it revised the by-product calculation made to the draft remand calculations and clarified certain sentences in its explanation of its decision not to adjust financial ratios to account for benefits included in the ILO surrogate value for labor. RR at 3. All other aspects of the Remand apparently remained unchanged.

Regarding those remand results, Kangtai continues to contest Commerce's elimination of India in the surrogate country selection pro-

[1] *See* RR at 3 (citations omitted).

cess.[2] Kangtai and Arch both argue that the labor FOP continues to double count certain indirect labor costs, and that Commerce's by-product methodology is unsupported by record evidence and is contrary to law.[3]

Clearon requests that the court accept the Remand "in its entirety."[4] The court construes this to mean Clearon is satisfied with Commerce's reconsideration of Arch's and Kangtai's by-product offsets claims and that Clearon has therefore abandoned its own claims with respect thereto. However, Clearon's other claims concerning the surrogate valuation of urea and hydrogen gas remain live, as do Arch's and Kangtai's claims regarding the surrogate valuation of chlorine, sodium hydroxide, and electricity. As discussed herein, because the court must remand again concerning Commerce's selection of surrogate values for certain FOP's and its by-product offset methodology, the primary surrogate country selection remains an open question subject to reconsideration as may be appropriate.

II. *Jurisdiction and Standard of Review*

The action was brought pursuant to Section 516A(a)(2)(B)(iii) of the Tariff Act of 1930, as amended, 19 U.S.C. §1516a(a)(2)(B)(iii). Clearon, Kangtai, and Arch have standing under 19 U.S.C. §1516a(d) and 28 U.S.C. §2631(c).

The party challenging a final administrative determination of the type at bar is burdened with showing how it is "unsupported by substantial evidence on the record" or is not "otherwise in accordance with law." 19 U.S.C. §1516a(b)(1)(B)(i). Substantial evidence means "more than a mere scintilla", it must be "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 477 (1951), citing *Consol. Edison Co. v. N.L.R.B.*, 305 U.S. 197, 229 (1938). Commerce's statutory interpretations are considered pursuant to the familiar two-step analysis set forth in *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842–43 (1984) (if "Congress has directly spoken to the precise question at issue . . ." *et cetera*).

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[2] Kangtai's Comments on Remand Results, RR-PDoc 76 (Jan. 28, 2015) at 1–23 ("Kangtai's Cmts.").

[3] Kangtai's Cmts. at 23–37; *see also* Arch's Comments on Remand Results, RR-PDoc 75 (Jan. 28, 2015) at 3–17 ("Arch's Cmts.").

[4] Clearon's Comments on Remand Results, RR-PDoc 82 (Feb. 26, 2015) at 22 ("Clearon's Cmts.").

III. *Discussion*

A. Process of Selecting the Primary Surrogate Country

The selection of a primary surrogate country was remanded because Commerce had not explained its GNI range selection process of country inclusion on its Surrogate Country List. Opinion at 34. The Remand details how Commerce arrives at its list of surrogate countries and provides historical context, particularly in the form of helpful charts and graphs showing the widening GNI gap between India and the PRC over time. Commerce's current practice involves seeking GNI ranges that are "evenly distributed around the PRC's GNI". *See* RR at 9, referencing *Dongguan Sunrise Furniture Co. Ltd. v. United States*, 38 CIT ___,____, 865 F. Supp. 2d 1216, 1238 (2012). From the annual release of the *World Bank Development Report,* Commerce looks beyond that report's "lower middle" income grouping of the PRC's GNI when considering which countries are economically comparable thereto.[5] *See id*. at 9–14. On remand, Commerce again selected the Philippines as its primary surrogate country and disregarded India not only for use as the primary surrogate country but also for valuing certain FOP's. *Id*. at 2, 31–39.

Kangtai argues the very scope and length of Commerce's "first ever" explanation of its country selection process demonstrates that Kangtai was prejudiced by the lack of explanation while the segment was ongoing, and that had Kangtai been aware of the policy considerations it would have been in a better position to research surrogate countries. It argues dropping India from the list was "sudden" because it had been the country of choice for 25 years, and that the "mere existence of a regulation, one that had not been used to change the primary surrogate in 25 years, cannot justify or render reasonable the Department's *implementation* of this regulation (GNI reliance for economic comparability) in this instance." Kangtai's Cmts. at 2, referencing Opinion at 44–45 (Kangtai's italics). Further emphasizing the point, Kangtai argues:

> The number and size of the companies offered in India versus the Philippines demonstrates this emphatically. The existence of a weekly chemical reporter in India and the non-existence, on this record, of a domestic chemicals trading market in the Phil-

[5] In particular, Commerce states that it relies on its experience and professional judgment on a range of factors when considering to add or remove countries from the list, including the surrogate value requirements for the existing products under investigation, the data quality and availability of alternative surrogate countries, economic diversity of the manufacturing sector in the alternative countries, and the degree of specificity in the import data relied on to value the FOP's. RR at 13.

> ippines demonstrates this emphatically. Procedurally, the Department has dropped India after Kangtai's POR sales were made, based on GNI data that was not available when the sales were made. This totally frustrates the compliance purpose of the statute and is not a problem that a market economy respondent would have to encounter. Accordingly, the Department's procedure was arbitrary and unreasonable.

Id. at 3. Kangtai thus continues to argue that India's data quality outweigh those of countries on the Surrogate Country List, and that Commerce has unreasonably refused to even consider India's data quality when making its primary surrogate country selection.

Commerce's response is to explain that its general rule is to select a surrogate country from its list of surrogate countries but that it also considers countries that other parties propose. It generally selects a surrogate country that is "at the same level of economic development" as the NME

> unless it is determined that none of the countries are viable options because (a) they either are not significant producers of comparable merchandise, (b) do not provide sufficient reliable sources of publicly available surrogate value (SV) data, or (c) are not suitable for use based on other reasons.

RR at 6 (internal citation omitted). Commerce only selects countries that are not at the "same level of economic development as the NME country, but still at a level of economic development comparable to the NME country" when data considerations outweigh the difference in levels of economic development.[6] India's data are not "better," Commerce maintains, because they are not from a country "at a level of economic comparability" to the PRC, noting that to be selected for the list over the other countries which are at the same level of economic comparability to the PRC, "the data quality and availability from India must outweigh its *per capita* GNI disparity with respect to the PRC". RR at 15. Commerce maintains more importantly that because the Philippines has "reliable and useable" data (that Commerce also characterizes as "quality" data), Commerce did not need to consider the Indian data's quality. RR at 35–36, 38 (internal citations ommitted).

As discussed in the Opinion, Commerce's primary reliance on per capita GNI to identify economically comparable countries was not

[6] *Id.* ; *see also* RR at 35 ("Countries outside the implied GNI range are also considered, [but] are selected *only* to the extent that the data considerations outweigh the level of economic development factor (as indicated by disparate GNIs).")(italics in original).

unreasonable and was in accordance with law. *See* Opinion at 25.[7] In the Remand, Commerce provided a reasonable explanation of how it generated the Surrogate Country List and selected the range of GNI's that qualify countries as proximate and "economically comparable" to the PRC. *See* RR at 4–19. However, Commerce's selection of the Philippines as the primary surrogate country relies heavily on its determination that the Philippine data for valuing chlorine and hydrogen gas is the "best available information"[8] on the record, and as discussed *infra*, that determination cannot be sustained at this time; therefore, the primary surrogate country selection remains an open question, to be addressed on remand as appropriate.

B. Consideration of India as Surrogate Country for Valuing FOP's

While in the Remand Commerce added India's per capita GNI to the record, provided a reasonable explanation of the methodology it applied when determining that India was "less economically comparable" than the PRC and that its GNI did not qualify it for the Surrogate Country List, Commerce did not provide the court with the data analysis it claims to undertake, or it did not adequately articulate the analysis if it did in fact undertake it, when considering India and the data therefrom should be used for valuing certain FOP's. RR at 4–17. Commerce's adherence to it's regulatory "preference" to value all FOP's from one surrogate country, in this instance the Philippines, and to completely disregard Indian data for consideration for certain FOP's was unreasonable.

It must first be pointed out that the statutory standard for Commerce valuing FOP's is not whether the surrogate data are merely "usable", as Commerce categorized the Philippine data, but whether

[7] Kangtai re-argues several points in its motion for judgment regarding the methodology Commerce applies when creating the surrogate country list that the court addressed and rejected in that opinion and which it will not again consider here. Specifically, that it was prejudiced by Commerce's "dropping India from the Surrogate Country List", that Commerce's use of GNI in determining economic comparability was unreasonable, and that the statute requires Commerce to equally weigh economic comparability and significant production of comparable merchandise. Kangtai's Cmts. at 1–23, and Kangtai's Motion for Judgment on the Agency Record, ECF No. 30 (Aug. 14, 2013) ("Kangtai's Br.") 6–11. *See Intergraph Corp. v. Intel Corp.*, 253 F.3d 695, 697 (Fed. Cir. 2001) (noting that the law of the case doctrine "generally bars retrial of issues that were previously resolved") (internal citations ommitted).

[8] *IDM* cmt. 2 at 7 ("the Department is selecting the Philippines as the surrogate country given its superior data availability"), and at 8 ("[s]ince the Department has usable information from the Philippines on the record to value all inputs, except for steam, the issues raised above [concerning "Surrogate Values if the Philippines is Not Selected as the Surrogate Country"] are moot"), and at 11 ("[t]herefore, we can find no basis to consider the Philippines GTA value for liquid chlorine to be unreliable and find no reason to consider information from a non-Philippine source").

they are the "best available". *Jiaxing Brother Fastener Co. v. United States*, 38 CIT ___, ___, 961 F. Supp. 2d 1323, 1333 (2014) ("*Jiaxing Brother*").[9] While it is reasonable for Commerce to prefer to use data from a surrogate country that is at a comparable level of economic development over one that is at a less comparable level of development, when presented with a "less economically comparable" country off the list it must still provide an analysis of how the data from the less comparable country presented does not outweigh its economic disparity. RR at 36.

In the selection of primary surrogate country, Commerce found the fact that India may have a significant chemical industry comparable to the PRC was "irrelevant" to its analysis of India's level of economic development because the point only addresses whether the country is a "significant producer" of comparable merchandise. RR at 38.[10] On the one hand, it is unreasonable for Commerce to acknowledge that the level of economic comparability and the quality of a country's data are two separate considerations, and then refuse to undertake a comparative analysis, of the type Commerce here implies it must undertake, in order to determine whether data quality outweighs the fact that a country is not on the surrogate country list. *See* RR at 6, 14–15, 35. The fact that India's data originates from a country not inside the GNI band does not implicate those data's availability or quality. On the other hand, requiring a full comparative evaluation of the data quality of a country not on the surrogate country list, as compared with the data of those that are, would be a pointless exercise if in the final analysis the non-listed country's data quality is in fact insufficient to overcome the fact that the country is not on the surrogate country list and substantial evidence of record can support the conclusion that data for another country thereon are the "best available information" for purposes of selecting surrogate values for FOP's. Commerce therefore acts not unreasonably in burdening the

[9] Commerce declaring that the Philippine data are "quality" data, on the other hand, indicates that they satisfy Commerce's five-factor test of "period-wide price averages, prices specific to the input in question, prices that are net of taxes and import duties, prices that are contemporaneous with the period of investigation or review, and [are] publicly available". Import Policy Bulletin 04.1.

[10] It also observed that "[i]f a country is a significant producer of comparable merchandise, then the economy of the surrogate country is developed enough to support an industry in the comparable merchandise." RR at 38. This is confusing. Is the point here that because Commerce finds India's GNI "not comparable" to the PRC's, India cannot, therefore, be a "significant producer" of comparable merchandise or cannot have a significant chemical industry comparable to that of the PRC, in contradiction of the roughly 25 years of prior proceedings in which India has been relied upon as an appropriate primary surrogate country or even a *secondary* surrogate country, as the record of the preliminary determination of *this* proceeding shows? Or is the point that India's economy *is* "developed enough" that its economy provides a fruitful comparison (*i.e.*, is "economically comparable") to the NME economy under consideration?

party proposing a non-listed country with demonstrating that no country on the surrogate country list provides the scope of "quality" data that it requires in order to make a primary surrogate country selection.

However, if that threshold is met, then Commerce must consider the quality of the data on the country not on the list that a party proposes. Towards that end, determining the interstice of Commerce's five-factor data quality checkbox *vis-à-vis* particular datasets is a start, but the analysis does not end there if there are other relevant qualities of the datasets that require consideration. Commerce "must consider the record as a whole, including evidence that supports as well as evidence that fairly detracts from the substantiality of the evidence", *Nucor Corp. v. United States*, 32 CIT 1380, 1384,594 F. Supp. 2d 1320, 1332 (2008) (internal quotation marks omitted), *aff'd*, 601 F.3d 1291 (Fed. Cir. 2010), as it is the facts that drive the law, not the other way around.

Commerce has steadfastly refused to address Kangtai's arguments concerning the quality of the data of record with respect to India's chemicals industry and Kangtai's conclusion that those data are far superior the Philippines' chemicals industry data, on the ground that the Philippine data satisfy Commerce's five-factor test. The court therefore deems this as an admission on Commerce's part as to the quality of the data covering India's chemicals industry. The validity of both parties' positions (Kangtai's as well as Commerce's) on the issue of resort to India as the primary or even secondary surrogate country for valuing FOP's is therefore dependant on the reasonableness of Commerce's conclusions as to the quality of each challenged element of the Philippines data. *Cf. Preliminary Results* (selecting South Africa's primary surrogate country but resorting to India as secondary surrogate for certain data).

At this point, after considering the Remand and the parties positions, the court must here conclude that Commerce's selection of the Philippines as the primary surrogate country from the Surrogate Country List has general support in the record. However, as discussed below, because the choice of the Philippines was expressed in the Remand as largely dependant upon Philippine import data for chlorine and hydrogen gas, during which Commerce ignored a previously well-articulated preference for domestic data for these types of chemicals (even including reliance upon a domestic source from a non-surrogate-list country; *see*, *e.g.*, *Preliminary Results*), and because the latter determinations have not been reasonably explained, the choice of the Philippines as the primary surrogate country[11]

[11] Or "*countries*" -- as provided by 19 U.S.C. §1677b(c)(1)(B).

remains an open question. *See* RR at 36–39.[12]

C. Surrogate Valuation of Hydrogen Gas and Chlorine

For the *Preliminary Results*, Commerce looked to its second surrogate country, India, and used the values from three and four Indian producers, respectively, of hydrogen gas and chlorine producers to value those chemicals. *See* Prelim. SV Memo, at 12–13 and Appx. III.39 & III.40, PDoc 104. In doing so, Commerce explicitly recognized the previous reviews (as well as the *Preliminary Results*) in which it had found that both hydrogen and chlorine are not only infrequently traded on an international basis, but that due to the very nature of those chemicals they face special concerns both in transporting and in packaging, which are exacerbated over longer distances, greatly adding to their costs. *See id*.[13]; *see*, *e.g.*, *Chlor-Isos from the PRC*, 76 Fed. Reg. 40689, 40695 (July 11, 2011) (prelim. admin. review), unchanged in *Chlor-Isos from the PRC*, 76 Fed. Reg. 70957 (Nov. 16, 2011) (final admin. review). For the *Final Results*, however. Commerce used GTA import data from the Philippines to value chlorine and hydrogen gas. *IDM* cmts 7 & 8, at 11–16.

Clearon and Kangtai both argue that the domestic Indian prices are better alternatives, not only because the volumes of those chemicals in the Philippines import data are small, and the prices contained therein unreliable, but because Commerce did not articulate what

[12] *Cf. also*, Kangtai's Surrogate Country Cmts., PDoc 58 (Dec. 19, 2011) (acknowledging that India is no longer on the Surrogate Country List but urging flexibility about what Commerce "will consider 'comparable' production in the countries it now does list as comparable"); Jiheng's Prelim. SV Submission, PDoc 65 (Jan. 9, 2012) (urging reliance upon data from India for valuation of steam and water consistent with *Multilayered Wood Flooring*, in which the Philippines was also selected as the primary surrogate country); Clearon's Prelim. SV Submission, PDoc 66 (Jan. 9, 2012) (arguing for use of Indian financial statements for calcium hypochlorite and stable bleaching powder values due to lack of publicly available financial statements for producers thereof in South Africa, the petitioners' preferred choice of primary surrogate country); Kangtai's Prelim. SV Submission, PDoc 70 (Jan. 9, 2012) (urging reliance upon Indian financial statements' value of chlorine notwithstanding argument that Commerce "should look to the Philippines and/or to Thailand for industries producing comparable product")

[13] The *Preliminary Results* specifically acknowledge that "chlorine gas and hydrogen gas are not frequently traded on an international basis," Prelim. SV Memo at 4, and that "due to the very nature of chlorine, it faces special concerns both in transporting and in packaging, which are exacerbated over longer distances, *greatly adding to the cost of chlorine*", *id*. at 12 (italics added); therefore, due to "these reasons, the Department continues to find that the GTA does not provide the best surrogate value for chlorine", *id*. With respect to hydrogen gas, Commerce stated that it "has previously determined that the GTA does not provide the best representative surrogate value for hydrogen because hydrogen, like chlorine, is not frequently traded on an international basis, *and incurs special transport costs over long distances*." *Id*. at 13 (italics added).

had changed about those chemicals' "nature" since the *Preliminary Results* to suddenly render import data for them reliable surrogate values. Clearon's Motion for Judgment on the Agency Record, ECF No. 31 (Aug. 15, 2013) ("Clearon's Br.") at 17–21; Kangtai's Br. at 11–27. Clearon and Kangtai also present myriad other arguments for their respective positions,[14] which the court has considered, but it will follow the path of least resistance to focus only on those points pertinent to the ultimate conclusion, to wit, that there are certain flaws in Commerce's determinations with respect to surrogate valuations of chlorine and hydrogen gas, which must therefore be remanded for further analysis, reconsideration, or explanation.

As indicated, the *IDM* does not articulate direct responses to a number of Clearon's and Kangtai's points, in particular those concerning the higher transportation and packaging costs associated with movement of those chemicals and why Commerce's expressed preference for valuing all FOPs from a single country should trump

[14] Commerce raises a litany of points in response, *interalia* : (1) the court has recognized that a small volume of imports, by itself, does not establish that the import data are aberrational, *Trust Chem Co. v. United States*, 35 CIT ___, ___, 791 F. Supp. 2d 1257, 1265–66 (2011); (2) interested parties bear the burden of creating an adequate record, *QVD Food Co. Ltd. v. United States*, 658 F.3d 1318, 1324–25 (Fed. Cir. 2011); (3) at the time of the *Preliminary Results* the record lacked Philippine production data, and Commerce accordingly could not determine whether the Philippines was a significant producer of comparable merchandise, *IDM* cmt. 7 at 11, 13; (4) after the *Preliminary Results* Commerce examined data availability for both South Africa and the Philippines to determine which country had superior data availability, *IDM* cmt. 2 at 7; (5) once it had selected the Philippines as the primary surrogate country, Commerce applied its regulatory preference to value all factors in a single country where possible and examined the record to identify Philippine data, 19 C.F.R. § 351.408(c)(2); (6) the only Philippine surrogate value on the record for chlorine was the Philippine GTA import data for chlorine, *IDM* cmt. 7 at 11–13; (7) there was no evidence on the record to value hydrogen using a source from one of the other economically comparable countries, *IDM* cmt. 8 at 14; (8) the Philippine GTA import data for hydrogen and chlorine satisfied its criteria of being product-specific, representative of a broad-market average, publicly available, contemporaneous with the period of review, and free of taxes and duties, *e.g., IDM* cmt. 7 at 12; (8) Commerce selects data from outside of the primary surrogate country only when data sources from the primary surrogate country cannot provide reliable surrogate values, *Certain Frozen Fish Fillets from the Socialist Republic of Vietnam*, 68 Fed. Reg. 37116 (June 23, 2003) (final LTFV determin.), and accompanying I&D Memo at cmt. 14; (9) because India is not on the economically comparable Surrogate Country List "any comparison to data from India is inappropriate", Defendant's Response to Plaintiff's Motions for Judgment on the Agency Record, ECF No. 49 (Feb. 2, 2014) ("Def's Resp.") at 32 (citation omitted); (10) using data from a country that is not on the list of economically comparable countries could result in distortions in Commerce's calculations, *Clearon Corp. v. United States*, 37 CIT ___, ___, Slip Op. 13–22 (Feb. 20, 2013) at 12; (11) the record contained no data demonstrating that chlorine and hydrogen gas are rarely traded internationally because the parties failed to place price data on the record from either the domestic industries therefor or from other economically comparable countries, and "Commerce cannot make a finding that Philippine GTA import prices vary significantly when compared to other GTA import data without this information", *See* Def's Resp. at 33.

its other (presumably co-equal) preference for using domestic prices over import prices especially where these chemicals are concerned. Commerce's articulation in the *IDM* is essentially that it finds that the Philippine GTA import data for those chemicals are reliable because theyconstitute "commercial quantities" and their prices have not been shown to be aberrant or distorted.[15] Rather than abide by its previous statements concerning the "nature" of hydrogen gas and chlorine, Commerce also shifts the burden onto Clearon and Kangtai to provide proof for the record thereof. Hence, whether substantial evidence of record moots the points Clearon and Kangtai raise, thereby rendering Commerce's improper burden-shifting[16] harmless error, depends upon the validity of Commerce's ultimate conclusion.

As a "preliminary" matter, Kangtai disagrees with Commerce's implication that Commerce was unable to consider the Philippines import data for the *Preliminary Results* at the time thereof. Kangtai contends that import data for chlorine pertaining to South Africa and the Philippines were on the record before the *Preliminary Results*, and that nothing in the record has changed since those results that would cause Commerce to select Philippine import data to value chlorine. Kangtai's Br. at 15–16. The point is somewhat at odds with Kangtai's overall contention. Commerce responds that Kangtai's point ignores the fact that at the time of the Preliminary Results, the record lacked Philippine production data, and that Commerce accordingly could not determine whether the Philippines was a significant producer of comparable merchandise, and therefore whether it could use Philippine data for surrogate values. Def's Resp. at 23, referencing *IDM* cmt. 7 at 12–13. But that does not appear to be the case, as Clearon also makes the point that Mabhuay Vinyl Corporation ("MVC"), upon whose financial statements Commerce determined to rely, "was a major producer of chlorine in the Philippines", Clearon's 56.2 Response Brief, ECF No. 47 (Feb. 24, 2014)("Clearon's Resp.") at

[15] Commerce, supported by Clearon (thus undercutting its own argument with respect to hydrogen gas), makes the point that the record of this review does not indicate that the cost of shipping chlorine is so burdensome that it is not a "frequently" traded international good, and that Kangtai identifies no record evidence indicating that the containers used to store chlorine domestically could not be used to ship chlorine internationally, such that those "special . . . concerns" of transport and packaging exist regardless of whether those chemicals are moved domestically or internationally. Whether that was rather Commerce's burden -- to explain in the *Final Results* why it was reversing its precedent on the "nature" of chlorine and hydrogen gas this *post hoc* rationalization here will not carry the day. *SEC v. Chenery Corp*., 332 U.S. 194, 196 (1947) (agency action is to be upheld, if at all, only on the grounds articulated by the agency itself).

[16] Final findings in prior reviews become the law of the case and "agency action is arbitrary when the agency offers insufficient reasons for treating similar situations differently". *See Dongbu Steel Co., Ltd. v. United States*, 635 F.3d 1363, 1371 (Fed. Cir. 2011).

32, referencing Jiheng Final SV Submission, PDoc 122 (Sep. 5, 2012), Att. 1 at 14, and that MVC's 2010 financial statement was of record at the time of the *Preliminary Results*. *See also* Jiheng's Prelim. SV Submission at Tab 4. Arguably, therefore, there were at least sufficient data of record at the time of the preliminary determination to have determined if the Philippines was a "significant producer" of comparable merchandise, just as Commerce did when "conceding" (according to Kangtai) that India was a significant producer of comparable merchandise and selecting the Indian data for chlorine at the time of the *Preliminary Results*. Kangtai's Br. at 16. Be that as it may, "Preliminary Results are just that -- preliminary", and parties may "not presume Commerce would not adopt a different approach in determining the Final Results." *Changshan Peer Bearing Co., Ltd. v. United States*, 38 CIT ___, ___, 953 F. Supp. 2d 1354, 1363 (2014) (italics removed) ("*Changshan Peer*").

All parties acknowledge that there is some degree of international trade in chlorine and hydrogen gas. The issues appear to be (1) whether substantial evidence of record supports finding that the import data represent "commercial quantities" and (2) whether the import prices can be concluded non-aberrant. As to these questions, the court requested further briefing on what constitutes "commercial quantities" and the standard for establishing that an import statistic for a particular input represents or does not represent a "commercial quantity." *See* Supplemental Briefing Request, ECF No. 89 (May 8, 2015).

Clearon responded that whether a quantity is a "commercial quantity" depends upon the product itself and the manner in which it is traded in the market; thus a commercial quantity of a gas might be an ISO tank, a 100-kg pressurized cylinder, or a container holding a large number of smaller volume cylinders.[17] Kangtai responded similarly, stating that its understanding of the agency's practice is that the definition of a commercial quantity is "contextual and somewhat flexible." Kangtai also argued that at a minimum the term "must be

[17] Clearon's Resp. to Court Questions at 8–9, referencing *Ferrosilicon from Russia and Venezuela*, Inv. No. 731-TA-1224–1225 (Preliminary), USITC Pub. 4426 (Sep. 2003) (ferrosilicon shipped in super sacks, pallet boxes, drums, and 25 and 50 pound bags); *Certain Stilbenic Optical Brightening Agents from [the PRC] and Taiwan*, Inv. Nos. 731-TA-1186–1187 (Final), USITC Pub. 4322 (May 2012) (aqueous solutions shipped in bulk by tank truck or rail cars or in non-bulk by drums or intermediate bulk containers; powder shipped in bulk bags); *Certain Potassium Phosphate Salts from [the PRC]*, Inv. Nos. 701-TA-473 and 731-TA-1173 (Final), USITC Pub. 4171 (July 2010) (sales to distributors typically made in truckloads).

understood and interpreted in the context of the quantities previously considered by the agency itself in the previous review segments of this very order."[18]

Commerce's response to the court's questions indicated that it "generally" compares the total quantity of the input imported by the primary surrogate country against the total quantities for the same input imported by other potential surrogate countries on the surrogate country list.[19] Arch, however, provided references to administrative comparisons of an imported quantity to the quantity of the domestically produced product in the surrogate country under consideration.[20]

As indicated below, it appears Commerce does both, which also appears to be appropriate.[21] On that note, however, Commerce here maintains that "[t]he appropriate comparison for the prices represented in the Philippine GTA import data are import prices from other countries on the comparable countries list, or prices from Philippine domestic companies, none of which are on the record". Def's Resp. at 27. At this point, the court fails to understand why that is

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[18] Kangtai's Resp. to Court Questions at 5–6.

[19] Def's Resp. to Court Questions at 8.

[20] Arch's Resp. to Court Questions at 11, referencing *Certain Seamless Carbon Alloy Steel Standard, Line, and Pressure Pipe From the PRC*, 75 Fed. Reg. 57449 (Sep. 9, 2010) (final LTFV determ., *inter alia*) and accompanying I&D Memo at cmt. 8 (comparing imported quantity to quantity of domestically produced product); *Certain Steel Threaded Rod From the PRC*, 74 Fed. Reg. 8907 (Feb. 27, 2009) (final LTFV determ.) and accompanying I&D Memo at cmt. 3 ("the Department finds that there is no record evidence to indicate that any of the reported values are aberrant or unrepresentative of commercial quantities"); *Lightweight Thermal Paper From the PRC*, 73 Fed. Reg. 57329 (Oct. 2, 2008) (final LTFV determ.) and accompanying I&D Memo at cmt. 10 (addressing a commercial quantity challenge by stating that the challenged surrogate value was not aberrational and represented the best information available).

[21] Full analysis of all data of record, *e.g.*, cross-country comparisons of import-with-import, import-with-domestic, domestic-with-domestic, is to be encouraged to the extent it paints the fullest picture of whether particular data are appropriate for purposes of surrogate valuation and produces the greatest accuracy in the attempt to reflect a surrogate's commercial appropriateness to a respondent's actual production experience. *Cf.*, *e.g.*, *Fuwei Films (Shandong) Co., Ltd. v. United States*, 36 CIT ___, ___, 837 F. Supp. 2d 1347, 1355 (2012) (noting Commerce's reason for rejecting import statistics in that case, to wit, that they "contained an insignificant quantity of imports not representative of the DuPont Group's PET chip purchase volume or consumption experience"); *Freshwater Crawfish Tail Meat From the PRC*, 75 Fed. Reg. 79337 (Dec. 20, 2010) (final rev. and new shipper results) and accompanying I&D Memo at cmt. 3 ("the Spanish import prices may or may not, arguably, constitute information that is directly representative of the production experience of the respondents in these reviews"); *Circular Welded Austenitic Stainless Pressure Pipe from the PRC*, 73 Fed. Reg. 51788 (Sep. 5, 2008) (prelim. LTFV determ.) and accompanying I & D Memo at "Selection of Surrogate Country" ("because India better represents the experience of producers of subject merchandise and provides better financial data[,] we have selected India as the surrogate country").

"appropriate" or why the prices represented in the Philippine GTA import data cannot be compared with domestic price data from a country (or countries) not on the Surrogate Country List, when the comparison would be at least for the purpose of showing those prices -- for that one FOP -- in relief, *e.g.*, through a August 17, 2015 comparison of import price data with Indian domestic price data. *See*, *e.g.*, *Jiaxing Brother*, *supra,* 38 CIT at ___, 961 F. Supp. 2d at 1332–35 (significantly lower domestic Indian price as compared to import price and fluctuation in the Indian import volumes and prices revealed comparable fluctuation in the Thai import volumes and prices, implying that the "only reasonable inference one could draw from the administrative record is that the Thai import values are similarly affected and thus do not reflect domestic Thai HCL prices"). *Cf. Blue Field (Sichuan) Food Indus. Co., Ltd. v. United States*, 37 CIT ___, ___, 949 F. Supp. 2d 1311, 1317 (2013) (discussing use of benchmark data, which "need not come from an economy comparable to the foreign producer's") (citation omitted) *with Hebei Metals & Minerals Imp. & Exp. Corp. v. United States*, 29 CIT 288, 299–300, 366 F. Supp. 2d 1264, 1273–74 (2005) ("[D]omestic price is preferred for the calculation of surrogate values by prior practice, policy, and logic. All else being equal, tax-and duty-free domestic data is clearly preferable over imports data"); & *Yantai Oriental Juice Co. v United States*, 26 CIT 605, 617 (2002) (rejecting more contemporaneous import data because the Department failed to explain why the industry would purchase more expensive imported coal over domestic coal); & *Rhodia, Inc. v. United States*, 25 CIT 1278, 1287, 185 F. Supp. 2d 1343, 1352 (2001) ("*Rhodia*") ("Commerce has a stated preference for the use of the domestic price over the import price, all else being equal"). Explanation from Commerce would therefore assist, in accordance with the following.

The entirety of Commerce's support for finding that the Philippines data represent internationally traded commercial quantities for hydrogen and chlorine rests on its decision in *Glycine from the PRC,* 77 Fed. Reg. 64100 (Oct. 18, 2012) (final rev. results) ("*Glycine from PRC*"). *IDM* cmt. 7 at 10–12, cmt. 8 at 13–14. *See Glycine from PRC*, I&D Memo cmt. 1 at 3–9. Issued subsequent to the *Preliminary Results*, in *Glycine from PRC* Commerce selected Indonesian GTA import data for chlorine, claiming that they represent commercially significant quantities.[22] Commerce emphasizes here that the Philip-

[22] *See Glycine from PRC*, accompanying I & D Memo cmt. 1 at 6–9. Specifically therein, Commerce determined that Indonesian GTA import prices for chlorine were not aberrational because Indonesia's average unit value was within the range of values of imports from countries on the economically comparable list and because Indonesia had the highest

pine GTA import data show over 1,000 metric tons of chlorine imported into the Philippines, that the quantity of imports in this review is higher than imports in the previous reviews, *see* Kangtai's Admin. Rebuttal Br., PDoc 159 (Dec. 10, 2012) at 16, and that since *Glycine from the PRC* determined 2,000 MT of chlorine to be a commercially representative quantity, the 1,000-plus MTs of chlorine imports into the Philippines cannot be dismissed as "commercially insignificant." Def. Resp. at 26.

On the issue of the surrogate valuation of chlorine, *Glycine from the PRC* is essentially *ipse dixit*, and Commerce here neglects to mention that the issue is among those of that determination that are under appeal. *See generally, Baoding Mantong Fine Chemistry Co., Ltd. v. United States*, Court No. 12–00362; *see also id*., ECF No. 30, Motion for Judgment (July 22, 2013) at 20–23. The court will therefore accord *Glycine from the PRC* only a *Skidmore* level of deference at this time. *See Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944) ("power to persuade, if lacking power to control").

Kangtai also stresses that Commerce "had consistently rejected the use of imported chlorine values for two reasons[ ], one of [which] was that 'chlorine is not frequently traded on an international basis'", a finding on a record that contained imports into a potential surrogate country that exceeded 2,000 MT, in stark contrast to this record of only 1,000 MT of chlorine imported into the Philippines being found commercially significant. Kangtai's Resp. to Court Questions at 5–6, referencing *AR09–10 Chlor-Isos* Prelim. SV Memo at 12 & *id*. at Att. XXXII(a). Kangtai argues that the frequency[23] of imports into the Philippines does not equate to commercial amounts thereof, because Commerce had to aggregate an entire year's volume to reach 1,000 MT and the actual volumes underlying the transactions are far smaller.

volume of chlorine among the countries on the list. *Id.* at 6–7. Commerce therein stated that in previous reviews for glycine it had rejected import prices because the import volume of chlorine was just one metric ton, and because the import volume for Indonesia during the relevant review period exceeded 2,000 metric tons, Commerce determined that the Indonesian GTA import data "show[ed] that liquid chlorine is shipped frequently on an international basis and in substantial commercial quantities, thus undermining the notion that high transportation costs are prohibitive of a robust international trade in chlorine." *Id*. at 9.

[23] The court understands "frequent" "frequently" and "frequency", in the sense used by the parties, to refer to the number of transactions in a given period. In that sense, "frequent" produces a greater number of data points during a specific period, thus imparting breadth to the average, but that does not, in itself, indicate anything with respect to the prices underlying the transactions. On the other hand, given a total known volume, then the higher the frequency (*i.e.*, number of transactions), the lower the average volume.

Commerce, however, points out that the record at bar contains comparable GTA import data, albeit pointing to the only other country on the list of economically-comparable countries with GTA import data for chlorine -- South Africa (*see* Clearon's Prelim. SV Submission at Ex. 23), and when Commerce compared the 4.6 MT import volume for South Africa against the 1,062.3 MT import volume for the Philippines, Commerce found that the import volume for the Philippines exceeded those of the other import data on the record pertaining to a country on the Surrogate Country List (*i.e.*, "economically comparable"), and therefore, as in *Glycine from the PRC*, Commerce determined that the Philippine imports represented a significant commercial quantity during the period of review.[24] *See* Def's Resp. at 25, referencing *IDM* cmt. 7 at 14; Final SV Memo, PDoc 167 (Jan. 18, 2013) at Appx. III.39.

In other words, as Kangtai argues, Commerce is simply saying that because a particular quantity of chlorine was imported into the Philippines, the import data therefor was *per se* superior, *See* Kangtai's Br. at 16. Such a response, of course, ignores the data for India of record. Kangtai also emphasizes that in contrast to *Glycine from the PRC*, in the prior 2009–2010 review of chlor-isos ("*AR09–10 Chlor-Isos*"), Commerce rejected GTA import data for chlorine representing approximately 2,000 MT, finding that chlorine was not only not frequently traded into India, but not frequently traded into *any country* on an international basis. Kangtai's Reply at 15 (Kangtai's italics), referencing *AR09–10 Chlor-Isos* Prelim. SV Memo at 12 & at Att. XXXII(a).

Responding, Commerce implies that it "only" rejected Indian GTA import data in *AR09–10 Chlor-Isos* because of the "wide range of import volumes" reported in the Indian GTA import data compared to other economically comparable countries. Def's Resp. at 26–27 (citation omitted). That is inaccurate.[25] The response leads to discussion of the second issue noted above.

As to that issue, Commerce states that it found nothing of record concerning the domestic prices in the Philippines that could be compared to the Philippine GTA data. The only substantive consideration

[24] This also appears to have largely informed Commerce's decision to no longer rely on South Africa as the primary surrogate country.

[25] The *IDM* itself explains that the decision "was *partly* based on the wide range of import volumes reported in the Indian GTA data as compared to other potential surrogate countries, and *partly* attributed to the various means and costs associated with transporting chlorine over long distances", *IDM* cmt. 7 at 13 -- but, as above mentioned, if in fact the amount imported into the Philippines during the POR at bar can be concluded representative of a price that a producer would pay for the inputs, then that fact would moot those special cost concerns associated with those inputs.

of price in the *IDM* is the statement where Commerce found "that record evidence does not support a finding that the average unit value from any of the other countries, when compared with that of the Philippines, either is more specific to the input or demonstrates that the value from the Philippines is aberrational." *IDM* cmt. 7 at 12. This is a weak comparison for that inference. As Commerce itself points out, there was only *one* other country for that comparison -South Africa -- which had relatively minuscule imports of chlorine that Commerce *itself* rejected as appropriate for surrogate valuation purposes in the *Preliminary Results*, and there is no indication in the *IDM* of what South Africa's average import unit value for chlorine is for the purpose of that comparison. Commerce's statement, in other words, exists in a vacuum as far as the reader is concerned.

In any event, averages mask variance, and Kangtai pointed out that the average unit value of chlorine imports into the Philippines for the review at bar ranged from 3.4 Philippine pesos ("PhP") to 134 PhP -- an extraordinarily wide range for a purported chemical commodity. The court agrees that the *IDM*'s reasoning for finding the average unit value of the Philippines GTA data reliable as a surrogate for the chlorine input is undercut by a lack of consideration of the apparent extraordinarily wide range of Philippine import values in light of the fact that Commerce used such a variation to explain why, in part, it was opting for Indian domestic data in the prior review, therefore requiring remand. *Cf. Trust Chem, supra*, 35 CIT at ___, 791 F. Supp. 2d at 1264–65 (aberrancy is demonstrated through juxtaposition, *i.e.*, "*relative*", of data) (italics in original).

Commerce's ultimate conclusion, essentially, is that there were in fact sufficient commercial quantities of chlorine and hydrogen gas imported into the Philippines that enabled it to adhere to its "preference" for valuing from a single surrogate country "where possible." All things are "possible," but that does not make their realization reasonable. Commerce argues its preference does not "require [it] to use domestic price in all circumstances," Def's Resp. at 23, quoting *Rhodia*, *supra*, 25 CIT at 1287, 185 F. Supp. 2d at 1352 (this court's bracketing; italics omitted), and that Clearon and Kangtai did not urge Commerce to use domestic data instead of import data from countries on the economically comparable list, but rather urged Commerce to use domestic data from a country no longer on the Surrogate Country List, rather than import prices from the primary surrogate country. That in no way imparts anything of relevance to the reader concerning the quality of the Indian domestic data versus the quality of the GTA import data of record, and Commerce's only apparent redoubt, once again, is that Clearon's and Kangtai's argument is

"contrary" to its regulatory preference. *Id*. at 23 and 49, referencing Kangtai's Br. at 12–13; and *cf.* Clearon's Br. at 13 (domestic prices are preferred "all else being equal").

Commerce is required to use the best information available in choosing surrogate values. *E.g., Blue Field, supra*, 37 CIT at ___, 949 F. Supp. 2d at 1317, 1326, citing 19 U.S.C. §1677b(c)(1). The relevant regulation, 19 C.F.R. §351.408(c)(2), expresses leeway in providing that Commerce "*normally* will value all factors in a single surrogate country" (italics added). Commerce's response contradicts its own position in the *Preliminary Results*, where it relied on data from India --a country not on the Surrogate Country List -- as its "second" surrogate country to value chlorine. Prelim. SV Memo at 4. For that reason, Commerce's stance in the *Final Results* -- that not only is reliance upon Indian data improper but even reference thereto (let alone comparison therewith) improper, even for the purpose of enlightening as to what is the best surrogate value for a specific individual FOP (*i.e.*, because "India is not on the Surrogate Country List") -- rings hollow, even if it is the case that "Preliminary Results are just that -- preliminary". *Changshan Peer*, *supra*.

Clearon and Kangtai maintain it is unreasonable for Commerce to consider import data for hydrogen gas and chlorine as "reasonable" surrogate values in part due to the "very small" quantities represented by the import data. Kangtai in particular argues that the import quantities represented by the Philippine GTA import data were small as compared to MVC's production, the only apparent domestic producer of chlorine in the Philippines. Kangtai's Br. at 20. For this comparison, Kangtai relies on the fact that MVC reported that the company produced 5,000 MT of chlorine in 2010, representing approximately 60% of the purported 8,000 MT chlorine market in the Philippines. Kangtai's Admin. Rebuttal Br. at 19.

Commerce, however, here points out that the stockholder's meeting minutes from MVC's financial statement indicate that import prices for chlorine are "competitive" with prices for domestically produced chlorine, albeit at the time of the international financial crisis,[26] to wit:

> MVC remains to be a regular supplier of Manila Water and Maynilad, which are the main market[s] for chlorine in the

[26] Kangtai also interprets a statement from MVC's financial statements as indicating that it does not export chlorine because the export of chlorine is cost prohibitive. *See* Kangtai's Br. at 19. Commerce points out that the precise statement therefrom is that MVC "is not engaged in export sales," but MVC does not indicate that this is due to the expense of exporting chlorine. *See* Jiheng Resubmission of SV for FOP, PDoc 118 (Sep. 5, 2012), at Att. 1, MVC SEC Form 20-IS at 14. The record thus does not support the extent of Kangtai's construal.

> Philippines. However, both companies had signified their preference to use imported material for economic reasons. Apparently, they are able to procure the imported material at prices lower than what MVC can offer.

See Clearon's Final SV Submission, PDoc 128 (Sep. 5, 2012), Ex. 15 at Annex C at 3 of 9. In other words, Commerce argues, the cost of importing chlorine at the time was not so high as to not allow importers of chlorine to compete with domestic production; therefore, Commerce argues, Kangtai's argument that the price of chlorine reflected in the Philippine GTA import data are significantly higher than domestic prices because of transportation concerns is unsupported by the record.

The *IDM* did not, however, advance the foregoing heresay as a reasoned part of the analysis. If such statements were to be used, then in any event they need to be considered in the context of any record evidence addressing and MVC management's explanation of the state of the Philippines economy as a whole, including the impact of the international financial crisis and Thai plant disruptions, whether there were other producers of chlorine in the Philippines or whether MVC was able to command monopolistic pricing, whether MVC is an efficient producer of chlorine, *et cetera*, because the meaning of "economic reasons" and "imported material" are not immediately apparent, nor is it entirely clear whether Manila Water and Maynilad's "imported material" source(s), assuming for the sake of argument the truth of MVC management's statement, is or are from a market economy source or privately transacted.

All in all, the issue of selecting the best surrogate value for chlorine requires remand and reconsideration, as the *IDM*'s rationale does not reflect a full consideration of the parties' arguments, it instead reflects inconsistent logic as compared with Commerce's treatment of the chlorine surrogate value in the *Preliminary Results* and prior reviews, and it does not approximate a surrogate country with comparable production or Kangtai's actual production experience. *Cf.* note 21, *supra*. Whether other data of record might be more suitable for that purpose, no opinion is here offered.[27]

[27] The court notes in passing that Kangtai also claims that the GTA import price for chlorine makes no commercial sense because it is valued at approximately six times the value of the sodium salt, the input consumed to produce chlorine. *See* Kangtai's Br. at 25–27. The court finds little merit in the argument, but notes that Commerce's apparent nominalization of all off-shoots of production as "by-products" (or so it would seem) is unnecessarily obfuscating. *See infra*. Commerce succinctly stated that the value of a "by-product is the value it can obtain in the market", *IDM* cmt. 7 at 14, which is true, but it is unclear whether the price

D. Surrogate Valuation of Urea

Clearon argues the value selected for the urea FOP for the *Final Results*, based on GTA import data under the relevant Harmonized Tariff Schedule ("HTS") heading, also "violated the well established preference for published domestic price data", all other things being equal,[28] and that publicly available, POR-contemporaneous, and reliable domestic prices from the Philippines' Bureau of Agricultural Statistics were available on the record. Clearon's Br. at 11–16; Clearon's Reply at 2–6.

Commerce stated in the *Final Results* that it was unsure what the BAS data actually represent. Citing to a submission to the record from Arch, the *Final Results* state "there is record evidence that urea is not produced in the Philippines." *IDM* cmt. 5 at 10 (citation omitted). Commerce therefore opted for the Philippines' GTA data as the best available data. However, since the record shows that urea is in fact produced domestically in the Philippines, as the defendant concedes,[29] and since this contrasts with the apparent reason Commerce gave for selecting the Philippines' GTA data, the selection of the surrogate value for this FOP must be remanded for reconsideration notwithstanding the defendant's characterization that "the underlying concern of the data is that the price of urea in domestic Philippine market is not really representative of the domestic price of urea because domestic production had dropped significantly over time and imports comprised 92 percent of Philippine demand." Def's Resp. at 49. *See Motor Vehicle Mfrs. Ass'n v. State Farm*, 463 U.S. 29, 50 (1983) ("an agency's action must be upheld, if at all, on the basis articulated by the agency itself").

E. Surrogate Valuation of Sodium Hydroxide

For the *Final Results*, Commerce selected Philippine import data collected by the GTA for the HTS number for sodium hydroxide to value "sodium hydroxide."[30] Final SV Memo at 6. Kangtai argues that

therefor is skewed by the above concerns. At any rate, insofar as Kangtai's arguments are concerned, the surrogate value for chlorine includes values of the additional inputs and processing costs and is not analogous to the products in *Paslode Division* or *Wood Flooring from PRC*, and Kangtai cites to no evidence of record showing that chlorine is not a value-added product as a result of the processes that produce it.

[28] *See, e.g., Ferrovanadium and Nitrided Vanadium from the Russian Federation*, 62 Fed. Reg. 65656, 65661 (Dec. 15, 1997) (final rev. results) (Commerce has "articulated a preference for a *surrogate country's* domestic prices over import values") (italics added).

[29] *See* Def's Br. at 49 ("the evidence cited shows there is production [of urea] in the Philippines").

[30] The parties sometimes refer to sodium hydroxide (NaOH) as lye or caustic soda. The court notes that the common names would also cover potassium hydroxide (KOH).

the record reflects that it consumed sodium hydroxide at a concentration of 32 percent, which is lower than the 50 percent concentration produced commercially and reflected in the GTA Harmonized Tariff Schedule ("HTS") data and thus, Commerce should have made a downward adjustment to the surrogate value for sodium hydroxide in accordance with *Synthetic Indigo*.[31] *See* Kangtai's Br. at 27–31.

Commerce declined, explaining that the record contains information that sodium hydroxide is commercially traded at different levels of concentration, not just 50 percent as asserted by Kangtai, and there is no information on the record regarding the concentration level reflected in the Philippine GTA import data for sodium hydroxide. *IDM* cmt. 18 at 26–27. Clearon adds that the evidence submitted by it established that there was no correlation between prices for 100% sodium hydroxide flakes (HTS 2815.11) and liquid sodium hydroxide (HTS 2815.12). Clearon's Resp. at 37 (citation omitted).

Kangtai submitted Philippine GTA import data before the *Preliminary Results* and there was apparently only one source of Philippine surrogate value data on the record for sodium hydroxide. *See* Kangtai's Prelim. SV Submission at Ex. SV-13. In the *Final Results*, Commerce selected contemporaneous Philippines' GTA import data under the HTS number for sodium hydroxide to value sodium hydroxide. Final SV Memo at 6.

Kangtai argues that it presented in full that as a general matter of international commerce sodium hydroxide is normally traded at a 50% concentration, and that, based on the typical concentration level for sodium hydroxide, "it is unreasonable to speculate that imports are made at concentrations other than the standard commercial concentration." Kangtai's Br. at 29. Based on this assumption, Kangtai argues that the surrogate value for sodium hydroxide should be adjusted downward from 50 percent concentration to 32 percent concentration to account for Kangtai's consumption of sodium hydroxide at the 32 percent concentration. *Id*. at 29–30.

Commerce responds that although the record indeed contains evidence that sodium hydroxide is sold at a 32 percent concentration level,[32] Kangtai cites to no evidence that the Philippines' GTA import data in fact reflect prices for sodium hydroxide at only the 50 percent concentration level. Kangtai's claim that Commerce unreasonably speculated that imports are made at concentrations other than the

[31] *See Synthetic Indigo from the PRC*, 68 Fed. Reg. 53711 (Sep. 12, 2003) (final rev. results) ("*Synthetic Indigo*") and accompanying I&D Memo at cmt. 5, referencing *Saccharin from the PRC*, 68 Fed. Reg. 27530 (May 20, 2003) (final LTFV determination) ("*Saccharin*") and accompanying I&D Memo at 2.

[32] *See* Kangtai's Section D Questionnaire Resp., Nov. 30, 2011, at Ex. D-2.

standard commercial concentration is undermined by Kangtai's concession that it "purchases and consumes [sodium hydroxide] at a lower 32% concentration." Kangtai's Br. at 27–28. More importantly, regardless of whether 50 percent concentration is the typical concentration level for commercially-traded sodium hydroxide, Kangtai presented no evidence demonstrating that the Philippines' GTA import data actually reflect prices for sodium hydroxide at 50 percent.[33] *See IDM* cmt. 18 at 26–27. Absent any positive evidence on the record establishing the concentration level of the Philippines' GTA import data, any adjustment made by Commerce to the surrogate value would have been arbitrary. And regarding *Synthetic Indigo*, Commerce contends Kangtai's argument ignores the fact that therein Commerce had been able to determine that the surrogate value data source in question (the "Monthly Statistics of the Foreign Trade of India") represented prices for chemicals at commercially traded concentration levels, whereas there is no such information regarding the Philippines' GTA import data on this record.

Kangtai does not persuade that Commerce's surrogate valuation of sodium hydroxide was unsupported by substantial evidence or not in accordance with law, although judgment thereon will need to abide reconsideration of the selection of primary surrogate country, which may necessarily result in altering the surrogate valuation of this chemical.

F. Surrogate Valuation of Electricity

For the *Final Determination*'s surrogate valuation of electricity in the Philippines, Commerce analyzed *Camarines Sur* rate data and Manila Electric Company ("Meralco") rate data pursuant to the usual factors of public availability, broad market average, product specificity, contemporaneity, and freedom from taxes and duties.[34] Commerce selected the *Camarines Sur* electricity rate data as the surrogate value for the electricityFOP because the "electricityrate matches the factor rate in kilowatt hours for industrial users, is publicly available from the primary surrogate country, represents electricity rates from two cities in the Philippines, does not appear to include taxes or duties, and does not suffer from the unknown variability factors of the

[33] Commerce further argues that in a marketplace where sodium hydroxide is sold at various concentration levels, Kangtai is requesting a downward adjustment from 50 percent to 32 percent when the record simply does not establish that the starting point of the downward adjustment is 50 percent, and the public materials that Kangtai placed on the record do not suggest that the Philippines' GTA import data actually reflect prices for sodium hydroxide at 50 percent. Def's Resp. at 35, referencing Kangtai's Br. at 27–28.

[34] *See, e.g., See Certain Polyester Staple Fiber From the PRC*, 75 Fed. Reg. 1336 (Jan. 11. 2010) (final rev. results), and accompanying I&D Memo at cmt. 1("*Certain Polyester Staple Fiber*").

MERALCO rate". *IDM* cmt. 10 at 18–19.

Kangtai and Arch argue that the Meralco data set is better than the *Camarines Sur* data. Kangtai's Br. at 40–42; Arch's Motion for Judgment on the Agency Record, ECF No. 27 (Aug. 15, 2013) ("Arch Br") at 15–21. Commerce responds that all the plaintiffs are asking this court to do is re-weigh evidence, while referring to non-record material and administrative determinations that do not support their arguments. Def's Resp. at 36–46.

1. Relevant Facts

There are only two Philippine surrogate values on the record. One is the *Camarines Sur* electricity rates in kilowatts hours from the "2009 Doing Business in Camarines a Sur" report submitted by Kangtai. Kangtai's Prelim. SV Submission at Exs. SV-15 & SV-16b. The *Camarines Sur* data lists industrial electricity rates (with demand) for two cities in the Philippines, Naga and Iriga. *Id*. at SV-16b.

The other Philippine electricity rate data, the Meralco data, were submitted by Jiheng. Jiheng's Prelim. SV Submission at Tab 5. The Meralco data consist of a single page chart for the month of December 2010. *Id*. In the left hand column of the chart there are eight different main categories of users each with several subparts, 39 in all. *Id*. The remaining 21 columns list various charges, adjustments, discounts, and subsidies some in kilowatt hours others in kilowatts. *Id*. The notes to the chart indicate that certain charges vary on a monthly basis. *Id*. Commerce contends that neither Arch nor Kangtai provided any additional argument, explanation, or evidence as to within which of the 39 categories of users their production would fall into or how to use 21 columns of charges, adjustments, discounts, and subsidies to derive an industrial kilowatt hour electricity rate. Def's Resp. at 42–43.

To evaluate the quality of the two data sets to value electricity, Commerce applied its standard surrogate value analysis, which is its five-factor test of public availability, product specificity, whether they represented a broad market average, the contemporaneity of the data, and whether the data were free of taxes and duties. *See*, *e.g.*, *Certain Polyester Staple Fiber* at cmt. 1.

For the *Final Results*, Commerce found that both data sets were publicly available, *IDM* cmt. 10 at 18–19, but that the *Camarines Sur* data were more specific to the kilowatt hour factor than the Meralco data. *Id*. at 18–19. Commerce explained that the Meralco data contained some data in kilowatts, not kilowatt hours, and that the record lacked sufficient information to make the conversion. *Id*. at 18. Commerce determined that Arch's suggested conversion methodology

made assumptions that were not supported by the record. *Id*. Commerce also determined that the Meralco data indicated that several of the 21 different components of the electricity charge were variable on a monthly basis, and there was only one month of Meralco data on the record. *Id*. at 18–19.

Commerce found that both data sets represented a broad market average but that neither data set represented the entire Philippine market. *Id*. at 19. It noted that, although Arch argued that the Meralco data represented a broader section of the Philippine market, the *Camarines Sur* data represented industrial rates for two cities in the Philippines. *Id*. Commerce found that the 2009 *Camarines Sur* industrial electricity rates were sufficiently contemporaneous to the 2010–2011 period of review because utility rates apply forward and there was no record evidence that they had changed since 2009. *Id*. at 19. Finally, Commerce found that the Meralco data specifically excluded taxes and duties, and that there was no evidence that the *Camarines Sur* data included taxes and duties. *Id*. After weighing all of these factors, Commerce determined that the *Camarines Sur* data were the best available information on the record with which to value the electricity factor for both Kangtai and Arch. *Id*.

As an initial matter, the court notes that no party challenges the public availability of the *Carmines Sur* and the Meralco data sets. Kangtai and Arch express three shared contentions with regards to flaws they perceive in the *Camarines Sur* data and Commerce's analysis thereof. First, Arch and Kangtai argue the *Camarines Sur*-data is not broadly based, a fact Kangtai claims the defendant concedes.[35] Second, both parties claim that the *Camarines Sur* data is not contemporaneous. *See* Kangtai's Reply at 19; *see also* Arch's Br. at 19–20. Third, Kangtai claims that the data is not more specific than the Meralco data and Arch adds that the variability of the *Camarines Sur* was unknown and unknowable. *See* Kangtai's Reply at 19; *see also* Arch's Br. at 19. Arch also claims that the absence of any evidence of the *Camarines Sur* data being tax exclusive does not mean that the data actually were as Commerce claims. Arch's Br. at 18.

With respect to Arch's and Kangtai's challenges to Commerce's selection of the *Camarines Sur* data, Commerce contends the parties impermissibly refer to non-record information and misunderstand Commerce's administrative determinations, and that the court's role is not to reweigh the evidence but to determine whether Commerce's weighing of the evidence is supported by substantial evidence and is otherwise in accordance with law. Def's Resp. at 39, referencing

[35] *See* Kangtai's Reply at 18, referencing Def's Resp. at 44; *see also* Arch's Br. at 18.

Metallverken Nederland B.V. v. United States, 13 CIT 1013, 1017, 728 F. Supp. 730, 734 (1989).

2. Representative of a Broad Market

Commerce's specific findings were that neither the Meralco data nor the *Camarines Sur* covered the entire Philippine market and that the *Camarines Sur* data covered two cities. *IDM* cmt. 10 at 19. Commerce made these findings by weighing the results of its analysis of the factors against each other. In the same paragraph, Commerce also discussed the specificity and the tax-and-duties factors. *Id*. Kangtai avers that Meralco data is more representative of a broad market as it is the largest electrical supplier in the Philippines and is one that covers all of the country's "major industrial zones", while the *Camarines Sur* data covers only "two tiny cities in one non-industrial province." *See* Kangtai's Reply Br. at 41–43. The choice Commerce made, it claims, does not take into account a respondent's production experience and is between "one source which is broadly based and representative of the industrial experience in the Philippines and one source which is neither." *Id.* at 18. Arch echos Kangtai's contentions stating that the record indicates that "the Meralco rate applied to 60% of the industrial base of the country, including one of the facilities making the comparable product", and that "none of the surrogate product was manufactured within the coverage of the *Camarines Sur* data, because the company had no facilities located in that Province". Arch's Br. at 18.

Although the Meralco data may have broader market coverage than the *Camarines Sur* data, when weighed with other factors, which Commerce concluded detract from the Meralco data, Commerce concluded the *Camarines Sur* data have sufficiently broad coverage (two cities) to be a reliable surrogate value of the Philippine market. Arch's and Kangtai's assertions that the Meralco data cover a broader portion of the Philippines' electricity market do not overcome or render unreasonable that analysis, and the court cannot engage in reweighing of this evidence of record.

3. Specificity

The production factor that Commerce valued was the kilowatt hours of electricity used to make the subject merchandise (chlor-isos). Commerce observed that the *Camarines Sur* data represent a single average industrial electricity rate in kilowatt hours. *See* Kangtai's Prelim. SV Submission at Ex. SV-15 & SV-16b. Also, that the Meralco data do not provide an industrial electricity rate in kilowatt hours, but consist of a chart representing one month of 21 components of an

electricity rate, some of which are not in kilowatt hours, some of which are identified as varying by month, with no explanation or evidence as to what should be included in an electricity rate and no explanation of how to convert the components that are in kilowatts to kilowatt hours. *See* Jiheng's Prelim. SV Submission at Tab 5. Based on this, Commerce found that the record did not contain the information to make the conversion. *IDM* cmt. 10 at 18.

Commerce's decision that the *Camarines Sur* data were more specific to the electricity factor, which was in kilowatt hours, therefore has support in the record. *See id.* at 18–19. Arch and Kangtai argue that Commerce calculated kilowatt hour rates from one month of the Meralco data in other cases and should have done so here. Arch's Br. at 16–17; Kangtai's Br. at 40. However, the cases on which they rely point more towards the principle that the record facts in each administrative review determine the analysis that Commerce will perform to determine the best available information on the record.

The determinations in those cases provide no information other than that Commerce used the Meralco data to value electricity. In the *Steel Wire Hangers* case,[36] there is no discussion of any alternative electricity rate data sources, nor is there any "best available information" analysis using the five factors. The most that can be inferred from this determination is that there was only one electricity data source on the record and that Commerce used the Meralco data as the "best available information." Arch's reliance on the *Hardwood Plywood* decision is similarly unavailing. *See* Arch's Br. at 17 (citing *Hardwood and Decorative Plywood from the PRC*, 78 Fed. Reg. 25946 (May 3, 2013) (final LTFV investigation) ("*Hardwood Plywood*"). There is no indication that Commerce had any other alternatives from which to choose. *See generally id.*

Arch attempts to support its challenge here by referring to a document from the *Steel Wire Hangers* record. Arch's Br. at 17, n.2. As it is not in the record of this case, it will be disregarded. *See* 28 U.S.C. §1516a(b)(2)(A). Even assuming it can be considered, it does not establish that Commerce had any alternative electricity rates from which to choose. *See* Arch's Br. at 17, n.2. As a result, Arch's reliance on the *Steel Wire Hangers* and *Hardwood Plywood* cases do not demonstrate that Commerce's determination here should be set aside.

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[36] *Steel Wire Garment Hangers from the PRC, accompanying Steel Wire Garment Hangers From the PRC*, 77 Fed. Reg. 66952 (Nov. 8, 2012) (prelim. rev. results) and accompanying I&D Memo, unchanged in the final results, 78 Fed. Reg. 25946 (May 16, 2013) (final rev. results) ("*Steel Wire Hangers*").

Next, as explained above, there is no evidence on the record of this proceeding with which to make the conversions from kilowatts to kilowatt hours and Arch and Kangtai have not cited any. Furthermore, there is no information or argumentation on the record which indicates how the 21 components for the electricity rate should be combined to form an actual electricity rate. Finally, there is no information on the record to indicate in which of the 13 industrial user categories out of 39 categories, Kangtai and Arch fall. Because the record contains an average industrial rate in kilowatt hours from *Camarines Sur* there was no reason to go through the speculative process of converting and constructing an average industrial electricity rate from the Meralco data, even if the components of that rate in kilowatts represent "a minuscule part of the overall Meralco rate" as Kangtai claims. Kangtai's Reply at 19.

To defend the record deficiencies in the Meralco data, Arch contends that, because the website for the Meralco data is on the record, Commerce should have gone to the website and allayed any concerns concerning the Meralco data and its variability. Arch's Br. at 19. Kangtai similarly argues that the website for the *Camarines Sur* data is on the record and argues that the data on the website do not support Commerce's determination. Kangtai's Br. at 42. That the website addresses are on the record does not mean that all of the data on the websites are on the record. If a party wants evidence from a website on the record of a Commerce proceeding, it must submit the appropriate pages from the website; otherwise, the information is not on the record of the proceeding. Both Kangtai and Arch had the opportunity to put whatever aspects of these websites on the record they chose. Kangtai put on selected portions of the *Camarines Sur*-data. Kangtai's Prelim. SV Submission, at Ex. SV-15, SV-16b. Jiheng placed on the record a single chart from the Meralco site but without explanation. Jiheng's Prelim. SV Submission at Tab 5. Arch and Kangtai cannot now rely on data that they never placed on the record.

Finally, Arch and Kangtai speculate that the *Camarines Sur* data lack detail to determine whether they suffer from an unknown variability. *See* Arch's Br. at 19; *see also* Kangtai's Reply at 19. Kangtai claims that half of the rate from the *Camarines Sur* is based off "completely unknown" variables from an "on demand" electricity based system.[37] The record shows that the *Camarines Sur* data are an average industrial electricity rate from two cities in the Philippines. Kangtai's Prelim. SV Submission, at Ex. SV-15, SV-16b. There is no record evidence that the average rates suffer from unknown

[37] Kangtai's Reply at 19 (referring to the Naga City industrial rate which it claims depends on the individual customers daily demand or maximum usage).

monthly variability. In contrast, even if there were data to convert the Meralco rate components from kilowatts to kilowatt hours, the Meralco chart itself indicates that some of the Meralco components are subject to monthly variation. Jiheng's Prelim. SV Submission at Tab 5. To construct an annual average rate from the one month of data would require Commerce to assume numerous variables did not vary during the year, which would have been an unreasonable assumption given that the chart itself identifies monthly variation.

Kangtai also argues that the *Camarines Sur* data are listed as industrial "with demand" which it contests Commerce "is certainly aware" means that the *Camarines Sur* data are also variable. Kangtai's Br. at 42. However, neither Kangtai nor Arch made this argument to the agency. As a result, they failed to exhaust their administrative remedies and accordingly the issue was not discussed in Commerce's Final Results. *See, e.g., Shandong Huarong Machinery Co., Ltd. v. United States*, 30 CIT 1269, 1305, 435 F. Supp. 2d 1261, 1292 (2006). In any event, Kangtai's statement that Commerce "is certainly aware" is not record evidence and thus the argument is not supported by record evidence. In short, the *Camarines Sur* data are more specific to the factor of production being valued, electricity usage in kilowatt hours, and Arch's and Kangtai's argumentation on the record does not persuade that Commerce's specificity determination is unsupported by substantial evidence or not in accordance with law.

4. Exclusion of Taxes And Duties

The record demonstrates that the Meralco data do not include taxes and duties while there is no record evidence that the *Camarines Sur* data do include taxes and duties, as Arch points out and as Commerce specifically found in its Final Results. *See IDM* cmt. 10 at 19; *see also* Arch's Reply at 18–19. Given this identified and acknowledged difference in the record evidence on the exclusion of taxes and duties, based on a weighing of all of the factors which includes the serious problems with the specificity of the Meralco data, as discussed above, Commerce preferred to use the more specific *Camarines Sur*data over the less specific Meralco data. This is not an unreasonable decision. In Commerce's view, the difference in the record data on taxes and duties is not enough to justify rejecting the *Camarines Sur* data.

5. Contemporaneity

In the *Final Results*, Commerce found that the *Camarines Sur* data were from 2009 based on the copyright date on the publication "Doing

Business in Camarines a Sur". *IDM* at 19. In addition, Commerce found that utility rates generally, "represent a current rate as indicated by the effective date for each of the rates provided." *Id*. It found further that the *Camarines Sur* rate was sufficiently close to the period of review of 2010–2011 that it was likely to still be in effect. *Id*.

Arch distinguishes this review from the prior review. Arch's Br. at 19–20. It claims that Commerce used a "non-sequitur" concerning the effective dates of electricity rates because, in the prior review, the surrogate country was India and not the Philippines. *Id*. at 19. There is no non-sequitur. That the surrogate country in the last review was India and in this review the surrogate country is the Philippines is irrelevant to a finding that generally utility rates represent a current rate by the effective date, the proposition for which the case was cited.

Arch and Kangtai also both attempt to distinguish this case from the prior review by arguing that the fact that the *Camarines Sur* data have a copyright date of 2009 does not mean that their electricity rates are from 2009, whereas the India electricity rates in the last review have a specific effective date, a date type which the *Camarines Sur* data do not contain. Arch's Br. at 2021; *see also* Kangtai's Reply at 18. This is again a distinction without a difference. The "Doing Business in Camarines a Sur" publication is published to attract business to Camarines a Sur. The section of the publication from which the electricity rates are derived contains, in relevant part, the following description, "[t]his section provides investors with a clear perspective of what to consider like fees and licenses and what to expect such as attractive incentive packages available before taking a business venture of a lifetime [in Camarines a Sur]." Kangtai's Prelim. SV Submission at Ex. SV-16b. Based on the express purpose of the "Doing Business in Camarines a Sur" publication, it is illogical to assume, as Arch does, that the 2009 publication would not contain electricity rates effective in 2009. As a result, Arch and Kangtai fail to distinguish this case from the decisions in the prior review.

Finally, once again, the discussion of the contemporaneity of the two sets of data in Commerce's Final Results is in the context of weighing the various factors against one another. *IDM* at 19. Even assuming that the *Camarines Sur* data were 2009 data and not effective during the 2010–2011 period of review, this factor would not be enough to reject using the *Camarines Sur* data. Commerce regularly indexes data to make it contemporaneous with the period of review.

In short, based on Commerce's analysis and weight of the data factors, Commerce's selection of the *Camarines Sur* data was reasonable.

G. Accounting for Labor in the SG & A Financial Ratio

In the *Final Results*, Commerce relied on Philippine labor statistics as reported in the International Labour Organization's statistics for category 6A. As alluded in the prior opinion, Commerce now employs a rebuttable presumption that this category 6A "better accounts for *all* direct *and indirect* labor costs." *Antidumping Methodologies in Proceedings Involving Non-Market Economies: Valuing the Factor of Production: Labor*, 76 Fed. Reg. 36092, 36093 (June 21, 2011) ("*Labor Methodology*") (italics added).[38] Because ILO Chapter 6A data are intended to be all-inclusive of labor costs, Commerce further explained in *Labor Methodology*, that

> [i]f there is evidence submitted on the record by interested parties demonstrating that the NME respondent's cost of labor is overstated, the Department will make the appropriate adjustments to the surrogate financial statements subject to the available information on the record. Specifically, when the surrogate financial statements include disaggregated overhead and selling, general and administrative expense items that are already included in the ILO's definition of Chapter 6A data, the Department will remove these identifiable costs items.

Id.

For the *Final Results*, Commerce relied upon the 2010 financial statement for Mabuhay Vinyl Corporation ("Financial Statement") for surrogate selling, general and administrative ("SG & A") expenses in the calculation of a surrogate SG & A financial ratio for the respondents. The prior opinion remanded the issue of whether employee retirement and other benefits had been double counted in that calculation, due to an indication in the Financial Statement of certain retirement and employee benefits included among the SG & A portion of that statement.

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[38] *Labor Methodology* was the consequence of the Federal Circuit's invalidation of Commerce's prior regression-based analysis as provided in 19 C.F.R. §351.408(c)(3). *See Dorbest Ltd. v. United States*, 604 F.3d 1363, 1372 (Fed. Cir. 2010). As explained in *Labor Methodology*, Commerce first resorted to reliance upon ILO Chapter 5B labor cost data, but because those data only cover direct labor compensation and bonuses, Commerce became concerned that such data were underinclusive. Thus, going forward, Commerce announced in *Labor Methodology* that it would rely on ILO Chapter 6A instead, and whereas in the past Commerce distinguished between direct labor cost and indirect labor cost that was accounted either as a part of the surrogate value for factory overhead or as part of labor, in accordance with *Labor Methodology* it now appears the cost of "labor" as a whole is to be calculated simply by multiplying the labor hour input by the relevant ILO-based unit labor cost figure.

On remand, Commerce concluded that since these itemized amounts relating to labor had been included in the Financial Statement as operating costs rather than cost of sale, they were properly included in its surrogate SG&A calculation. Kangtai had argued that the Philippines ILO data of record for labor costs include those for all paid employees, including managers, executives and supervisors, but Commerce responded that it had only relied on the "Industrial/ commercial survey", which made no such mention. RR at 39–40. Restating Arch's argument, Commerce interpreted it as claiming that the Financial Statement had "incorrectly accounted for" or "misallocated" production-labor employee benefits in the administrative labor accounts,[39] but Commerce found that record evidence does not support such a finding. *Id*. at 40–41. The Financial Statement indicated that employee and retirement benefits were provided to all "regular employees" and Commerce stated that its conclusion on what "regular employee" means is based on its understanding of the Philippines' generally accepted accounting principles. Quoting Clearon, Commerce stated that "there is no basis to assume that the ILO labor cost data would include employee and retirement benefits associated with direct production workers, but that the same employee benefits would be reported as operating expenses rather than costs of sales."[40]

Actually, there is. Although the Philippine generally accepted accounting principle upon which Commerce claims to have relied has not been made a part of the record (at least insofar as the court can discern from the papers submitted here[41]), the Financial Statement's independent auditors' opinion letter of record asserts that the Financial Statement is in accordance with Philippine Financial Reporting Standards. And insofar as the court could discern, by its own examination of Philippine and international generally accepted accounting standards in existence in 2010–11, the "proper" accounting treatment of employee retirement and other benefits, as those relate to accounting for cost of goods sold, is not as clear-cut as Commerce assumes, except to the extent that they must be accounted for and reported.

Be that as it may, Kangtai appears correct in arguing that Commerce's assumption, as to how labor is distinguished among the

[39] Arch had argued that, "[i]n its filing with the Philippine SEC authorities, MVC stated 'The company has a registered, non-contributory retirement plan. *All regular employees are covered from the President down to the rank and file*.'" As quoted in RR at 41, referencing Arch's Draft Remand Cmts. (Arch's italics).

[40] RR at 41–42, quoting Letter from Petitioner, "Remand of the 2010–2011 Administrative Review of the Antidumping Duty Order on Chlo-Isos from the PRC: Comments Regarding New Data Placed on the Record" (August 20, 2014).

[41] Therefore, Commerce's assumption or projection of what is the "proper" way to account for these employee retirement and other benefits has no support in the record, unless that be by way of official notice.

operating and period costs of the Financial Statement, is all beside the point. Commerce faults Arch for "claiming that the ILO data includes SG & A type labor for which an adjustment to the financial data is necessary" and that "like Kangtai's argument, [Arch] has also failed to demonstrate that such labor is included in the ILO data", but Commerce's own *Labor Methodology* policy presumptively and apparently includes *all* costs relating to labor via category 6A data. That policy pronouncement specifically stated that any labor item identified among the SG & A (or "period") items must be excluded from the surrogate SG & A ratio in order to avoid overstatement, and it is not reasonably disputed that the employee and retirement benefits described in the Financial Statement are a type of labor item that the *Labor Methodology* policy was meant to address. If the determination in this matter implies that Commerce has discovered a problem with its policy, then it should address that by way of further notice and comment, rather than attempting the type of tortured analysis in which it has engaged in here.

As Arch argues, the record shows that MVC has treated its employee and retirement expenses as a coherent whole, as indicated in its Notes to the Financial Statement. Were Philippines' Accounting Standards ("PAS") a part of the record, in particular PAS 19, they would likely inform that the Financial Statement has been prepared in accordance therewith and does not, as intimated by Commerce, involve a "misallocation" of labor amounts. Note 19 of the Financial Statement provides detail, including the exact calculation of year 2010's retirement benefit costs. Note 17 also itemizes "employee benefits," although it does not provide as much information on these expenses as for the retirement benefits. Note 24 breaks out the amounts of compensation of "key management personnel" into "short-term employee benefits" and "retirement benefits", which establishes that these benefits, too, apply beyond administrative expenses. Thus, the Financial Statement has itemized costs that would be included in the Chapter 6A labor rates, that are individually itemized, and are not included in the labor costs in the financial statements. This appears to be precisely the situation Commerce contemplated when stating that it would make adjustments in order to avoid overstating labor costs, and the court must therefore conclude that Commerce has apparently failed to interpret the record correctly, thereby inadvertently violating its *Labor Methodology* policy without adequate justification.

On remand, in order to address the foregoing, Commerce should either remove the labor items identified among MVC's SG&A ex-

penses or explain why adhering to its *Labor Methodology* policy is inappropriate in this instance.

H. By-Product Offset Methodology

If a by-product resulting from production of subject merchandise has commercial value, then the costs associated with its production must be allocated from the costs associated with production of the subject merchandise. To date, apparently, Commerce has recognized by-products' commercial value either by sales thereof or by reintroduction into the production of the subject or non-subject merchandise.[42] Arch and Kangtai challenge Commerce's explanation of its by-product offset determination.

1. Further Background on the *Final Results*

Commerce accepts that ammonia gas and sulfuric acid are the relevant by-products cast out of the respondents' production of subject merchandise at a certain "split off" point from the production of chlor-isos. Kangtai avers that these by-products are then further processed into ammonium sulfate, first into liquid form, and then into a powder, for sale primarily as fertilizer. *See* Kangtai's Resp. to Court's Letter of May 8, 2015, ECF No. 98 (May 22, 2015).

In the original investigation, Commerce found that its "downstream by-products practice" for determining by-product credits did not apply to the process of subject merchandise production. *See*, *e.g.*, Arch's Br. at 25. Therefore, in previous reviews of the Order as well as for the *Preliminary Results*, Commerce had calculated the volume of the ammonia gas and sulfuric acid by-products based upon the amounts of those products that are chemically (*i.e.*, formulaically) required to produce the amounts of ammonium sulfate reported by Arch and Kangtai as having been actually produced (as opposed to the amount actually sold). Commerce would then calculate the total of each re-

[42] *See, e.g., DuPont Teijin Films China Ltd. v. United States*, Consol. Court No. 13–00229, ECF No. 86 (Jan. 9, 2015) ("*DuPont Teijin Films Redetermination*") at 5–6; *Frontseating Service Valves From the PRC*, 78 Fed. Reg. 35245 (June 12, 2013) (final 2010–2011 rev. results), and accompanying I & D Memo at cmt. 10; *Frontseating Service Valves From the PRC*, 76 Fed. Reg. 70706 (Nov. 15, 2011) (final 2008–2010 rev. results), and accompanying I & D Memo at cmt. 18; *Certain Frozen Warmwater Shrimp From the Socialist Republic of Vietnam*, 74 Fed. Reg. 47191 (Sep. 15, 2009) (*inter alia*, final rev. results), and accompanying I & D Memo at cmt. 7.A ("because by reintroducing the by-product into production, the material costs of the subject merchandise are directly reduced"). Complexities can arise depending upon whether the by-product is re-introduced into production of the subject merchandise or non-subject merchandise, and whether the by-product requires inventorying (different PORs) or is reintroduced immediately into a continuous production process. *See, e.g., DuPont Teijin Films Redetermination* at 5–8.

spondent's by-product offset based upon selected surrogate values for the ammonia gas and sulfuric acid from among those the parties had submitted.[43] *See* RR at 28.

After the *Preliminary Results*, in their administrative case brief the petitioners argued that if Commerce continues to rely upon the Philippine import data, it should consider the fact that the surrogate values for ammonia gas and sulfuric acid of record exceed that of ammonium sulfate, leading to a "counterintuitive conclusion that respondents are combining two high-value by-products . . . in order to produce a significantly lower value by-product in ammonium sulfate", which is not realistic. *See* RR at 47, quoting Clearon's Admin. Case Br., PDoc 255 (Dec. 3, 2012) at 38. Restating this argument, for the *Final Results* Commerce changed its methodology for determining the by-product offsets, characterizing the change as necessary "to conform to the Department's recent practice," and because the new methodology is both "more reasonable" than that employed in the *Preliminary Results* and

> is consistent with the information the Department requests in our questionnaire, which asks respondents: "[i]f the by product for which you are claiming an offset is a downstream by-product, in addition to responding to the items above,[44] please also: (i) Provide the per-unit usage rate of each input used to produce the downstream by-product."
>
> Consistent with this practice, the Department first starts with the value of the downstream product actually sold by the respondents, ammonium sulfate, produced during the POR. From this amount, the Department would normally deduct the costs associated with converting the by-products into the downstream product, such as labor and electricity. Since this information is not on the record of this review, the Department is not able to deduct such costs for these final results. In the future, the

[43] Neither respondent actually sold ammonia gas or sulfuric acid, and thus the calculations were based upon hypothetical "sales" derived from actual sales of ammonium sulfate. *See* Jiheng Resp. to Questionnaire Section D, PDoc 49 (Nov. 28, 2011), at D-32–33; Kangtai's Resp. to Questionnaire Section D, PDoc 51 (Nov. 28, 2011) at 17.

[44] Earlier in precedence was this questionnaire request, which has been omitted from Commerce's discussion in the *IDM* : "Please note: By-product/co-product offsets are only granted for merchandise that is either sold or reintroduced into production during the POR, up to the amount of that by-product/co-product actually produced during the POR. If you are claiming a by-product or co-product offset in your FOP database, please report each by-product or co-product in a separate field. Further, in your narrative response please: i. Provide a description of the by-product/co-product; ii. Provide an explanation why you have defined the products as by-products or co-products, as applicable; . . ." Questionnaire, Section D (Oct. 6, 2011) at D-9.

> Department will require such information in order to grant this offset. But in this instance, we are using the full value of the ammonium sulfate as the by-product offset. We calculated this amount by multiplying the quantities of ammonium sulfate produced *and sold* by respondents during the POR by the surrogate value (Philippine GTA data) for ammonium sulfate.

IDM cmt. 14 at 23–24 (footnotes omitted; italics added).

The respondents challenged this change here, arguing, *inter alia*, that they had been prejudiced by lack of notice concerning the new methodology and that they had relied upon the old methodology in their pricing of subject merchandise. Agreeing with the parties that it had not explained its new by-product methodology,[45] Commerce voluntarily requested remand in order to consider those arguments, provide explanation, and collect additional relevant information if necessary. *See* Opinion at 18, referencing Def's Resp. at 54.

2. Results of Remand

The Remand explains that in order to approximate a "market value" for the ammonium gas and sulfuric acid by-products, RR at 29, Commerce is now determining a "net realizable value"[46] for the ammonium gas and sulfuric acid by-products. Commerce states that this is "consistent with its practice" of "start[ing] with the value of a downstream product, in this case ammonium sulfate that was *actually sold* by the respondents *and produced* during the POR", which leads to "an offset equal to the amount of value a company *actually receives*, less any processing costs, and not a hypothetical value that

[45] To the court, Clearon had argued that the value of the downstream by-product (ammonium sulfate) overstates the value of the input by-products (ammonia gas and sulfuric acid) and that Commerce should find that the respondents had "withheld" relevant information and that the matter should at least be remanded for its collection. *See* Clearon's Br. at 21–25. Clearon had also argued for application of "adverse inferences" pursuant to 19 U.S.C. §1677e(b), which Commerce declined to apply. In addition to arguing that the change in methodology was unlawful, Kangtai and Arch had argued and that the value of the ammonia gas and sulfuric acid by-products should be individually and directly determined by reference to surrogate values therefor, as Commerce had done in prior reviews. On remand, however, Commerce pursued applying its new methodology by issuing a questionnaire to Arch and Kangtai, obtaining data from the parties, and incorporating the data in its recalculation of the offset based on the new methodology. *See* RR at 30.

[46] *Id*. at 29 (italics added), quoting *Citric Acid and Certain Citrate Salts From the PRC*, 79 Fed. Reg. 101 (Jan. 2, 2014) (final 2011–2012 rev. results) ("*Citric Acid and Certain Citrate Salts*"), and accompanying I&D Memo at 12.

is unrelated to a company's financial books and records"[47]. Commerce determines these values by deducting the costs of further processing the ammonium gas and sulfuric acid by-products (*e.g.*, labor and electricity) that are incurred from the split-off point in the production of subject merchandise when transforming those by-products into the downstream product ammonium sulfate. Commerce reasoned that

> [t]he value of ammonium sulfate reflects the actual economic value of the byproducts generated through the respondents' cyanuric acid production process and is accordingly an appropriate source to value the byproducts that are combined to produce ammonium sulfate. Thus [Commerce's] methodology reflects the actual value that the company receives for the by-products [that] are contained in the downstream product which Kangtai and [Arch] actually sell.

RR at 47. Commerce again noted that although it did not elaborate on its change in methodology in the *Final Results*, the "policy is evident from our boilerplate questionnaire, used in the underlying review, which asks parties to report the FOPs required to process the by-product into saleable downstream product."[48] Commerce also noted again that this methodological "change" is in order to comport with recent "agency-wide" policy and avoids overstating the value of the by-product offsets. *Id*. at 28. As applied in the instant review, Commerce found that it "did not have the FOPs to deduct, so we used the full value of the ammonium sulfate as the full value of the two by-products combined as the by-product offset." *Id.* at 28.

3. Arguments

Supporting Commerce's determination, Clearon claims that the by-product offset determinations for each respondent were appropriately limited to the downstream product actually sold. Clearon's Cmts. at 9–16. The respondents oppose, arguing that even on remand Commerce has failed to provide a reasoned explanation for departing from its established methodology or demonstrated why the new methodology is better, that the change was unsupported by substantial evidence and was arbitrary, and they ask the court to remand the issue with instruction to apply the original methodology. Arch's Cmts. at 2–3, 17; Kangtai's Cmts. at 33–34, 38.

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[47] *Id*. at 28–29 (italics added), referencing *Magnesium Metal from the Russian Federation*, 73 Fed. Reg. 52642 (Sep. 10, 2008) (final rev. results), and accompanying I&D Memo at cmt 1.B & 1.C.

[48] *Id*. at 29, referencing Letter to Jiheng, "2010–2011 Administrative Review of the Antidumping Duty Order on Clor-Isos the PRC" (Oct. 6, 2011) at D-9.

Arch continues to argue that Commerce has not provided a reasoned explanation, and without one they are not able to "respond to, or address, whatever concerns Commerce may have had with the previous methodology" or comment substantively on the change. Arch's Cmts. at 10, 13. Arch argues that although the Draft Remand results stated that the change in practice was necessary "to bring the calculation into conformity with agency-wide policy",[49] and that "this policy is evident from [Commerce's] boilerplate questionnaire used in the underlying review, which asks parties to report the FOPs required to process the byproduct into saleable downstream product", this is not, in fact, what the underlying questionnaire asked, *see supra*, and that the Draft Remand was the first time Commerce used the term "saleable product" in the proceeding.[50]

Because the foregoing was the only explanation provided in the draft remand results, Arch argued to Commerce that beginning with "saleable product" was not an "agency-wide" practice at the time of the underlying review, which was instead to require that a by-product have commercial value.[51] Pointing to the second administrative review of the Order, Arch notes that Commerce defended its practice before the court and that the court upheld Commerce's findings that ammonia gas and sulfuric acid had commercial value and were the appropriate by-products for offset purposes. Arch's Cmts. at 11–12, referencing their Cmts. on Draft Remand Results at 11–12, RR-PDoc 67. *See Clearon Corp.*, *supra*, 37 CIT at ___, Slip Op. 13–22 at 27–31. Arch avers that Commerce did not explain why products that it had previously stated were not downstream by-products, and which over the course of the investigation and previous reviews it did not treat as downstream by-products, were now suddenly being treated as downstream by-products. Arch's Cmts. at 10.

Kangtai avers that in making the change Commerce devalued its by-product offset to production costs and created conditions where NV is determined by the manufacture of the non-subject downstream ammonium sulfate, not by the manufacture of the subject merchan-

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[49] Draft Remand Results, RR-PDoc 64.

[50] Arch's Cmts. at 10, referencing Questionnaire, Section D (Oct. 6, 2011) at D-9; *see supra*, note 44. Arch also argues that because Commerce had previously stated that the downstream by-product methodology did not apply to its ammonia gas and sulfuric acid by-products, Arch had no reason to think the boilerplate language in the questionnaire referred to its downstream by-product, a point bolstered by the fact that Commerce had accepted Arch's response that it had no downstream by-products in the *Preliminary Results* of the review. Re-opening the record on remand and Arch's responses to Commerce's requests for additional information, however, moots the point.

[51] Arch's Cmts. at 11, citing the 2008–2010 and the 2010–2011 *Frontseating Valves* reviews, *see supra* note 42.

dise itself, while the original methodology captures the full costs and full measurable offsets most accurately Kangtai's Cmts. at 36. It avers that recent administrative decisions are evidence that its new methodology is "no policy at all" but that it was instead applied arbitrarily in the review to increase antidumping duty margins. *Id.* at 33–34. Kangtai also claims that because the argument for the new methodology was only raised at the briefing stage by petitioners in their case brief they were not provided sufficient opportunity to argue if the surrogate value for ammonium sulfate was artificially low. Kangtai also supports Arch in arguing that the record demonstrates there are two methods under which Commerce determines "commercial value" and the right to a by-product offset, that Commerce has unreasonably ignored the latter method, and that Kangtai's by-products are reintroduced into production because they are piped "directly from where they are generated into a centrifuge tank to make ammonium sulfate."[52]

4. Analysis

Because of uncertainty over how prices are determined in non-market economies, 19 U.S.C. §1677b(c) requires the calculation of "normal value" in these sorts of proceedings to be achieved through FOP methodology. Although not directly addressed in the statute, Commerce's treatment of co-products and by-products apparently derives from the consideration that is required of it (Commerce) with regard to generally accepted accounting principles pursuant to 19 U.S.C. §1677b(f)(1)(A). Among those, accounting's matching principle[53] requires proper allocation to co- and by-products of the costs of their production (*i.e.*, all relevant FOPs). Since the accounting objective therefor is to determine the impact of such products on *income* and *inventory* carrying values for financial reporting purposes,[54] Commerce's apparently current by-product offset practice, which fo-

[52] Kangtai's Cmts. at 34–35, referencing *DuPont Teijin Films Redetermination*; *see also* Kangtai's Br. at 39–40; Kangtai's Reply at 9–11; Arch's Br. at 24–30; Kangtai's Cmts. on Draft Remand, RR-PDoc 68, at 20–22; Arch's Cmts. on Draft Remand, RR-PDoc 67, at 10–13.

[53] *I.e.*, matching expenses with the benefits derived therefrom. *See*, *e.g.*, *Live Swine From Canada*, 70 Fed. Reg. 12181 (Mar. 11, 2005) (final LTFV determ.), and accompanying I&D Memo, at cmt. 57.

[54] *See, e.g.*, Steven M. Bragg, *Wiley GAAP 2011*, pp. 329–31 (2010) (discussing cost flow assumptions for determining inventory carrying cost); *see also* 26 U.S.C. §472. For financial and cost accounting purposes, the "split-off" point is the point at which co- and by-products become separate and identifiable and at which the joint costs of production to that point must be allocated based upon suitable methodology. *See, e.g.*, Wayne J. Morse and Harold P. Roth, *Cost Accounting*, p. 147 (3rd ed. 1986) ("*CA*"). *See generally id.*, pp. 147–62, and Charles T. Horngren, *Cost Accounting: A Managerial Emphasis*, 531–534 (5th ed. 1982). *Cf.*

cuses upon whether a by-product has commercial value (demonstrated either by the respondent's sales of the by-product or by reintroduction into production), accords with generally accepted cost accounting principles' income and inventory concerns.

Commerce also has the discretion in antidumping and countervailing duty proceedings to modify a given methodology in order to calculate a more accurate dumping margin or for ease of use.[55] Commerce may not, however, apply a new methodology if a respondent has an expectation right in the application of existing methodology, *e.g.*, demonstrated reliance upon the methodology, in effect at the time of action taken, to avoid dumping.[56] Commerce must also provide a reasoned explanation for the change, and it must demonstrate that its explanation is in accordance with law and supported by substantial evidence.[57] In changing methodology, Commerce must also provide parties with timely notice and sufficient opportunity to provide the information required by the revised methodology.[58]

Commerce explains in the remand results that between the preliminary and final results of the matter at bar it modified its methodology to "net realizable value" in order to conform with "agency wide policy" and "to avoid overstating the value of the by-product". RR at 28. Net realizable value, sometimes called "net sales value," is common to both co- and by-product cost accounting and is a recognized method for assigning income or inventory value to a co- or

Ipsco, Inc. v. United States, 13 CIT 402, 405–06, 714 F. Supp. 1211, 1214–15 (1989) (discussing need for cost allocation but variable cost allocation methodologies), referencing *id*.

[55] *See, e.g., NSK Ltd. v. United States,* 19 CIT 1013, 1027, 896 F. Supp. 1263, 1275 (1995) (noting that Commerce need not "adhere to its prior . . . methodology, especially where Commerce is striving for more accuracy"), *aff'd in part and rev'd in part on other grounds*, 115 F.3d 965 (1997); *SeAH Steel Corp. v. United States*, 34 CIT 605, 615, 704 F. Supp.2d 1353, 1361–62 (2010); *Arch Chemicals, Inc. v. United States*, 33 CIT 954, 963–64 (2009), referencing *Fujian Machinery and Equipment Import & Export Corp. v. United States*, 25 CIT 1150, 1169, 178 F. Supp. 2d 1305, 1327 (2001) ("*Fujian Machinery*"); *SKF USA Inc. v. United States*, 31 CIT 951, 958, 491 F. Supp. 2d 1354, 1362 (2007).

[56] *See*, *e.g.*, *Shikoku Chemicals Corp. v. United States*, 16 CIT 382, 386–89, 795 F. Supp. 417, 420–22 (1992) ("*Shikoku Chemicals*").

[57] *Arch Chemicals, Inc. v. United States*, 33 CIT 954, ___ (2009) ("*Arch Chemicals*"), referencing *Fujian Machinery*, 25 CIT at 1169–70, 178 F. Supp. 2d at 1327 (citation omitted); *see also Nippon Steel Corp. v. U.S. Int'l Trade Comm'n*, 494 F.3d 1371, 1378 n. 5 (Fed. Cir. 2007) ("[w]hen an agency decides to change course . . . it must adequately explain the reason for a reversal of policy") (citation omitted).

[58] *See, e.g., Arch Chemicals*, *supra*, 33 CIT at 963–64; *Anshan Iron & Steel Co., Ltd. v. United States*, 27 CIT 1234, 1241–42 (2003); *Fujian Machinery*, *supra*, 25 CIT at 1169–70, 178 F. Supp. 2d at 1326–27; *Hussey Copper, Ltd. v. United States*, 17 CIT 993, 998, 834 F. Supp. 413, 419 (1993); *Shikoku Chemicals*, *supra*, 16 CIT at 388, 795 F. Supp. 2d at 421.

by-product. *See CA* at 151. And yet, regarding Commerce's attempted articulation of its new methodology,[59] it is the function of the court to sustain only on the basis of that articulation, and not to impute reasoning that the agency itself did not raise. On that basis, the court has concerns over Commerce's reasoning and cannot sustain its change of by-product offset methodology.

As an initial matter, the first portion of Commerce's explanation, that it modified its methodology to conform with "agency wide policy", is not supported by substantial evidence. In supplemental briefing requested by the court, Commerce explains that it did not intend "agency wide" as a term of art but only used it to signal both a departure from its past practice and an attempt to conform with its then-recent practice.[60] However, the Remand points to only one case, *Citric Acid and Certain Citrate Salts,* to support the claim that the new methodology is an "agency wide" practice, and as Arch rightly points out, one case does not qualify this methodology as "agency wide" or even a "practice".[61] Moreover, the proceeding in question was published in 2014, a year after the results of the review at issue, and thus does not speak to what practice was in place or altered at the time of the review.

The remainder of Commerce's explanation for its change in methodology (to "avoid overstating the value of the by-product") also contains several deficiencies. First, the remand results are unclear on whether Commerce in this matter is granting an offset to each respondent for the full amount of the ammonia gas and sulfuric acid claimed as *produced* during the POR, in accordance with Commerce's general by-products practice, as opposed to limiting the offset to the value of the amount of those by-products as embodied in the amount of ammonium sulfate actually *sold* during the POR. *Cf.* RR at 28 ("it [i]s still the Department's practice to first start with the value of the downstream product (*i.e.*, ammonium sulfate) that was *actually sold* by the respondents *and produced* during the POR") (italics added). At a minimum, the matter requires remand for clarification thereof.

Second, if Commerce is only granting an offset based on the amount of ammonium sulfate that was actually sold during the POR, *cf. id* ("we must grant an offset equal to the amount of value a company actually receives, less any processing costs, and not a hypothetical value"), then the new methodology is actually a "net realized value"

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[59] The court will uphold "a decision of less than ideal clarity" *et cetera. See Bowman Transp., Inc. v. Ark.-Best Freight Sys., Inc.*, 419 U.S. 281, 285–86 (1974).

[60] Def's Resp. to Court Questions (May 29, 2015) at 7–8.

[61] *See* RR at 29, referencing *Citric Acid and Certain Citrate Salts*, *supra*, 79 Fed. Reg. 101, and accompanying I&D Memo at 12; *see also* Arch's Cmts. at 12.

standard (based upon the values of the ammonium gas and sulfuric acid by-products in actual sales of the downstream product that occur during a period of review), not a "net realizable value" standard, which would therefore be at odds both with the generally accepted accounting principles' cost accounting concerns for income and inventory valuations as well as at odds with Commerce's allegedly still-existing policy of determining whether or not the by-product has commercial value by proof of sales or reintroduction into production. Arch raised this last point in its comments on the Draft Remand, and it is an argument of cogent materiality that Commerce failed to address, requiring remand for that reason as well. *See Altx, Inc. v. United States*, 25 CIT 1100, 1103, 167 F. Supp. 2d 1353, 1359 (2001), quoting *United States v. Nova Scotia Food Products Corp*., 568 F.2d 240, 252 (2d Cir.1977) ("[i]t is not in keeping with the rational [agency] process to leave vital questions, raised by comments which are of cogent materiality, completely unanswered"); *see also* Arch's Cmts. at 12.[62]

Third, it is unclear how Commerce's new methodology is an improvement over its previously applied methodology and is a reasonable change. Although it is apparent that Commerce perceived a need to adjust how it calculates the by-product offset in this proceeding due to concern over the irrationality of record evidence of higher surrogate values for the by-products than for the downstream product into which they were further processed, Kangtai correctly points out that "this is an accident of the surrogate values in a particular surrogate country at a particular time period and has nothing to do with the legitimacy of the methodology"[63], and that Commerce's concern is really a "capping" argument. *See, e.g., Multilayered Wood Flooring from the PRC*, 76 Fed. Reg. 64318 (Oct. 18, 2011) (final LTFV determ), and *IDM* at cmt. 23. Further, it is difficult to fathom why Commerce would opt for a more complex methodology over the simplicity of the earlier one in order to address the problem identified by the petitioners. The former methodology simply determined the volume of the ammonia gas and sulfuric acid by-products that must have been

[62] Citing *DuPont Teijin Films China Limited, et al. v. United States*, 38 CIT ___, Slip Op. 14–106 (Sep. 11, 2014), and final results of redetermination pursuant thereto (dated Jan. 9, 2015). "The Department grants an offset for by-products generated during the production of subject merchandise if evidence is provided that such by-product has commercial value. The Department considers that a byproduct has commercial value if it is sold, or if, as in this instance, it is reintroduced into production. Thus, the Department's practice is to attribute the commercial value to a by-product by virtue of its reintroduction. Given that DuPont Group ultimately reintroduces the PETWASTEOUT into production, this demonstrates that this byproduct has commercial value." Arch's Cmts. on Remand at 12.

[63] Kangtai's Resp. to Court Questions at 4.

produced at the split-off point and calculated their values based upon the per-unit surrogate values of record that were deemed appropriate. Some form of "cap" to address the petitioners' (and Commerce's) concern regarding overstatement would be appropriate, and would certainly comport with Occam's Razor, but simplicity itself, of course, does not render a more complex method unreasonable. Rather, the reasonableness of increased complexity must be assessed on the basis of the increased accuracy it purports to achieve.

From the first through the fifth administrative reviews Commerce determined that the allowable by-product offset is for those by-products that are generated at the split-off point in the production of subject merchandise. For those reviews, Commerce adhered to a methodology that simply assigned a surrogate value to those by-products. For the matter at bar, the further-manufacturing FOPs (labor and electricity) that Commerce states "must" be deducted appear to be relevant only for purposes of determining income or inventory values. Yet in focusing on sales of ammonium sulfate during the POR, both the new methodology and the previous one ignore the under- or over-statements of ammonia gas and sulfuric acid production during the POR that occur due to changes between beginning and ending inventories of ammonium sulfate[64] at the close of the POR.

Certainly the new methodology does not result in improved accuracy to that extent, and if the concern is simply over a proper per-unit valuation, one is left wondering: what, exactly, is the improvement of the new methodology over the old one? After all, by-product valuation is not an exact science but is largely arbitrary, albeit with defined rules of varying complexity. *See*, *e.g.*, *Cost Accounting* at 149; *Wiley GAAP 2011*, ch. 9. Further, the new methodology appears to be an attempt to determine what the "actual" (*i.e.*, "saleable") value of the ammonia gas and sulfuric acid is to the respondents, but the "reality" of those values are apparently tethered to the *surrogate* value for the downstream by-product, based upon a Philippine value, and not what the "reality" of what the respondents "actually" received as compensation for sales of ammonium sulfate. Commerce does not, on that further basis, demonstrate or persuade that its new methodology actually produces a more accurate result than the old methodology, even if it is an attempt to comport with accepted cost-accounting methodology.

Fourth, in voluntarily requesting remand, Commerce has sidestepped the parties' arguments concerning lack of notice and com-

[64] Kangtai avers that it has a "continuous production" operation. Kangtai's Resp. to Clearon's Br. at 8 (Feb. 24, 2015).

ment. Commerce claims to have modified its methodology in order "to avoid overstating the value of the by-product", but Kangtai points out that in the petitioners' administrative case brief following the *Preliminary Results* they only expressed concern over the surrogate values used to value ammonia gas and sulfuric acid and did not voice concern over the existing methodology, and no party otherwise expressed concerns over the existing methodology. Where there is no reliance interest in a particular methodology, Commerce has the discretion to reconsider the methodology on its own, *sua sponte*, but in this matter, in announcing after the *Preliminary Results* that it would base the by-product offset on actual sales of the downstream product during the POR, not only has Commerce not adequately explained what was wrong with the old methodology (except to state a desire to avoid "overstating", which can be addressed via, *e.g.*, capping, as argued by Kangtai), it has not addressed or apparently considered Kangtai's and Arch's arguments that they relied on the old methodology for their pricing of subject merchandise, and that applying the new methodology *ex post facto* is fundamentally unfair. *See*, *e.g.*, Kangtai's Reply to Court Questions, ECF No. 98 (May 29, 2015) at 8–9. The issue therefore requires reconsideration via remand.

In passing, the court considers Kangtai's argument regarding Commerce's apparent agreement with the petitioners that based on Kangtai's record keeping in the normal course of business there was no verifiable way to allocate to the downstream ammonium sulfate product certain labor and electricity associated with its production as a basis for rejecting Kangtai's proposed method of allocating labor and electricity incurred after the split-off point, and allocating such FOPs to the production of subject merchandise. On the one hand, the court agrees the record does not demonstrate that any labor was involved in the respondents further processing of ammonium gas and sulfuric acid into ammonium sulfate, and Commerce's point is not in accordance with its own acknowledgment that production of "[a]mmonium sulfate . . . involves a large amount of electricity". *See* RR at 50. Furthermore, Commerce's point is not in accordance with the "net realizable value" methodology that it claims it had to utilize.[65] On the other hand, to the extent Kangtai argues that this amounts, in effect, to an *ex post facto* adverse inference against Kangtai for not keeping the records that Commerce's new methodology would require, the remand results state that Commerce relied on Kangtai's own contention that if "the Department does not agree with Kangtai's allocation

[65] *See*, *e.g.*, *CA* at 151 ("[S]eparate production costs incurred after the split-off point are easier to identity with individual products . . .. When separate production costs exist, joint costs are allocated on the basis of relative net realizable values.").

methodology . . ., the Department should simply award the by-product offset with no additional by-product FOPs and with the Direct Material FOPs as previously reported at Exhibit D-7 of Section D response dated November 28, 2011, where Kangtai attributed all and total consumption to the CYA production." RR at 50, quoting Letter from Kangtai, "Certain Chlor-Isos from the PRC -Remand Questionnaire Response," August 18, 2014, at 3–4. In other words, since the remand results are apparently in accordance with what Kangtai itself argues, they are therefore not unreasonable to that extent.

Commerce has the discretion to adopt a new by-product valuation methodology with prospective effect, so long as it provides the respondents time to adapt and comply. On remand of this matter, Commerce might be able to offer a valid explanation of why the respondents had no reliance interest in the then-existing methodology and why the new methodology results in greater accuracy and "avoid[s] overstating the value of the by-product" as well as address the parties' arguments concerning lack of notice and comment and the remainder of the foregoing. If on remand it again determines to calculate Kangtai's by-product offsets based on net realizable value methodology, then Commerce is requested to consider using the facts available, notwithstanding Kangtai's apparent concession, above, in order to properly allocate and attribute all FOPs incurred in the production of ammonium sulfate. Further, Commerce must either supply valid reasons to support changing its methodology in this proceeding which amounts to a "sufficient, reasoned analysis",[66] supported by substantial evidence, or it should revert to its "former" (apparently still-existing) methodology, albeit with any appropriate modification (*e.g.* capping) to avoid the "illogical conclusions that do not match the real world experience of [Arch] and Kangtai," that Commerce explained was its true concern. *See* RR at 47.

IV. *Conclusion*

For the above reasons, the matter must be remanded for further proceedings not inconsistent with this opinion. The results of remand shall be due December 18, 2015, whereupon by the fifth business day thereafter the parties shall file a joint status report as to a proposed scheduling of comments, if any, on the remand results, as well as a proposed page limitation(s) thereof.

So ordered.

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[66] *See NMB Singapore Ltd., v. United States*, 557 F.3d 1316, 1328 (Fed. Cir. 2009); *see also Huvis Corp. v. United States*, 570 F.3d 1347, 1353 (Fed. Cir. 2009).

Dated: August 20, 2015
New York, New York

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

Slip Op. 15–92

DIAMOND SAWBLADES MANUFACTURERS' COALITION, Plaintiff, v. UNITED STATES, Defendant, and BEIJING GANG YAN DIAMOND PRODUCTS COMPANY, and GANG YAN DIAMOND PRODUCTS, INC., Intervenor-defendants.

Before: R. Kenton Musgrave, Senior Judge
Court No. 13–00168

[Denying motion to dismiss, granting motion for preliminary injunction, and granting motion for voluntary remand of determination in section 129 proceeding to partially revoke antidumping duty order on diamond sawblades and parts thereof from the People's Republic of China.]

Dated: August 20, 2015

Daniel B. Pickard and *Maureen E. Thorson*, Wiley Rein LLP, of Washington, DC, for the plaintiff.

Alexander V. Sverdlov, Trial Attorney, Commercial Litigation Branch, Civil Division, U.S. Department of Justice, of Washington, DC, for the defendant. With him on the brief were *Benjamin C. Mizer*, Principal Deputy Assistant Attorney General, *Jeanne E. Davidson*, Director, and *Franklin E. White, Jr.*, Assistant Director. Of Counsel on the brief was *Aman Kakar*, Attorney, Office of the Chief Counsel for Import Administration, U.S. Department of Commerce, of Washington, DC.

Jeffrey S. Neeley and *Michael S. Holton*, Husch Blackwell, LLP, of Washington, DC, for the intervenor-defendants.

OPINION AND ORDER

Musgrave, Senior Judge:

The plaintiff, Diamond Sawblades Manufacturers' Coalition ("DSMC"), brought this suit to challenge a determination of the International Trade Administration, U.S. Department of Commerce ("Commerce") made pursuant to section 129 of the Uruguay Round Agreements Act, Pub. L. No. 103–465, §129, 1087 Stat. 4809, 4836–39 (1994) (section 129), 19 U.S.C. § 3538, in connection with the antidumping investigation of diamond sawblades from the People's Republic of China ("PRC"). *See Certain Frozen Warmwater Shrimp from the PRC and Diamond Sawblades and Parts Thereof From the PRC* (notice of section 129 implementation and partial revocation), 78 Fed.

Reg. 18958 (Mar. 28, 2013) ("*Implemented PRC Section 129 Determination*"). That determination resulted in revocation of the antidumping duty order on subject merchandise with respect to the "ATM entity."[1]

Now before the court are a motion for voluntary remand filed by Commerce, a motion to dismiss filed by ATM, and a motion for "preliminary" (*pendente lite*) injunction filed by the DSMC. For the following reasons, the motion to dismiss will be denied and the motions for preliminary injunction and remand granted.

I. *Background*

The history of the diamond sawblades from the PRC antidumping investigation is presumably familiar. Briefly, in 2006 Commerce determined that certain PRC producers of diamond sawblades, including the collapsed ATM entity, were dumping their products, while the International Trade Commission ("ITC") determined that there was no injury, either material or threat thereof. *See Diamond Sawblades and Parts Thereof from the PRC*, 71 Fed. Reg. 29303 (May 22, 2006) (final determination), as amended, 71 Fed. Reg. 35864 (June 22, 2006) (amended final determination) ("*LTFV Final Result*"). After numerous court proceedings, the ITC reversed its position, determining there to be threatened material injury, and Commerce published the antidumping duty order in 2009. *Diamond Sawblades and Parts Thereof from the PRC and the Republic of Korea*, 74 Fed. Reg. 57145 (Nov. 4, 2009) ("Order").

Among its other findings during its investigation, Commerce concluded that the collapsed ATM entity had demonstrated independence from government control, and therefore was entitled to receive its own calculated rate. DSMC and certain respondents challenged the *LTFV Final Result*; among other aspects, DSMC contested the ATM entity's entitlement to a separate rate. *Advanced Technology & Materials Co. v. United States*, 37 CIT ___, 938 F. Supp. 2d 1342 (2013). After two remands, Commerce determined that the ATM entity had not, in fact, satisfied the requirement for a separate rate because it had failed to rebut the presumption of state control. *Id*. at 1345. Commerce therefore assigned the ATM entity the country-wide margin of 164.09 percent. *Id*. The appeals affirmed this determina-

[1] The members of the ATM entity are: Advanced Technology & Materials Co., Ltd.; Beijing Gang Yan Diamond Products Co. (a/k/a Beijing Gang Yan Diamond Products Co., Ltd., Beijing Gang Yan Diamond Products Company); HXF Saw Co., Ltd. (a/k/a Yichang HXF Circular Saw Industrial Co., Ltd.); AT & M International Trading Co., Ltd. (a/k/a ATM International Trading Co., Ltd.); and Cliff International Ltd. (a/k/a Cliff (Tianjin) International Ltd., Cliff (Tianjin) International Ltd., Company). For the sake of consistency, the intervenor-defendants Beijing Gang Yan Diamond Products Co. and Gang Yan Diamond Products, Inc., will be referenced herein as "ATM."

tion. 37 CIT at ___, 938 F. Supp. 2d at 1353, *aff'd*, 541 Fed. Appx. 1002 (Fed. Cir. 2013).

While these challenges were being litigated in these courts, the PRC government challenged a different aspect of Commerce's diamond sawblades investigation before a certain foreign trade organization ("WTO"), namely, Commerce's use of its long-standing "zeroing" methodology to calculate the final antidumping duty rates. In June 2012, a WTO panel ruled that the use of zeroing in calculating certain dumping margins was not consistent with the United States' obligations under the Antidumping Agreement, and the WTO Dispute Settlement Body subsequently adopted the panel report. *See* WTO Panel Report, *United States -- Anti-Dumping Measures on Certain Shrimp and Diamond Sawblades from [the People's Republic of] China*, WT/DS422/R (June 8, 2012).

After receipt of a letter from the USTR with respect thereto dated September 2, 2012, *see* Def-Int's Appx. to Opp. to Mot. for Prelim. Inj. at Tab 2, ECF No. 71 (July 17, 2015), Commerce initiated proceedings pursuant to the requirements of section 129 to bring the United States into compliance with the WTO decision on the diamond sawblades and parts thereof from the PRC investigation. *See* 19 U.S.C. § 3538(b). After releasing a preliminary determination and considering the parties' comments, Commerce issued a final section 129 determination on March 4, 2013. As part of that determination, Commerce continued to assign the ATM entity a separate rate (just as it had prior to the litigation in the investigation), and recalculated that rate without using zeroing. Recalculation resulted in a *de minimis* or zero margin. *See Final Results of the Proceeding under Section 129 of the Uruguay Round Agreements Act: Antidumping Measures on Diamond Sawblades and Parts Thereof from the PRC* (Mar. 4, 2013) ("PRC Section 129 Final"), PDoc 23.

On March 22, 2013, the USTR instructed Commerce to implement the PRC Section 129 Final. *See Implemented PRC Section 129 Determination*.

The genesis of the specific lawsuit before this court can be traced back to earlier parallel proceedings that involved the antidumping duty order on diamond sawblades and parts thereof from the Republic of Korea ("Korea"). Similar to the WTO action brought by the PRC government for the benefit of the ATM entity, as a result of a successful WTO action brought by the Korean government and subsequent instruction from the United States Trade Representative to Commerce to "implement" the adverse WTO decision pursuant to section 129, Commerce announced that it would revoke the Korean anti-

dumping duty order due to the *de minimis* margins recalculated without zeroing. Because of the impact revocation would have on the DSMC's then-ongoing litigation over the investigation of subject merchandise from Korea (and the margins determined thereat), the DSMC sought to enjoin that revocation, but did not successfully persuade that such enjoinder was appropriate, although the DSMC did obtain enjoinder of liquidation of entries of that subject merchandise. *See Diamond Sawblades Manufacturers Coalition v. United States*, 35 CIT ___, Slip Op. 11–137 (Nov. 2, 1011) (denying enjoinder of revocation of antidumping duty order on diamond sawblades and parts thereof from the Republic of Korea on ground that enjoinder would inappropriately interfere with agency's lawful conduct of its duties).

Thus, in light of publication of the *Implemented PRC Section 129 Determination*, on May 24, 2013, DSMC filed its complaint to challenge that determination. *See* Compl. at 1 (May 24, 2013), ECF No. 9. In paragraph 14 of its complaint, DSMC challenged Commerce's calculation of ATM's margin in the section 129 determination due to Commerce's final determination in the investigation that ATM was eligible for a separate rate. *Id*. at 5–6. After issuance on October 11, 2013 of this court's decision sustaining Commerce's redetermination of the ATM entity as ineligible for a separate rate, the DSMC filed its motion for judgment and supporting brief on December 16, 2013, framing the sole issue as whether the partial revocation "was in accordance with law and/or supported by substantial record evidence where the revocation was premised on a separate rate determination that is void as a matter of law" DSMC Rule 56.2 Br. at 1. The motion was predicated on the argument that the litigation of the 09–00511 case had effectively replaced Commerce's revocation decision as a matter of law, and that the matter should be immediately remanded for reconsideration.

Subsequently, over the DSMC's objection, this matter was stayed pending a final decision on the appeal of the 09–00511 case, and on October 24, 2014, the Court of Appeals for the Federal Circuit issued its decision sustaining the administrative redetermination of the ATM entity's ineligibility for separate rate status. *Advanced Technology &Materials Co. v. United States*, 581 Fed. Appx. 900 (Fed. Cir. 2014).

Because that decision affected the DSMC's challenge to an issue here that is separate from the adverse WTO decision, the implementation of the USTR's instructions with respect thereto, and the partial revocation that occurred in consequence, Commerce, in the matter at bar, filed on April 17, 2015 a motion for voluntary remand pursuant

to USCIT Rule 7(b) to re-evaluate its separate rate determination and reconsider its section 129 determination to revoke the antidumping duty order with respect to the ATM entity in light of the appellate decision. ECF No. 50.

By way of response, on May 1, 2015, ATM filed a motion to dismiss for lack of subject matter jurisdiction or for failure to state a claim upon which relief may be granted, arguing that the complaint fails to allege that Commerce acted contrary to law or without a basis of substantial evidence on the record with regard to implementing the instructions of the USTR regarding the WTO decision:

> DSMC . . . seeks to have this Court ignore the instructions of the USTR (and possibly the WTO decision while adding in evidence not before the WTO Panel or on the record here). There is no statutory basis cited for revoking the instructions of the USTR to Commerce without finding that those instructions are contrary to law. Indeed, the USTR instructions are not reviewable under section 3538.

Def-Ints' Mem. in Support of Mot. to Dismiss at 1.

The defendant takes the "awkward" step of joining the DSMC in opposing the motion to dismiss, arguing that it cannot concur in ATM's arguments. Def's Resp. in Opp. to Def-Ints' Mot. to Dismiss at 1; *see also* Pl's Opp. to Def-Ints' Mot. to Dismiss.

Also, on June 24, 2015, Commerce filed a letter in consolidated court number 09–00511 notifying that the preliminary injunction order in that case enjoined liquidation "pending a final and conclusive decision in this litigation and any appeals", that that case was now final, that the preliminary injunction has dissolved by its own terms, that Commerce can now liquidate the entries subject to that case, that the entries that can be liquidated include those that are subject to the suit at bar, that Commerce interprets 19 U.S.C. §1673d(c)(2) as governing a "negative determination" "such as the one Commerce made as part of its section 129 proceedings" and that liquidation of these entries is required by statute, and that Commerce is aware of no authority that permits continuation of suspension of liquidation of the post-section-129 entries entered on or after March 22, 2013, the date of revocation. *See* Consol. Ct. No. 09–00511, ECF No. 144 (Mar. 28, 2013) ("Defendant's Notice").

Therefore, on June 25, 2015, the DSMC moved for and obtained a temporary restraining order against liquidation of the post-section-129 entries, and it has also moved to convert that TRO into a preliminary injunction during the pendency of the litigation. ATM opposes granting preliminary injunction, arguing that the DSMC's

motion is untimely and does not meet the legal standards therefor, and that the court will not lose jurisdiction in the absence of injunction.

The motions are addressed sequentially, as follows.

II. *Motion to Dismiss*

In its motion to dismiss, ATM argues that this court lacks subject matter jurisdiction to consider DSMC's challenge to Commerce's final determination under section 129 of the URAA, and that even if subject matter jurisdiction exists the DSMC has failed to state a claim upon which relief may be granted. ATM characterizes the DSMC's complaint as

> requesting this Court to add facts that were not before the WTO panel, or on the record of the 129 determination, to find that the WTO panel decision is a nullity, to ignore the instructions of the USTR to Commerce pursuant to statute, to force Commerce to make a determination that is not authorized by the request and implementation language provided by the USTR, and to do so without the explicit authorization of the USTR, which is the agency that is given the authority to make request determinations and finally determine whether any 129 determination should implemented.

Def-Int's Mot. to Dismiss at 11. In short, ATM argues the complaint amounts to "a collateral attack on the WTO panel decision" and "an end run around the statutory authority of the USTR" seeking "for relief that cannot be granted in the absence of instructions from the USTR" under the provisions of 19 U.S.C. § 3538 (b). *Id*. ATM argues the statutory authority and the review process by this court for determinations of Commerce made under 19 U.S.C. § 1673 and the statutory authority of URAA section 129 determinations, 19 U.S.C. §3538 (b), are "distinct procedures and provide distinct jurisdictional authority pursuant to 19 U.S.C. §1516a" and that, as a result, the DSMC's complaint fails to assert any claims cognizable under 19 U.S.C. §3538 (b) but instead asks for reversal of the revocation determination as if the section 129 determination had been made pursuant to 19 U.S.C. §1673. *Id*. at 11–12. "Were DSMC to be successful in obtaining jurisdiction here, the entire statutory scheme for section 129 cases will be undermined, with Commerce able to ignore the authority of the USTR to implement WTO panel decisions, and with Commerce taking over as the lead agency for making decisions on implementation of WTO panel decisions." *Id*. at 12.

ATM further argues that even if, *arguendo*, subject matter jurisdiction is proper here, DSMC's complaint fails to state a claim upon which relief may be granted because Commerce's authority to issue a new determination pursuant to the section 129 only extends to the scope of the WTO findings at the direction of the USTR, and that even if Commerce can issue a "new" section 129 determination as requested by DSMC, the determination would have no legal effect unless and until the USTR directs Commerce to implement that determination in whole or in part, which is relief that exceeds the scope of the statute. *Id*. at 12–13.

DSMC responds that jurisdiction is proper here pursuant to 28 U.S.C. §1581(c), as it is challenging the determination to revoke the antidumping duty order on diamond sawblades from the PRC as to the collapsed ATM entity. Complaint, (May 24, 2013) at ¶2, ECF No. 9. In order to preserve the full relief to which it is entitled from its cause of action in *Advanced Technology &Materials Co. v. United States*, Consol. Ct. No. 09–00511, the DSMC instituted this suit. And because the DSMC prevailed on that challenge (to the LTFV investigation with respect to the ATM entity even in the absence of zeroing methodology), then the revocation cannot lawfully stand. DSMC's brief on its motion for judgment expounds on the fact that the calculations that resulted in revocation of the order as to the ATM entity were based on erroneous findings that led to an erroneous original LTFV determination, *see*, *e.g.*, DSMC 56.2 Br. at 11, and since those findings were judicially found unsupportable and have since been administratively disavowed as well, *see id*., DSMC asserts that jurisdiction over the instant matter is proper and it should be remanded for further consideration.

A. The Court Has Subject Matter Jurisdiction Over this Action

Section 129 of the URAA provides a process whereby the United States may alter or amend the results of past antidumping duty determinations in response to adverse WTO decisions. 19 U.S.C. §3538. The statute provides that, where an adverse WTO decision is rendered concerning an antidumping duty determination issued by Commerce, the USTR may direct Commerce to make a new determination that would render Commerce's original determination "not inconsistent" with the WTO decision. 19 U.S.C. §3538(b)(2). After Commerce makes its new determination, USTR may then direct the agency to implement the new determination. 19 U.S.C. §3538(b)(4).

In this instance, Commerce has implemented, and therefore fully complied with, the USTR's instruction -- by eliminating zeroing from

its calculation. Nothing concerning the matter at bar will affect or alter that implementation. Moreover, the USTR did not explicitly instruct Commerce to "revoke" the antidumping duty order, "implementation" of the USTR's instruction simply resulted in recalculation of *de minimis* margin for the collapsed ATM entity. Commerce determined to revoke of its own accord, pursuant to 19 U.S.C. §§ 1673b(b)(3) and 1673d(a)(4) and 19 C.F.R. §351.204(e), (if the antidumping duty margin for a respondent in an antidumping duty investigation is calculated at less than two percent, the respondent is to be excluded from any resulting order), as the logical extension of "implementing" the adverse WTO panel's findings, pursuant to section 129 of the URAA, based on the record available *at that time*.[2] That decision, to revoke, is a separate matter, albeit one that is bound to "implementation" of the relevant adverse WTO panel's finding concerning zeroing. *See*, *e.g.*, Slip Op. 13–137 (Nov. 3, 2011) at 11 ("*Commerce* has determined that revocation of the Order will be necessary upon implementation of its section 129 determination") (italics added).

In its motion to dismiss for lack of subject matter jurisdiction, ATM's objection appears to be three-fold. *See* Def-Int's Mot. to Dismiss at 13–18. First, it argues that 19 U.S.C. §1516a and 19 U.S.C. §3538 only permit challenges to Commerce's failure to issue section 129 determinations "not inconsistent" with adverse WTO panel reports, that the USTR's instructions in that regard are not reviewable, and that there has been no allegation that "Commerce failed to follow such instructions properly pursuant to its statutory obligations." *Id*. at 16; *see id*. at 14–18. Second, ATM argues that DSMC has failed to challenge "th[e] section 129 at the time it was made," *i.e.*, on the basis of the record before Commerce. *Id*. at 14–15. Finally, ATM appears to argue that substantive review is foreclosed by reason of USTR's role in implementation. *Id*. at 14–18. None of these arguments, however, establishes that this court lacks jurisdiction over DSMC's action.

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[2] The contested revocation was the result of similarly "implementing" the adverse decision of the WTO telling these United States what this sovereign country had "agreed to", in effect, with regard to the Antidumping Agreement, the WTO panel having decided that Commerce had erred, once again, in the less-than-fair-value ("LTFV") investigation into alleged dumping of subject merchandise when Commerce again applied its long-established practice of "zeroing" to the ATM entity respondent. *See* 19 U.S.C. §3538(b)(2); *see also Certain Frozen Warmwater Shrimp From the People's Republic of China and Diamond Sawblades and Parts Thereof From the People's Republic of China*, 78 Fed. Reg. 18958 (Mar. 28, 2013) (notice of implementation of section 129 determinations and partial revocation of the antidumping duty orders) ("final results") and Panel Report, *United States -- Anti-Dumping Measures on Certain Shrimp and Diamond Sawblades from [the People's Republic of] China*, WT/DS422/R (June 8, 2012).

1. The Statute Provides for Substantive Challenges to Section 129 Determinations

ATM begins by arguing that, although 19 U.S.C. §1516a authorizes challenges to, and judicial review of, determinations made under 19 U.S.C. §3538, the latter statute is structured such that only Commerce's *failure* to issue or failure to implement a determination may be appealed. Def-Int's Mot. to Dismiss at 14. Both the DSMC and the defendant counter that Congress expressly provided for judicial review of Commerce's determinations under 19 U.S.C. §3538. The court finds that ATM's reading cannot be squared with the plain language of either statute, the legislative history of section 129, or with the courts' consistent treatment of that statute as providing for challenges to the "factual findings" and "legal conclusions" incorporated into section 129 determinations.

Section 129 of the URAA, 19 U.S.C. §3538, describes the process to be followed when an adverse foreign trade organization (WTO) decision implicates a determination issued by Commerce under the trade laws. The statute first obliges consultations by Commerce, Congress, and USTR regarding the matter. 19 U.S.C. §3538(b)(l). It then states that "the administering authority shall, within 180 days after receipt of a written request from the Trade Representative, issue a determination in connection with the particular proceeding that would render the administering authority's action . . . not inconsistent with the findings of the panel or the Appellate Body." 19 U.S.C. §3538(b)(2). The statute then directs USTR to further consult with Commerce and relevant congressional committees. 19 U.S.C. §3538(b)(3). Finally, the statute provides that, after such consultations, USTR may instruct Commerce to implement the determination that Commerce made pursuant to subsection (b)(2) of the statute. 19 U.S.C. §3538(b)(4).

As for judicial review thereof, the Tariff Act of 1930, as amended, plainly provides that such review may be sought with respect to "notice of the *implementation* of *any* . .. determination by the administering authority or the Commission under section 3538 of this title". 19 U.S.C. §1516a(a)(2)(A)(III) and (B)(vii) (italics added). The only "determination" referenced in section 3538 is a determination made by Commerce (or the ITC) in response to USTR's request, 19 U.S.C. §3538, and the plain language of the statute is at odds with ATM's reading of it.

The standard of review also supports a broader reading than that argued by ATM. By expressly authorizing this court to consider whether a section 129 determination is "unsupported by substantial evidence on the record, or otherwise not in accordance with law," Congress contemplated more than a review of a failure to make or

implement a determination. 19 U.S.C. §1516a(b)(l)(B(i). And the statute clearly contemplates review of the substance upon which determinations under 19 U.S.C. §3538 are based (*i.e.*, its "factual findings" and "legal conclusions") in the "implementation" thereof. 19 U.S.C. §1516a(a)(2)(A)(III).

ATM's interpretation is also at odds with the legislative history of section 129 of the URAA, which confirms, in accordance with the plain language of 19 U.S.C. §1516a and 19 U.S.C. §3538, that Congress intended to provide for substantive judicial review of Commerce's "section 129" determinations. The Statement of Administrative Action ("*SAA*") accompanying the URAA states that the section "amends section 5l6 A of the Tariff Act of 1930 to provide for review by the courts . . . of new Title VII determinations made by Commerce . . . under section 129 that are implemented." H.R.Doc. No. 103–316, vol.1 at 1026 (1994), reprinted in 1994 *U.S.C.C.A.N.* 4040, 4314. Confirming that the intended review was meant to be substantive -- in other words, to reach the legal and evidentiary underpinnings of the determinations under challenge --the legislative history acknowledges that there might be instances in which "it is possible that Commerce . . . may be in the position of simultaneously defending determinations in which the agency reached different conclusions". *Id*. at 1027, 1994 *U.S.C.C.A.N.* at 4314. In context, this implies that appeals of "determinations" would result in the agency defending its findings in an initial determination on the one hand, and on the other hand defending a section 129 determination meant to bring the initial determination into compliance at the same time or in separate proceedings.

Moreover, the *SAA* notes that in such cases, the courts are not expected to forego substantive review of either the section 129 determination or the pre-existing determination that it alters, but to "be sensitive to the fact that . . . multiple permissible interpretations of the law and the facts may be legally permissible in any particular case." *Id*. This further indicates that Congress intended the courts to review the substance of section 129 determinations in accordance with the standard of review provided for in 19 U.S.C. §l516a(b)(1)(B)(i), *i.e.*, for substantial support in the record and for otherwise being consistent with law. Indeed, if ATM's reading were correct, and only a failure to issue or implement a section 129 determination could be challenged, it is difficult to *see* how Commerce would ever be placed in the position of "simultaneously defending determinations in which the agency reached different conclusions" as, at most, the agency would be simultaneously defending its initial determination and a subsequent failure to issue or implement a

section 129 determination. *Cf*. Def. Opp. to Mot. to Dismiss at 6 (Commerce "would never be in a position of defending 'different conclusions' if -- as ATM suggests -- the actual conclusions Commerce reached as part of its section 129 determination could never be challenged").

Finally, ATM's understanding of 19 U.S.C. §3538 as only permitting challenges to a failure to make or implement a section 129 determination is not in keeping with the manner in which the courts have actually treated challenges to section 129 determinations. Rather than limiting their consideration to the question of whether Commerce failed to make or implement a determination, the courts have engaged with the "factual findings" and "legal conclusions" underpinning the substance of the determinations themselves. *See*, *e.g.*, *Wheatland Tube Co. v. United States*, 38 CIT ___, 26 F. Supp. 3d 1372 (2014) (remanding for further explanation of the logical underpinnings of the agency's redetermination, pursuant to section 129, of a double-counting offset regarding the trade orders on Chinese circular welded carbon quality steel pipe). Indeed, ATM does not point to any case in which a court has followed ATM's interpretation of the statute as permitting only narrow challenges to a failure to issue or implement a determination.

In sum, ATM's interpretation of 19 U.S.C. §3538 is at odds with the plain language of that statute, with its legislative history, and with judicial treatment, in practice, of section 129 appeals. Thus, ATM's first objection to the court's exercise of jurisdiction is without merit.

2. Jurisdiction Is Unaffected by Timing of Commerce's Disavowal of Its Original Calculations

ATM's next argument is likewise unpersuasive. ATM complains that rather than challenging "the section 129 at the time that it was made," DSMC's complaint references "later developments not on the record of the section 129 case." Motion to Dismiss at 14. As such, ATM avers, "DSMC's request for relief is outside the scope of the section 129 determination" most particularly because it goes beyond "the specific findings that WTO found to be inconsistent with U.S. international obligation." *Id*. at 15.

As previously noted, this court reviews Commerce's section 129 determinations to determine whether they are supported by substantial record evidence and otherwise in accordance with law. It is with this latter area of review that DSMC's complaint is particularly

concerned. *See* 19 U.S.C. §1516a(b)(l)(B(i). As explained in DSMC's opening brief, pages 6–7, Commerce's section 129 determination was based on the assumption that the 2.82% antidumping duty margin originally calculated for the ATM entity was valid under U.S. law. *See*, *e.g.*, Revocation Notice, 78 Fed. Reg. at 18958 n.3, PDoc 25. DSMC contends that at the time, Commerce was also aware that the margin might not, in fact, be valid, as the issue of whether the entity was eligible for an individual margin calculation (as of the time the section 129 determination was issued) had been twice remanded, *see*, *e.g.*, Order, *Advanced Technology & Materials Co. v. United States*, CIT Consol. Ct. No. 09–511, Slip Op. 12–147, ECF No. 124 (Nov. 30, 2012), and that "very soon" after the section 129 determination recalculated the ATM entity's margin as *de minimis*, Commerce replaced its original calculations, as a matter of law, with a finding that subjected the entity to the PRC-wide rate. *See* Second Remand Results, *Advanced Technology & Materials Co., Ltd., et al. v. United States*, CIT Consol. Ct. No. 09–115, ECF No. 148 (May 6, 2013). This remand determination was subsequently upheld through appeals. *See*, *e.g.*, CAFC Rule 36(a) (judgment); *Advanced Technology & Materials Co. v. United States*, CAFC Ct. No. 14–1154 (Oct. 24, 2014). ATM appears to argue that the facts of record upon which the original section 129 determination rests are "written in stone" and cannot be altered, *e.g.*, Def-Int's Reply on Mot. to Dismiss at 9 ("the information on that issue is not on the record of this review"), but that is an incorrect statement of law, regarding the state of the record, and the judicial and administrative authority to reopen it. The Federal Circuit has previously held that "deference is not owed to a determination that is based on data that the agency generating those data indicates are incorrect. The law does not require, nor would it make sense to require, reliance on data [that] might lead to an erroneous result." *Borlem S.A. -Empreedimentos Industriais v. United States*, 913 F.2d 933, 937 (Fed. Cir. 1990). *See also Essar Steel Ltd. v. United States*, 678 F.3d 1268, 1278 (Fed. Cir. 2012). The section 129 determination, as it currently stands, is based on data -- the original margin calculations -- that Commerce has itself determined are incorrect, and because it is based on "material and significant inaccurate facts," remand of the section 129 determination is appropriate.

Contrary to ATM's implications, the fact that the agency disavowed its original calculations only after issuing the section 129 results does not deprive this court of jurisdiction. ATM protests that count 14 is the only part of DSMC's complaint that raises a plausible cause of action but it is one that is based on "actions" (or facts) that occurred subsequent to the instructions issued by USTR to implement the

adverse WTO panel's decision and were not on the record of the section 129 "or reviewed in the section 129" determination, Def-Int's Reply to Mot. to Dismiss at 2–3, but the court has previously found that the lawfulness of an agency determination may hinge upon the outcome of separate litigation, as in *Borlem*. *Diamond Sawblades Mantfacturers Coalition v. United States*, Slip Op. 13–130 (Oct. 11, 2013) at 6 (where the original results upon which a section 129 determination is based are themselves under challenge, "[a]dministrative revocation pursuant to a section 129 determination . . . can only be regarded as interlocutory, *i.e.*, provisional, and dependent upon the outcome of [the challenge to the LTFV results]"). Similarly, the court has also found that a revocation, pursuant to an antidumping duty administrative review, of an order as to a respondent that had obtained three consecutive zero or *de minimis* margins was contingent upon the outcome of litigation over earlier reviews. *Elkem Metals Co. v. United States*, 31 CIT 672, 676 (2007) (acknowledging that the disposition of the matter before the court was contingent upon whether the Department's determination in an earlier proceeding was sustained). And finally, the Federal Circuit has previously held, in similar circumstances, that:

> a reviewing court is not precluded . . . from considering events which have occurred between the date of an agency (or trial court) decision and the date of decision on appeal. Where such intervening events are properly brought to the attention of the reviewing court, that court may rely on that occurrence and typically will remand for consideration by the decision-maker.

Borlem, 913 F.2d at 939 (citation omitted). Thus, the fact that the agency released its second remand results subsequent to its section 129 determination does not deprive this court of jurisdiction or otherwise foreclose this court from remanding the revocation of the antidumping duty order for reconsideration.

Lastly in this regard, ATM argues that DSMC's "request for relief is outside the scope of the section 129 determination," in that the complaint does not "address[ ] solely the issue of removing zeroing" from the calculation of the ATM entity's LTFV margin. Def-Int's Motion to Dismiss at 15–16; *see also* Def-Int's Reply to Mot to Dismiss at 3. Commerce and DSMC take the position, essentially, that the section 129 proceeding was initiated in order to re-determine the ATM entity's margin and that the DSMC's challenge is to the "factual findings" and "legal conclusions" that underpin the agency's re-determination at that time but which have subsequently been determined invalid. Accordingly, the DSMC states that it is utilizing its rights of appeal

over the section 129 determination for exactly the reason that Congress intended when it provided that right of appeal: to ensure that, in rendering decisions consistent with the WTO Agreements, Commerce did not issue new determinations that were unsupported by substantial record evidence or otherwise not in accordance with U.S. law.

ATM responds that factual findings can of course be reviewed by the court based on the substantial evidence standard, but it argues that "factual findings not on the record, and not in the instructions from USTR, but which 'underpin' the determination were not legally before Commerce and cannot be reviewed consistent with the jurisdictional statute." In so arguing, ATM contends that the substantive review "is whether substantial evidence on the record supported the *zeroing* determination, and nothing more." Def-Int's Reply to Mot. to Dismiss at 5 (ATM's emphasis). ATM argues that if any "underpinning" fact can be brought into an appeal, it creates a "nightmare scenario" for all appeals of dumping cases and that Commerce's position is "inconsistent with the statutory structure" because if the court has jurisdiction to review "any and all" factual findings once the section 129 determination is decided, then there would be no need for the jurisdictional statute to separate the various reviewable determinations into separate bases for jurisdiction. From this, ATM argues that if the underpinning of all legal and factual findings are at issue and not just the record of the determination being appeal, then the specific "section 3538 of this title" at 19 U.S.C. §1516a(a)(2)(B)(vii) is superfluous:

> In other words, based on Defendant's argument and Plaintiff's theory of the case, Plaintiff can re-litigate any issue from any other review that was the original basis for the WTO findings in the context of the section 129 determination, even if it was not before Commerce in its section 129 determination. Here, the issue of separate rates was not before Commerce because it was not in the instructions from USTR. But now, the Government concedes that the scope of the instructions from USTR can be ignored and Commerce can set its own scope as to what should be implemented.

Id. at 6–7.

However, this argument overlooks that DSMC's suit here is intended to challenge the partial revocation aspect of *Implemented PRC Section 129 Determination*, which is the legal conclusion Commerce reached in that determination based upon the posture of the investigation at that time. DSMC is not attempting to "re-litigate" the separate rates issue "not before Commerce because it was not in the

instructions from USTR", *see id*. at 6; DSMC is seeking correction of the legal conclusion on revocation in the section 129 determination in order to comport with the final decision on the investigation.

ATM points to *ThyssenKrupp Acciai Speciali, Terni S.P.A. v. United States*, 33 CIT 200, 602 F. Supp.2d 1362 (2009), *aff'd*, 603 F.3d 928 (Fed. Cir. 2010) for support, but that case is inapposite, if not the inverse of the matter at bar. *ThyssenKrupp* involved a plaintiff's attempt to revive -- in the context of a section 129 proceeding that took place in 2007 --its litigious challenge to a ministerial allegation that it had abandoned eight years prior, to wit, that the amended final results of the original investigation into its subject merchandise did not indicate proper correction or incorporation thereof.[3] *See Acciai Speciali Terni S.P.A. v. United States*, 25 CIT 245, 142 F.Supp.2d 969 (2001); *see also* Order of Dismissal, Court No. 99–08–00551, ECF. No. 91 (Jan 23, 2002). Unlike the finality of the original investigation sought to be amended via the section 129 determination that was considered in *ThyssenKrupp*, finality on the diamond sawblades from the PRC investigation only recently occurred, finality of the challenged section 129 determination at bar has not occurred, and the applicability of the former to the latter is a live issue. DSMC simply seeks, properly, to have consistency of results through remand of the latter.

As such, Commerce's position is consistent with *ThyssenKrupp*, wherein it argued, as ATM points out, "that section 129 determinations are limited to the specific issue found inconsistent with the U.S.'s WTO obligations". Def-Int's Reply on Mot. to Dismiss at 7, referencing *ThyssenKrupp*, 602 F. Supp. 2d at 1362. The specific inconsistency Commerce was instructed to address and implement in the challenged section 129 determination at bar was the issue of zeroing. The logical *consequence* thereof, as interpreted by Commerce at the time, was the further determination of partial revocation, which was not improper at the time, and ATM does not go so far as to argue (against its own interest) that the revocation was unlawful in accordance with *ThyssenKrupp*. ATM's entitlement to a separate rate was not an adjudicated factual finding or legal conclusion that was made as part of the section 129 determination, and that fact or conclusion, upon which the revocation rests, has by now been adjudicated inapposite and finality has attached to it. In other words, the

[3] *Cf. Implementation of the Findings of the WTO Panel in US-Zeroing (EC): Notice of Determination Under Section 129 of the Uruguay Round Agreements Act: Antidumping Duty Order on Stainless Steel Sheet and Strip in Coils from Italy*, 72 Fed. Reg. 54640 (Sep. 26, 2007), *with Final Determination of Sales at Less than Fair Value: Stainless Steel Sheet and Strip in Coils from Italy*, 64 Fed. Reg. 30750, 30757 (June 8, 1999), *amended*, 64 Fed. Reg. 40567, 40570 (July 27, 1999).

status quo of the fact or conclusion underpinning the determination to revoke has changed. ATM's second objection to the court's exercise of jurisdiction is without merit.

3. Jurisdiction is Not Dispossessed By Reason of USTR's Role in Implementation

ATM's third objection to jurisdiction appears premised on the "political question" doctrine, pursuant to which the judicial branch is barred from "reviewing the substance of policy decisions that the U.S. Constitution commits to the discretion of the legislative or executive branches of government." *Almond Bros. Lumber Co. v. United States*, 36 CIT ___, Slip Op. 12–51 (Apr. 19, 2012) at 7. ATM alleges that because Commerce lacks statutory authority to implement a section 129 determination without direction from USTR, and because it is USTR that in fact directed the implementation of the determination, USTR is the entity over which jurisdiction must be asserted in order to grant the DSMC relief. Def-Int's Mot. to Dismiss at 16. Moreover, ATM alleges that a challenge to USTR's directions is not cognizable under 19 U.S.C. §3538, and that even if it were, the executive (branch wide) is to be afforded latitude over "the discretionary authority of the President's trade negotiations in the realm of foreign relations" *Id*. at 17. In effect, ATM argues that because implementation of the section 129 determination was within the "sound prosecutorial discretion" of the executive branch, the court may not review it or require Commerce in any way to reconsider or amend it.

The difficulty with this argument is that Congress expressly provided for judicial review of section 129 determinations. 19 U.S.C. §1516a(a)(2)(A)(III) & (B)(vii). Such review clearly covers section 129 determinations regardless of the fact that USTR has instructed their implementation. *See* 19 U.S.C. §1516a(a)(2)(A)(III) (stating that time to appeal dates from notice of implementation); *see also SAA* at 1026–27, 1994 *U.S.C.C.A.N.* at 4314 (noting that the URAA "provide[s] for review by the courts . . . of new Title VII determinations made by Commerce or the ITC under section 129 that are implemented"and confirming that "implemented determinations may be appealed"). Indeed, such review only covers section 129 determinations that USTR has instructed be implemented. *See id.* As such, there is no indication in the statute or the legislative history that Congress understood USTR's role in directing implementation to bar judicial review, or as otherwise insulating section 129 determinations from remand --and potential adjustment -- for failure to comply with the standards provided for in 19 U.S.C. §1516a(b)(l)(B(i). Were ATM's view of the law accepted, the statute would authorize review that

could not result in anything other than an "advisory opinion," by reason of the political nature of USTR's implementation instructions, which is not what Congress contemplated.

Nor is that view how the courts have understood the scope of their review of section 129 determinations. In considering appeals of Commerce's determinations issued under section 129, courts have had to engage, obviously of necessity, with the "factual findings"and "legal conclusions" underpinning the substance of the determinations themselves, and have evidently not found themselves barred from doing so by reason of USTR's role in implementation. *See*, *e.g*, *Wheatland Tube Co.*, 38 CIT at ___, 26 F. Supp. 3d at 1372–89. This court finds no merit to ATM's argument that "*any* change to the original [section 129] determination . . . must be reviewed by USTR and Congress". Def-Int's Reply on Mot. to Dismiss at 8 (court's italics), citing 19 U.S.C. § 3538(b)(3) and (4). Remand will not disturb the previous "implementation" by Commerce of the adverse WTO panel's findings. For these reasons, ATM's third and final objection to the court's exercise of jurisdiction must therefore also fail.

B. DSMC Has Stated a Claim Upon Which Relief May Be Granted

ATM also argues that the DSMC has failed to state a claim upon which relief may be granted. Def-Int's Mot. to Dismiss at 18–19. In making this argument, ATM largely relies on the same arguments that undergird its claim that the court lacks jurisdiction. In particular, ATM argues that "there has been no allegation that there was any failure of Commerce at the time that the Section 129 determination was issued, and that "no allegations of error against the USTR have been made." *Id*. at 18. These statements are unpersuasive as to DSMC's alleged failure to state a claim upon which relief may be granted.

As discussed above, DSMC's challenge relates to the fact that the section 129 determination is based on "data that the agency generating those data indicates are incorrect." *Borlem*, 913 F.2d at 937. As such, it is irrelevant to the matter at bar that Commerce disavowed the basis for its section 129 determination outside of the section 129 determination itself. In the context of the Korean diamond sawblades investigation, the court previously noted that Commerce's revocation of the order was "interlocutory, *i.e.*, provisional and dependent upon the outcome" of the challenge to the LTFV results, *Diamond Sawblades Manufacturers Coalition*, 37 CIT ___, ___, Slip Op. 13–130 at 6, and here continues to stand by that observation. The final LTFV results indicate that the revocation was erroneous, as it was based on

inaccurate data -- indeed, on data that Commerce itself has disavowed. As such, DSMC avers that the section 129 determination is not in accordance with law, *per* 19 U.S.C. §1516a(b)(l)(B(i), and that this unlawfulness can be remedied -- just as it was in *Borlem*[4] --through "remand for consideration bythe decision-maker"and subsequent judicial evaluation of the remand results for compliance with 19 U.S.C. §1516a(b)(l)(B(i)'s standards. *Borlem*, 913 F.2d at 939.

There is also no merit to ATM's argument that no relief can be granted because DSMC has not made "allegations of error against the USTR." Def-Int's Mot. to Dismiss at 18. The statute expressly authorizes judicial review of the factual findings and legal conclusions on which implemented determinations are based, and to the extent that USTR directs implementation of a determination that is not in accordance with law or unsupported by substantial evidence, the statute contemplates that interested parties may challenge that determination directly. *See*, *e.g.*, 19 U.S.C. §1516a(a)(2)(A)(III) and (B)(vii). There is no requirement under the law to allege separately that USTR "erred in directing implementation," and to the extent ATM argues that Commerce cannot be required to issue a determination "inconsistent" with the WTO panel's findings,[5] the relief DSMC seeks through this suit is not inconsistent with those findings. As stated above, the WTO panel only addressed the fact that Commerce impermissibly applied zeroing methodology in determining the ATM entity's margin, whereas the separate rate redetermination DSMC sought, through litigation that finally concluded after section 129 determination, does not implicate zeroing in any way.

Finally, ATM's argument that Commerce would lack authority to implement any new determination issued pursuant to remand without instructions from USTR does not mean that DSMC has failed to state a claim. Def-Int's Mot. to Dismiss at 19. In a recent *Wheatland Tube* case, Commerce reconsidered its section 129 determination and reached different results on remand by denying an adjustment previously granted. *See Wheatland Tube Co. v. United States*, CIT Consol Ct. No. 12–00298, ECF No. 70 (Apr. 27, 2015) (redetermination pursuant to court remand); *see also Wheatland Tube Co.*, 38 CIT at ___, 26 F. Supp. 3d at 1372–89. In reaching those results on remand, Commerce did not claim that it could not reach such results in the absence of direction from USTR, or that the results would have no

[4] In *Borlem*, the court remanded an ITC determination in light of an amended final LTFV determination Commerce had issued. *Borlem SA. -Empreedimentos Industriais v. United States*, 13 CIT 535, 541, 718 F. Supp 41, 45 (1989). To do otherwise would have allowed a determination to stand that was, in fact, based upon "material and significant inaccurate facts". *Id*.

[5] *See* Def-Int's Mot. to Dismiss at 19.

legal effect in the absence of such direction, *see id.* ; rather, it complied with the court's remand order and replaced, as a matter of law, its original section 129 determination with a substantively different determination. *Id*. Likewise, no valid reason has been offered here for concluding that Commerce lacks authority to comply with the orders of the court, or that such orders can only result in a redetermination without legal effect. Rather, Congress provided this court with the jurisdiction to ensure that section 129 determinations are supported by substantial record evidence and otherwise in accordance with law, and to require their alteration where they are not. 19 U.S.C.§l516a(a)(2)(A)(III) & (B)(vii); *see also* 19 U.S.C. §1516a(a)(2)(A)(III). This jurisdictional power is not conditioned upon USTR's approval.

III. *Motion for Preliminary Injunction*

Turning to the motion for preliminary injunction, DSMC seeks pursuant to USCIT Rules 7, 56.2(a), and 65(a) to enjoin the defendant, together with its delegates, officers, agents, servants, and employees of Commerce and the United States Bureau of Customs and Border Protection ("Customs"), pending a final and conclusive court decision in this litigation, from causing or permitting liquidation of unliquidated entries made on or after March 22, 2013 of diamond sawblades and parts thereof from the PRC that were produced and/or exported by the ATM entity and/or any of its members, pending a final and conclusive final judicial resolution of this action. It would remain in effect during the pendency of this litigation (including all relevant remands and appeals) in order to maintain the *status quo*, to preserve the jurisdiction of this court, to prevent relief sought by DSMC from being mooted, and to ensure the orderly administration of the Order.

USCIT Rule 56.2(a) contemplates the filing of a motion for preliminary injunction later than 30 days after service of a party's complaint where "good cause" is shown. Good cause exists in this case. Until recently, the ATM entity entries at issue were covered by a preliminary injunction issued in CIT Consol. Court No. 09–00511 (DSMC's appeal of Commerce's LTVF determination) that prevented their liquidation. *See Advanced Tech. & Materials Co., Ltd. v. United States*, Court No. 09–00511, Slip Op. 13–42 (Mar. 28, 2013). However, because the decision in that litigation and the appeal therefrom is now final and conclusive, the injunction has dissolved by its own terms, and since Commerce has explicitly stated that it "will shortly be issuing instructions to lift suspension of [the ATM entity's] post-section 129 entries and to liquidate those entries", Defendant's Notice Concerning the Status of Previously-Enjoined Entries, CIT Court No.

09–00511, ECF No. 179 (June 24, 2015) ("Defendant's Notice"), entries of diamond sawblades and parts thereof produced or imported by the ATM entity have thereby been in imminent danger of liquidation, without the assessment of antidumping duties, unless liquidation is suspended (or rather if the suspension of liquidation is not continued). A preliminary injunction is now required in order to preserve the *status quo* and prevent the relief sought by DSMC from being mooted while this issue is litigated before the court.

Preliminary injunctions have been issued in similar circumstances. While "[n]either this court's rules nor case law defines 'good cause' as it applies in Rule 56.2(a)," in other contexts, courts have found the term to generally mean, "that good reason must exist and that relief must not unfairly prejudice the opposing party or the interests of justice." *Carpenter Tech. Corp. v. United States*, 31 CIT 1, 4 (2007) (quoting USCIT R. 56.2(a)). Recently, the court issued a preliminary injunction even though the plaintiffs' motion in that case was filed more than 30 days after service of the complaint. *Zhejiang Native Produce & Animal By-Products Import & Export Corp. v. United States,* 39 CIT ___, 61 F. Supp. 3d 1358 (2015). The court found that good cause existed to accept the motion, because, as in this case, the entries at issue had previously been enjoined from liquidation by means of an injunction in place in another appeal. *See id.* 39 CIT at ___, 61 F. Supp. 3d at 1365. DSMC in this case similarly asks that the court find that its motion for preliminary injunction is timely made for purposes of USCIT Rule 56.2(a). The court so finds, on the basis of Defendant's Notice filed in consolidated court number 09–00511.

In order to prevail on a motion for a preliminary injunction, the moving party must show that: (1) without the requested relief, it will be immediately and irreparably injured; (2) the balance of hardships on the parties favors it; (3) success on the merits is likely; and (4) the public interest would be better served by granting the requested relief. *See U.S. Association of Importers of Textiles & Apparel v. United States Department of Commerce*, 413 F.3d 1344, 1346 (Fed. Cir. 2005); *Zenith Radio Corp. v. United States*, 710 F.2d 806, 809 (Fed. Cir. 1983). As discussed below, the criteria for issuing a preliminary injunction are satisfied here.

A. Immediate and Irreparable Injury Will Result In the Absence of Injunctive Relief

Absent issuance of a preliminary injunction that continues the TRO's present enjoinder of liquidation, Commerce will instruct Customs and to liquidate the relevant entries, thereby depriving DSMC of its right to meaningful judicial review of the challenged section 129

determination. Because Commerce's original (later-reversed) separate rate determination formed the legal premise for the section 129 recalculations, liquidation at such separate rate would be inconsistent with 19 U.S.C. §1516a(e) and not "in accordance with" the final and conclusive court decision in Court No. 09–00511, which sustained Commerce's finding of the ATM entity as ineligible for a separate rate. DSMC would thus be immediately and irreparably harmed unless this preliminary injunction is granted as, absent injunction, the relevant entries of the ATM entity's diamond sawblades and parts thereof from the PRC will be liquidated and no dumping duties assessed thereon, regardless of the court's final judgment in this action.

DSMC argues by this appeal that revocation of the antidumping duty order as to the ATM entity is an incorrect disposition, as the 09–00511 litigation has confirmed, because had the ATM entity been considered part of the PRC-wide entity initially, the margin for the ATM entity would have received a margin of 164.09 percent without the use of "zeroing," and the order would have not been revoked as to the ATM entity. *See* Slip Op. 13–42 at 5 ("[i]f DSMC prevails here, the antidumping duty order will continue to apply to the ATM entity even in the absence of zeroing"). But if the ATM entity's entries are liquidated, that will moot DSMC's arguments as to these entries, thereby denying a substantial portion of the relief that DSMC seeks. This, in turn, would cause irreparable injury to DSMC. *See id*. at 6–7 ("DSMC will suffer irreparable harm if entries are liquidated without antidumping duties that may ultimately be determined owed as a result of this litigation"); *Zenith Radio Corp.*, 710 F.2d at 811 ("the inability of reviewing courts to meaningfully correct the review determination is irreparable injury that must be considered by the trial court"); *PPG Industries, Inc. v. United States*, 14 CIT 18, 21 (1990) (liquidation prior to the court's final decision would constitute irreparable injury); *Qingdao Taifa Group Co. v. United States*, 32 CIT 1169, 1170 (2008) ("It has long been established that liquidation of entries after a final determination of duties for a particular period, before the merits can be litigated, is sufficient harm"). If the ATM entity's imports enter the United States duty-free, U.S. diamond sawblades manufacturers will be denied a portion of the relief owed to them under the trade remedy laws, and they will experience further serious and irreparable injury. In the absence of an injunction preventing liquidation, this Court will not be able to provide meaningful relief for such imports.

In addition to largely rendering moot the relief that DSMC seeks in this case, liquidation of the ATM entity's entries would deprive DSMC of the relief it obtained in Court No. 09–00511 with regard to the ATM

entity's receipt of the PRC-wide rate. Moreover, as the court stated when granting the preliminary injunction in that case, "[a] final judgment in this action which determines that the ATM entity was not entitled to a separate rate would be ineffective as to [the ATM entity's] entries" if suspension of liquidation is lifted. Slip Op. 13–42 at 6.

This remains true with respect to the matter at bar: liquidation would render ineffective the final judgment and finding in CIT Court No. 09–00511 that the ATM entity was not entitled to a separate rate, as well as any finding in the instant appeal that the antidumping duty order was inappropriately revoked as to the ATM entity. Liquidation without imposition, and at a nonPRC-wide rate of, antidumping duties would appear to be inconsistent with 19 U.S.C. §1516a(e), as such liquidation would not be "in accordance with" the final and conclusive judicial determination rendered in Court No. 09–00511. As such, the liquidation of the ATM entity's entries of diamond sawblades and parts thereof from the PRC, while litigation regarding the Order (including regarding the section 129 determination at issue in this case) is pending, would result in irreparable harm to DSMC.

Furthermore, the potential harm to DSMC continues to be immediate. *See* Defendant's Notice at 3. As a result, "Commerce will shortly be issuing instructions to lift suspension of [the ATM entity's] post-section 129 entries [*i.e.*, those that entered post-revocation on or after March 22, 2013] and to liquidate those entries." *Id*. at 4. Thus, it is imperative that liquidation or issuance of instruction thereof continue to be enjoined.

B. The Balance of Hardships Favors DSMC

Balancing the hardships that each party would suffer necessarily requires this Court to determine which party would be most adversely affected by the decision to either grant or deny a preliminary injunction. *See Ugine-Savoie Imphy v. United States*, 24 CIT 1246, 1250 (2000). Here, any hardship to other parties that would be caused by a delay in liquidation is outweighed by the irreparable harm to DSMC that would occur if an injunction were denied. *See* Slip Op. 13–42 at 8 ("the court finds that any hardship to other parties that would be caused by an injunction against lifting the suspension of liquidation is outweighed by the irreparable harm to DSMC that would occur if an injunction were denied"). As noted above, DSMC's right to obtain meaningful judicial review is at stake. Should the ATM entity's entries be liquidated, the harm to DSMC will be irreversible, even should the current litigation result in a finding that Commerce's revocation of the order as to the ATM entity was unlawful.

In other words, in the absence of preliminary injunction again liquidation, DSMC faces the very real possibility of dumped imports entering the United States, further injuring the domestic industry. Furthermore, if the subject entries are liquidated, then the question of whether such imports may be found to be subject to the PRC-wide dumping margin (as a result of the combination of the court's decision in Court No. 09–00511 and the current litigation) becomes moot, and no relief will be available therefrom.

By contrast, neither the defendant nor the defendant-intervenors will suffer significant hardship as a result of the court granting the requested temporary restraining order and preliminary injunction. "The main effect of the injunction would be to require the continued suspension of liquidation on incoming entries," and suspension of liquidation is at most an "inconvenience" to the government. Slip Op. 13–42 at 8. *See also Timken Co. v. United States*, 6 CIT 76, 81 (1983). Similarly, any interested private party would only be inconvenienced by a delay in liquidation. *See id*. If any refunds of duties are ultimately owed to private parties, they will receive the amounts with interest, thereby compensating for any delay. *See* 19 U.S.C. §1677g(a).

Thus, the balance of hardships clearly favors DSMC on its motion.

C. Success on the Merits

It appears DSMC is likely to succeed on the merits of its case-in-chief. Where, as here, irreparable injury is firmly established, "it will ordinarily be sufficient that the movant has raised questions which are serious, substantial, difficult and doubtful" in order to satisfy this criterion. *Timken*, 6 CIT at 80. *See also Target Corp. v. United States*, 34 CIT 1570, 1573–74 (2010); *Mittal Canada, Inc. v. United States*, 30 CIT 154, 161 (2006) ("a convincing demonstration of irreparable harm will diminish the required burden of showing a likelihood of success on the merits"); *NMB Singapore Ltd. v. United States*, 24 CIT 1239, 1244 (2000) ("although this requirement is important, it is not determinative and must be balanced against the comparative injuries of the parties").

In its appeal, DSMC has raised issues that are clearly serious and substantial, and which cast significant doubt upon Commerce's section 129 determination. *See* Complaint, CIT Court No. 13–00168, ECF No. 9 (May 24, 2013). Namely, DSMC has raised serious questions with regard to the propriety of the Department's revocation of the antidumping duty order as to the ATM entity. *See* id. As noted above, this Court's decision and the Department's remand determination in Court No. 09–00511 resulted in the application of the PRC-

wide dumping margin, calculated in the absence of zeroing, to the ATM entity. The revocation of the order as to the AT &M entity pursuant to the section 129 determination underlying this appeal is accordingly premised on a determination that (1) the Court repeatedly found to be unexplained and (2) the agency itself has now disavowed. Indeed, the Department has requested a voluntary remand in this case. *See* Defendant's Motion for Remand, CIT Court No. 13–00168, ECF No. 50 (Apr. 17, 2015).

As such, and as detailed in DSMC's Rule 56.2 brief in this action, Commerce's section 129 determination is not supported by substantial evidence and is otherwise not in accordance with law. DSMC has therefore satisfied the standard for demonstrating the likelihood of success on the merits in this case.

D. Granting an Injunction Will Serve the Public Interest

As this court has previously found, "the public interest is best served by effective enforcement of the trade laws, by ensuring that accurate amounts of antidumping duties are assessed on entries covered by antidumping duty orders, and by ensuring that entities, to the extent that they continue to sell merchandise at less than fair value, remand subject to antidumping duty orders." Slip Op. 13–42 at 9. *See also Smith-Corona Group Consumer Prods. Div. v. United States*, 1 CIT 89, 98 (1980) (stating that the public interest is served "by the procedural safeguard of an injunction *pendente lite* to maintain the *status quo* of the unliquidated entries until a final resolution of the merits."), *aff'd*, 713 F.2d 1568 (Fed. Cir. 1983), *cert. denied*, 465 U.S. 1022 (1984).

In this case, absent an injunction, Commerce will liquidate the ATM entity's entries according to its section 129 decision, which, as it stands, is flawed, as it was premised on a now-invalid determination regarding the ATM entity's dumping margin. The public interest would be ill-served by permitting liquidation of entries under these circumstances. In contrast, the public interest would be well-served by enjoining liquidation of entries, maintaining the *status quo*, and allowing a resolution of the issues presented on their merits. Accordingly, the public interest is served here by enjoining liquidation of the entries at issue pending a final and conclusive court decision in this litigation.

IV. *Commerce's Motion for Voluntary Remand and Other Matters*

The defendant filed its motion for voluntary remand pursuant to USCIT Rule 7(b) on April 17, 2015, in order to provide Commerce an opportunity to reevaluate its separate rate determination in light of

the Federal Circuit's recent decision in *Advanced Technology & Materials Co., Ltd. v. United States*, 581 Fed. Appx. 900 (Fed. Cir. 2014), which affirmed the decision on the redetermination of the ATM entity's ineligibility for a separate rate.

The sole claim in DSMC's complaint challenges a decision that Commerce made as part of its section 129 determination to continue to grant the ATM entity a separate rate and to revoke the antidumping duty order with respect to it (them) as a result of recalculating its margin in a manner "not inconsistent" with the WTO panel report. *See* Compl., ECF No. 9. Commerce now wishes to reconsider its decision to revoke the antidumping duty order with respect to the ATM entity in light of this court's and the Federal Circuit's subsequent findings that denial of a separate rate for that respondent was appropriate. *See Advanced Technology & Materials*, 938 F. Supp. 2d at 1345–50, *aff'd*, 581 Fed. Appx. 900.

Commerce "may request a remand (without confessing error) in order to reconsider its previous position." *SKF USA, Inc. v. United States*, 254 F.3d 1022, 1029 (Fed. Cir. 2001). Such a remand is "usually appropriate" if Commerce's "concern is substantial and legitimate." *Id*. The agency's desire to reconsider its prior determination in light of later-issued court decisions is a "substantial and legitimate" concern, and remand will conserve judicial resources by obviating the need for a judicial ruling on a determination that Commerce itself wishes to reconsider. In such circumstances, voluntary remand is consistent with the court's stated objective to "secure the just, speedy, and inexpensive determination of every action and proceeding." USCIT Rule 1.

The case does not reveal any substantive objection to granting Commerce's request for voluntary remand at this time; however, in response to the defendant's motion for voluntary remand, ATM filed a partial consent motion for an extension of time to respond thereto with a proposed order that the court granted. On the one hand, the current litigation schedule calls for ATM to file a response to the DSMC's Rule 56.2 motion and brief within 30 days of a decision on the defendant's motion for remand. *See* Order dated May 1, 2015, ECF No. 55. On the other hand, ATM's partial consent motion indicated "if the Motion for Remand is granted then the Response to the Rule 56.2 Motion may largely be moot."[6] And in yet a further twist, as part of its reply on its motion to dismiss ATM argues that if this case goes forward then it should be allowed to file a counterclaim pursuant to USCIT Rule 13, and that it should be allowed to conduct discovery

[6] Def'-Int's Partial Consent Mot. For EOT to File Resp. To Plaintiff's Rule 56.2 Motion at1 (Apr. 28, 2015), ECF No. 52.

(including deposing Commerce officials) and place information on the record "regarding all of the underpinnings of the determination" which ATM claims would be facts "establishing the correct dumping margin [for it] should be zero, even if it is not entitled to a separate rate." Def-Int's Reply on Mot. to Dismiss at 19. "The determination of Commerce in the original investigation is not on the record and before this Court. However, if it is to be made part of the record, then *all* of the record of that case, and *all* of the underpinning of the determination should be before the Court and full discovery regarding the underpinnings should be allowed." *Id*. (ATM's emphasis).

The court will consider such a motion and responses thereto in due course if properly and formally raised.

In the meantime, in light on the foregoing and the papers presented, remand to Commerce appears to be the proper course of action.

V. *Conclusion and Orders*

Having considered the issues presented, in view of the foregoing, it is

ORDERED that the motion to dismiss must be, and hereby is, denied; and it is further

ORDERED that the motion for voluntary remand must be, and hereby is, granted; and it is further

ORDERED that the case will be, in the absence of any further motion, automatically remanded 30 days from the date of this opinion without further order of the court, in accordance with the Order of May 1, 2015; and it is further

ORDERED that the motion for preliminary injunction must and will be granted, pursuant to the particulars of a separate order issued concurrently herewith; and it is further

ORDERED that Commerce shall submit its results of remand within 90 days from the date of receipt of the case from the court; and it is further

ORDERED that upon filing of Commerce's final remand results with the court, the parties shall file comments, if any, on the final remand results within 30 days thereafter; and it is further

ORDERED that any responses to comments on the final remand results shall be due 21 days thereafter.

So ordered.

Dated: August 20, 2015
New York, New York

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

Slip Op. 15–93

JUANCHENG KANGTAI CHEMICAL CO., LTD., Plaintiff, ARCH CHEMICALS, INC., A LONZA COMPANY, ARCH CHEMICALS (CHINA) CO., LTD., and HEBEI JIHENG CHEMICAL CO., LTD., CONSOLIDATED Plaintiffs, v. UNITED STATES, Defendant, and CLEARON CORP, OCCIDENTAL CHEMICAL CORPORATION, Defendant-Intervenors.

Before: R. Kenton Musgrave, Senior Judge
Consol. Court No. 14–00056

[Remanding seventh (2011–2012) administrative review of chlorinated isocyanurates from the People's Republic of China for further proceedings.]

Dated: August 21, 2015

Gregory S. Menegaz, *J. Kevin Horgan*, and *John J. Kenkel*, deKieffer & Horgan, PLLC, of Washington DC, for the plaintiff.

Peggy A. Clarke, Law Offices of Peggy A. Clarke, of Washington DC, for the consolidated plaintiffs.

Jane C. Dempsey, Trial Attorney, Commercial Litigation Branch, Civil Division, U.S. Department of Justice, of Washington DC, for the defendant. On the brief were *Joyce R. Branda*, Acting Assistant Attorney General, *Jeanne E. Davidson*, Director, and *Patricia M. McCarthy*, Assistant Director. Of Counsel was *David Richardson*, Senior Attorney, Office of the Chief Counsel for Import Administration, U.S. Department of Commerce.

James R. Cannon, Jr., *Vanessa P. Sciarra*, and *Ulrika K. Swanson*, Cassidy Levy Kent (USA) LLP, of Washington DC, for the defendant-intervenors.

OPINION

Musgrave, Senior Judge:

This opinion addresses consolidated challenges to aspects of *Chlorinated Isocyanurates From the People's Republic of China* ("PRC"), 79 Fed. Reg. 4875 (Jan. 30, 2014), and accompanying issues and decision memorandum (Jan. 23, 2014) ("*IDM*"), Public Record Document ("PDoc") 200, (together, "*Final Results*"). The proceeding is the seventh administrative review of the antidumping duty ("AD") order on chlorinated isocyanurates ("chlorisos")[1] from the PRC conducted by the International Trade Administration of the U.S. Department of Commerce ("Commerce"). The period of review is June 1, 2011, through May 31, 2012, and the administrative analysis embodied in the *IDM* sets forth Commerce's determinations regarding the plaintiff Juancheng Kangtai Chemical Co., Ltd. ("Kangtai") and the consolidated plaintiffs Hebei Jiheng Chemical Co., Ltd. ("Jiheng") and Arch

[1] The subject merchandise are all forms of chlor-isos, which are derivatives of cyanuric acid. The three primary compositions are trichloroisocyanuric acid, sodium dichloroisocyanurate, and sodium dichloroisocyanurate, all in powder, granular, and tableted forms. *IDM* at 2.

Chemicals (China) Co., Ltd. (together, "Arch"), all producers and/or exporters of the subject merchandise from the PRC and respondents in the administrative review.

Kangtai and Arch have filed separate motions for summary judgment on the agency record pursuant to USCIT Rule 56.2. Each separately or together challenges: the selection of the Philippines as the primary surrogate country for valuing factors of production over those for (A) India and (B) Thailand; (C) the use of the financial statement from the Philippine company Mabuhay Vinyl Corporation ("MVC") to calculate the surrogate financial ratios; (D) the determination to treat retirement and employee benefits as selling, general and administrative ("SG&A") expenses rather than labor expenses and not to adjust the surrogate financial ratios for retirement benefits for International Labor Organization (ILO) Chapter 6A data; the valuation of (E) chlorine, (F) ammonium chloride, (G) sodium hydroxide, (H) electricity, and (I) steam; (J) treatment of Kangtai's and Arch's by-product adjustment claims regarding ammonium sulfate; and finally (K) the deduction of 8% from net U.S. price for the PRC's value added tax ("VAT") that is not actually, plaintiffs contend, collected upon export, concerning which issue Commerce has requested voluntary remand, which Kangtai and Arch oppose without the court first deciding the issue of law upon which the adjustment is predicated.

For the reasons below, remand is ordered as follows.

I. *Background*

Commerce initiated the seventh administrative review of the antidumping duty order covering chlor-isos from the PRC in July 2012. *Initiation of Antidumping and Countervailing Duty Administrative Reviews, Requests for Revocations in Part*, 77 Fed. Reg. 45338 (July 31, 2012). Selecting Kangtai and Jiheng as mandatory respondents, Commerce sent questionnaires to those companies. Respondent Selection Memoranda , PDoc 29 (Sep. 17, 2012); Commerce Questionnaire, PDocs 30 & 31 (Sep. 19, 2012) . Commerce's Office of Policy's list of potential surrogate countries was provided to the parties on or around February 7, 2013:

Per Capita GNI,

Country	*2009 (US$)*
PRC	4,940
Philippines	2,210
Indonesia	2,940
Thailand	4,420
Columbia	6,110
South Africa	6,960
Costa Rica	7,660

Letter from Commerce *re* Surrogate Country Memorandum, PDoc 80 (Feb. 7, 2013) ("OP List"). Commerce published its preliminary review results in July 2013. *Chlor-Isos From the PRC*, 78 Fed. Reg. 41364 (July 10, 2013) (prelim. admin. review) ("*Preliminary Results*"). Interested parties submitted administrative case briefs in November 2013, PDocs 180–84 & 186, and the parties submitted administrative rebuttal briefs in December 2013. PDocs 187, 190, 192. Commerce issued the *Final Results* in January 2014.

II. *Jurisdiction and Standard of Review*

The action is brought pursuant to Section 516A(a)(2)(B)(iii) of the Tariff Act of 1930, as amended, 19 U.S.C. §1516a(a)(2)(B)(iii). Kangtai and Arch have standing under 19 U.S.C. §1516a(d) and 28 U.S.C. §2631(c).

The party challenging a final administrative determination of the type at bar is burdened with showing how it is "unsupported by substantial evidence on the record" or is not "otherwise in accordance with law." 19 U.S.C. §1516a(b)(1)(B)(i). *See, e.g., NSK Ltd. v. United States*, 481 F.3d 1355, 1359 (Fed. Cir. 2007), citing 19 U.S.C. §1516a(b)(1)(B)(i)); *see also United States v. Eurodif S.A.*, 555 U.S. 305, 316 n.6 (2009). Substantial evidence means "more than a mere scintilla", it must be "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 477 (1951) ("*Universal Camera*"), citing *Consol. Edison Co. v. NLRB*, 305 U.S. 197, 229 (1938). Commerce's statutory interpretations are considered pursuant to the familiar two-step analysis set forth in *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842–43 (1984) (if "Congress has directly spoken to the precise question at issue . . ." *et cetera*) ("*Chevron*").

III. *Discussion*

A. Primary Surrogate Country Selection; India's Non-consideration

1. Further Background

Commerce generally calculates the normal value ("NV") of subject merchandise from a non-market economy ("NME") country based on the "best available information" from an appropriate market economy country "or countries" for valuing the factors of production, or "FOPs"[2], used to manufacture the merchandise.[3] 19 U.S.C. §1677b(c)(1). In that valuation, Commerce is required to utilize, to the extent possible, the prices or costs of FOPs in one or more market economy countries that are "at a level" of economic development comparable to that of the nonmarket economy country as well as "significant producers" of comparable merchandise. 19 U.S.C. §1677b(c)(4).

Commerce considers the statute ambiguous as to the meaning of the terms employed. In providing that it may be necessary to derive the "best available information" for the valuation of FOPs from "one or more" such countries, Commerce construes this as congressional indifference on whether FOPs are valued from a single market economy country as opposed to multiple countries, and therefore Commerce interprets the statute to permit valuation of FOPs based on the following hierarchy:

> (1) prices paid by the NME manufacturer for items imported from a market economy;
>
> (2) prices in the primary surrogate country of domestically produced or imported materials;
>
> (3) prices in one or more secondary surrogate countries reported by the industry producing subject merchandise in the secondary country or countries; and

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[2] FOPs include labor, raw materials, energy and other consumed utilities, "representative" capital cost including depreciation, plus general expenses, profit, and the cost of containers, coverings, and other expenses. 19 U.S.C. §1677b(c)(1) & (3).

[3] If "the available information is inadequate" for that purpose, Commerce is instructed to determine NV on the basis of merchandise from "one or more market economy countries that are at a level of economic development comparable to that of the nonmarket economy", which merchandise must be "comparable" to the subject merchandise. 19 U.S.C. §1677b(c)(2).

> (4) prices in one or more secondary surrogate countries from sources other than the industry producing the subject merchandise.

E.g., *Sparklers From the PRC*, 56 Fed. Reg. 20588, 20590 (May 6, 1991) (final less than fair value ("LTFV") determination). "This ranking of data sources reflects the Department's desire to use to the greatest extent possible factor prices in a single surrogate country." *Id*. *Cf*. 19 C.F.R. §351.408(c)(2) (except for labor Commerce "normally" will value all factors in a single surrogate country).

There is nothing inherently unreasonable in desiring, foremost, to value all FOPs from a single country, and Commerce's interpretation is entitled to deference in proportion to its reasonableness. Commerce's interpretation has evolved from practice. In proposing codification thereof, *see* 19 C.F.R. §351.408(c), Commerce received no comments on the issue of surrogate country selection. *See Antidumping Duties; Countervailing Duties*, 62 Fed. Reg. 27296, 27365 (May 19, 1997). Commerce explained that valuing all FOPs from a single source country attempts to curtail "margin shopping," *i.e.*, combining input prices from different surrogates to achieve the highest or lowest valuations of inputs. *Antidumping Duties; Countervailing Duties*, 61 Fed. Reg. 7308, 7345 (Feb. 27, 1996) (proposed rules).

It also encountered, to the contrary, "situations in which the accuracy of available information regarding prices for particular factors in the surrogate country is highly questionable" whereby it is "appropriate to reject the questionable values and use data from a second country." *Id*. Commerce did not explain why, in such a situation, a country with "highly questionable" data should even be considered in the selection of a "primary" surrogate in the first place, but be that as it may, there may be situations in which the pursuit of the administrative preference for valuing FOPs from a single surrogate country runs into conflict with what is the "best available information", to the point of relegating the statutory term "one *or more* market economy countries" to secondary (and therefore unreasonable) status in proportion to the extent to which data quality is ignored in that pursuit.

Of particular importance to this matter, as in the previous review, is the silence of 19 U.S.C. §1677b(c) regarding how Commerce may determine that a country is economically "comparable" to the nonmarket economy ("NME") country. Commerce states that its "long standing" practice on the consideration has been to engage in a "sequential" consideration of the statutory elements of economic comparability, comparable merchandise, significant producer, and data

quality. *See Import Administration Policy Bulletin 04.1: Nonmarket Economy Surrogate Country Selection Process* (Mar. 1, 2004) (reflecting a legal standard of emphasizing surrogate data availability and quality in the selection of the surrogate country or countries to use as sources for the surrogate values of material inputs and other costs under the nonmarket economy methodology). This has not been held unreasonable, but it has generated controversy.

"[A]s the measure of economic comparability", Commerce's regulation states that Commerce will place "primary emphasis" on a certain national economic indicator; its current practice places primary emphasis on gross national income ("GNI"). *See*19 C.F.R. §351.408(b). In that consideration, Commerce's practice currently relies on generating, early in the proceeding, a list from its Office of Policy ("OP list") of those countries that are "at", in terms of a narrow band, a level of economic development similar to the NME country in question, in this instance the PRC. In accordance with its announced policy, Commerce relies for that determination upon countries' *per capita* GNI data that are available in the World Development Report published by the World Bank.[4] Accordingly, for the matter at bar, Commerce's OP List explained to interested parties that the list of surrogate countries is "non-exhaustive" and

> provides you the countries that are economically comparable to [the PRC] and most likely to have good data availability and quality. You may also consider other countries on the case record if the record provides you adequate information to evaluate them. You may be unable to obtain the necessary factor price information in a suitable surrogate country. If that is the case, you will have to rely on the price of comparable merchandise that is produced in a surrogate country and sold in other countries, including the United States.

Op List.

On March 1, 2013, the petitioners, Clearon Corporation and Occidental Chemical Corporation (together, "Clearon"), and Arch submit-

[4] *See* Preliminary Decision Memorandum, PDoc 138 (July 2, 2013) ("*PDM*"), at 7, referencing *Pure Magnesium from the PRC*, 75 Fed. Reg. 80791 (Dec. 23, 2010) (final admin. rev. results) and accompanying I&D Memo at cmt. 4. *See also Fujian Lianfu Forestry Co., Ltd. v. United States*, 33 CIT 1056, 638 F. Supp. 2d 1325 (2009) (affirming reliance upon Commerce's "flexible GNI" inquiry in the identification of potential surrogate countries where Commerce reasonably explained why Indian and the PRC were still at comparable levels of economic development at that time despite GNIs of US$ 620 and US$ 1,290, respectively).

ted their respective surrogate country comments.[5] Kangtai did not submit any comments or rebuttal comments. On the March 15, 2013 deadline, Arch, Kangtai, and Clearon submitted substantial amounts of surrogate value data. *See* PDocs 92–109. In its first surrogate value submission, Kangtai submitted surrogate value data for India, the Philippines, and Thailand and made the following statement:

> Kangtai submits that the Department should look to India and/or the Philippines or Thailand for industries producing comparable products. The Department has seen fit in the past to use . . . surrogate values for chlorine from Indian financial statements, we submit Kanoria's 2010–2011 chlorine data to be used for the chlorine input in this review.

Kangtai Prelim. SV Submission, PDoc 108 (Mar. 15, 2013), at 1; *see also* PDoc 109.

In June 2013, Kangtai submitted a rebuttal to Clearon's pre-preliminary determination comments in which Kangtai argued that the record shows Thailand "constitutes the best available surrogate country" and "the most significant producer on the record" because it "has both production and exports of comparable merchandise" and "[p]arties have provided several financial statements of Thai producers for the record of this case, whereas only one financial statement for a Philippine producer has been submitted." Kangtai proceeded to argue against using the Philippine producer's financial statement because it revealed no export activities, only domestic market production, and that Thailand has both production and exports of comparable merchandise as well as "contemporaneous values for all factors of production, while the Philippines does not." Kangtai's Resp. to Prelim. Cmts, PDoc132 (June 20, 2013), at 2, referencing Jiheng SV Submission, PDocs 105–06 (Mar 15, 2013), at Ex. 9, 10 & 11. Kangtai did not submit any other comments regarding surrogate country selection.

As mentioned, Commerce published its preliminary determination in July 2013. *Chlor-Isos From the PRC*, 78 Fed. Reg. 41364 (July 10, 2013) (prelim. rev. results), PDoc 150; *see also PDM*. Despite Kangtai's argument, Commerce preliminarily selected the Philippines as the primary surrogate country. *See id.* at 7–8. The *PDM* reiterates that because it is Commerce's policy to consider all countries on the OP List to be "equally comparable economically" to the PRC, Commerce did not use GNI alone as the rationale for selecting

[5] *See* Arch Surrogate Country Cmts, PDoc 87 (Mar. 1, 2013); Clearon's Surrogate Country Cmts , PDoc 86 (Mar. 1, 2013). On March 29, 2013, Clearon submitted rebuttal comments. *See* Clearon's Surrogate Country Rebuttal Cmts , PDoc 117 (Mar. 29, 2013).

among the six countries that made the Surrogate Country List (*i.e.*, Colombia, Costa Rica, Indonesia, the Philippines, South Africa, and Thailand) but rather evaluated which of these countries "is also a significant producer of comparable merchandise" (as required by statute in any event) and also "has reliable data." *Id*. at 8.

Although India had been Commerce's surrogate country selection in the investigation and in the first through fifth administrative reviews, the relative GNI ranking of the PRC to India and other countries changed over time. Consequently, as in the prior administrative review covering the 2010–2011 period ("*Sixth Review*"), for this *Seventh Review* India did not make the OP list of potential surrogates, and, as in the *Sixth Review*,[6] Commerce selected the Philippines as the primary surrogate country for FOP surrogate values, this time by process of elimination:[7] "because there is either no data on the record for any FOP or usable surrogate financial statements for Colombia, Costa Rica, Indonesia, South Africa, and Thailand, these countries will not be considered for primary surrogate country selection purposes at this time." *Id*. at 9–10.

This determination remained unchanged in the *Final Results*.

2. Analysis

Kangtai argues for remand concerning Commerce's choice of primary surrogate country, repeating here a number of the points it raised on its previous appeal of the *Sixth Review*. Kangtai contends it argued for the choice of India before Commerce and that Commerce

[6] The *Sixth Review* was remanded *per Clearon Corp. v. United States*, 38 CIT ___, Slip Op. 14–88 (July 24, 2014) ("*Clearon I*") at 34. Due to certain arguments in the briefing of this *Seventh Review*, this matter was stayed pending the results of redetermination pursuant to that decision on the *Sixth Review. See* ECF No. 62 (Feb. 6, 2015). Those results were filed *sub nom. Final Results of Redetermination Pursuant to Court Remand*, *Clearon Corporation v. United States*, *see* Court No. 13–00073, ECF No. 69 (Dec. 11, 2014) ("*Clearon Redetermination*"), and Commerce's general responses therein are herein presumed indicative of its positions on the overlapping issues. *See Clearon Corp. v. United States*, 39 CIT ___, Slip Op. 15–91 (Aug. 20, 2015) ("*Clearon II*").

[7] This choice was based as well upon findings (1) that sodium hypochlorite is comparable to the subject merchandise based on similar characteristics and end uses and a similar production process (as previously determined in prior segments of the proceeding), (2) that the Philippines is a significant producer of the comparable merchandise, and (3) that there was no other information of record indicating that other countries on the OP List are significant producers of comparable merchandise. In so finding, Commerce also noted that Jiheng had placed export data for Thailand with respect to Harmonized Tariff Schedule ("HTS") subheadings 2828.90 and 2828.10, the subheadings for comparable merchandise calcium hypochlorite and sodium hypochlorite, respectively, and, as such, had argued that Thailand should therefore be considered a significant producer of comparable merchandise, but Commerce did not comment further in the context of its significant producer finding. Commerce observed in its "Data Availability" analysis, however, that none of the Thai financial statements Jiheng submitted were sufficient for calculating financial ratios due to countervailable subsidies indicated therein.

did not properly consider the data that would support the choice of India before rejecting India out of hand simply on the basis that it was not on the OP List.

Kangtai first argues that Commerce "broke established precedent" and that "principles of fairness" require Commerce to provide timely notice of the change. Kangtai's Br. at 22, referencing *Shikoku Chemicals Corporation v. United States*, 16 CIT 382, 388, 795 F. Supp. 417, 421 (1991). Pointing out that its rate leapt upwards based largely on the same Philippine surrogate sources used by Commerce in the *Sixth Review* and due to the fact that Commerce denied it a major by-product cost offset that it had been previously granted, Kangtai states that it relied upon Commerce's reasonable previous surrogate value practice and methodology "to its detriment", particularly with regard to country selection and the surrogate values for chlorine, sodium hydroxide and for by-product offsets.

Similar arguments were found unpersuasive in *Foshan Shunde Yongjian Housewares & Hardwares Co., Ltd. v. United States*, 37 CIT ___, 896 F. Supp. 2d 1313 (2013) ("*Foshan Shunde*"). In that case, the plaintiff also complained of unfair notice and detrimental reliance. The court was persuaded by the defendant's argument that a certain memorandum, from C. Showers to R. Weible dated February 24, 2011, *re* "List of Surrogate Countries for new shipper review of Certain Steel Nails from [the PRC]" (as quoted at page 3 and note 2 of the petitioner's rebuttal brief in that investigation[8]), where Commerce noted "the disparity in per capita GNI between India and [the PRC] has consistently grown in recent years, and should this trend continue, the Department may determine in the future that the two countries are no longer 'at a comparable level of economic development' . . .", which memorandum preceded the surrogate country memorandum for that review released on June 8, 2011, undercut the plaintiff's claim of a lack of notice. The court further noted that the plaintiff " 'oddly suggest[s]' that it would have reported FOPs differently had it known which surrogate country would be selected[,] because it was required to report accurate FOPs -- irrespective of the surrogate country". 37 CIT at ___, 896 F. Supp. 2d at 1319–20. The court did not accept that argument. *See id.* The review at bar, initiated in July 2012, has similar "advance warning" about the growing

[8] *See* Court No. 12–00069, ECF No. 42 (Feb 15, 2013) at Appx. 23 (petitioner's rebuttal brief); *see also Floor-Standing, Metal-Top Ironing Tables and Certain Parts Thereof from the PRC*, 77 Fed. Reg. 14499 (Mar. 12, 2012) (final results admin. review) and accompanying "I & D Memo" at 8; *Certain Steel Nails from the PRC*, 76 Fed. Reg. 56147 (Sep. 12, 2011) (preliminary rescission and partial revocation of new shipper review) (*NB* : Issues and decision memoranda pertaining to administrative proceedings other than the one at bar are hereinafter abbreviated "I & D Memo.").

GNI disparity between India and PRC.[9] Although there may be a certain reliance interest in the gathering and preparation of surrogate country data for an administrative review, to which *Foshan Sunde* does not appear to speak, Kangtai has not persuasively elaborated on its detrimental reliance argument. This court therefore finds Kangtai's arguments in this regard likewise unpersuasive.[10]

Kangtai's substantive complaint is that Commerce only summarized its arguments in the *Final Results* and failed to actually address the vast majority of Kangtai's arguments in the *IDM* analysis. Kangtai contends the review at bar relies on unexplained conclusions and/or weak precedent from the *Sixth Review*. Emphasizing that Commerce did not find India *not* economically comparable to the PRC, only less so, Kangtai argues that Commerce has not, contrary to its stated position, complied with its policy of "considering" other potential surrogates advocated by the parties. *See, e.g.*, Kangtai's Br. at 9–13.

Again here relying on *Ad Hoc Shrimp Trade Action Comm. v. United States*, 36 CIT ___, ___, 882 F. Supp. 2d 1366, 1374 (2012) ("*Ad Hoc Shrimp*") and *Amanda Foods (Vietnam) Ltd. v. United States*, 33 CIT 1407 (2009) ("*Amanda Foods*"), which both held that all surrogate value criteria must be considered individually as well as weighed together in the evaluation of competing surrogate countries, Kangtai criticizes the prior judicial decision on the *Sixth Review* and maintains that the statute does not support interpreting economic comparability as a "rigid concept and also a threshold determination paramount to all other considerations in selecting a surrogate country." Kangtai's Reply at 2. Commerce's own Policy Bulletin 04.1, according to Kangtai, does not "abide by the interpretation that economic comparability is a threshold" because that bulletin requires a complete weighing of the significance of production and data quality in addition to economic comparability, regardless of the "sequence" in which Commerce considers those criteria. By way of example, it points to *1-Hydroxyethylidene-1, 1-Diphosphonic Acid From the PRC*, 79 Fed. Reg. 16280 (Mar. 25, 2014) (prelim. rev. results) and *Certain Frozen Fish Fillets From the Socialist Republic of Vietnam*, 79 Fed. Reg,

[9] *See Clearon Redetermination*, Court No. 13–00073, at 15 & n.32, referencing Remand Data Memorandum, specifically the attachment, "Request for a List of Surrogate Countries for an Administrative Review of the Antidumping Duty Order on *1-Hydroxyethylidene-1, 1-Diphosphonic Acid from the PRC* (Oct. 28, 2010).

[10] That said, and notwithstanding that Kangtai did not otherwise press the point, the court questions whether providing the OP list six months after initiation of the review can be accurately characterized as an attempt to "resolve" the composition of the OP List "early on the proceeding". *See IDM* cmt. 1 at 10; Def's Resp. at 11–12.

19053 (Apr. 7, 2014) (final rev. and new ship. results) ("*Frozen Fish Fillets 2011–2012*") as instances where Commerce went outside the OP List in its choice of surrogate country, either because none of the OP-listed countries were significant producers of comparable merchandise or because the non-listed country sourced the "best" information for the primary input. Thus does Kangtai fault Commerce (and this court) for impermissibly failing to engage in the "precise analysis directed by the Court" in *Amanda Foods* and *Ad Hoc Shrimp*. Kangtai Br. at 8.

Arguing here again the choice of India as the primary surrogate, Kangtai repeatedly faults Commerce for relying solely on GNI, for finding countries on the surrogate country list "equally comparable" despite varying GNIs, for failing to engage in any basic comparison of the relative economic comparability to the PRC, for taking a "narrow view" on economic comparability, and for "declin[ing] to consider any countries outside of this very narrow group" while at the same time taking an "expansive" view that the countries were all "equally significant producers" based, presumably, only on the export data provided by the petitioners. Kantai's Br. at 8, referencing *PDM* at 7, *IDM* cmt. 1 at 6–7, and Clearon's Surrogate Country Cmts., PDoc 86 (Mar. 1, 2013), at 5–6. Such an interpretation, Kangtai maintains, is contrary to *Shandong Rongxin Imp. & Exp. Co. v. United States*, 35 CIT ___, ___, 774 F. Supp. 2d 1307, 1314 (2011) (Commerce "does not explain how treating a country with *any* quantity of exports actually accounts" for significant production) (italics in original).

Kangtai's arguments are wide of the mark and misrepresent what it argued before Commerce. Although Kangtai argued in favor of "other economic factors, such as the size of the economy, purchasing power, and workforce population" in making the economic comparability determination, Commerce found the "record . . . devoid of any material describing the relationships between these factors and the level of economic development". Commerce also determined that the "size" of the economy, GDP, and workforce population do not reflect "economic development" in any event. *IDM* cmt. 1 at 8–9. The court in this matter adheres to precedent holding that "primary" reliance on *per capita* GNI in compiling the surrogate country list is reasonable and in accordance with law in determining the statutory requirement of "one or more market economy countries that are . . . at a level of economic development comparable to that of the nonmarket economy country". As previously discussed, *Ad Hoc Shrimp* and *Amanda Foods*, unlike the *Sixth Review* as well as the matter at bar, concerned the selection of the primary surrogate country from among countries that had made the list of potential surrogates. The distinguishing fact

here, as in the prior review of chlor-isos, is that India has not been included in the list of countries at comparable economic development, and the court rejects the notion that Commerce's policy of narrowing the list of countries to a band, around a "level", of economic comparability is in violation of the statute.

Specifically, regarding the *Frozen Fish Fillets 2011–2012* proceeding to which Kangtai refers,[11] in the decision memorandum accompanying the preliminary results therefor,[12] Commerce explains, not unreasonably, that the number of countries that are at a "comparable" economic level depends on how broadly "level" is defined, and that it is simply not administratively feasible to manage long lists of potential surrogate countries based on an "expansive" interpretation of "level". For the review at bar, Commerce determined "there is either no data on the record for any FOP or usable surrogate financial statements for Colombia, Costa Rica, Indonesia, South Africa, and Thailand" and therefore "these countries will not be considered for primary surrogate country selection purposes at this time." *PDM* at 9–10.

Assuming the correctness of those findings, *arguendo*, it was not inappropriate, contrary to Kangtai's contentions, for Commerce to (1) "narrow" a list of countries within a band for purposes of administrative feasibility, (2) take an "expansive" view of which of those countries should be considered "significant producers" for purposes of further comparison, and then (3) not engage in further analysis when no countries but one were left to compare, due to a lack of quality data among those countries on the OP List. Thus, on Kangtai's broad contention, the court perceives little to distinguish the facts at bar from those analyzed in *Clearon I*, *supra*, and here generally adheres to that analysis.

It is also critical to note at this point that for this *Seventh Review*, as in the *Sixth Review*, Commerce did not find India to be economically *in* comparable to the PRC; Kangtai simply "tee-ed up" to Commerce for the *Seventh Review* the issue of India's consideration in its administrative case brief by, apparently, conditioning that consideration on finding neither the Philippines nor Thailand suitable as a surrogate country. *Cf.* Kangtai's Case Br at 17 ("If the Department Finds the Record Surrogate Data for Thailand and the Philippines is Unsuitable, Kangtai has Placed India on the Record for the Final

[11] Kangtai's Br. at 11, referencing *Certain Frozen Fish Fillets From the Socialist Republic of Vietnam*, 79 Fed. Reg, 19053 (Apr. 7, 2014) (final rev. and new shipper results for 2011–2012).

[12] *Certain Frozen Fish Fillets From the Socialist Republic of Vietnam*, 78 Fed. Reg, 55676 (Sep. 11, 2013) (prelim. results) and accompanying decision memorandum at "Surrogate Country".

Results") (bolding omitted) *with IDM* cmt. 1 at 5 ("If the Department Finds the Record Surrogate Data for Thailand and the Philippines is Unsuitable, India is the Best Overall Choice as the Primary Surrogate Country") (italics omitted). Thus, Kangtai argued foremost in its case brief for the use of countries that were on the OP List (*i.e.*, Thailand over the Philippines). On the other hand, the argument's construction was in accordance with how Commerce had been conveying its "consideration" of the problem, *i.e.*, that it would not consider any data of countries that were not on the list unless *no* country on the list had sufficient data. However, Kangtai here does not intimate that its arguments were the consequence of trying to navigate between Scylla and Charybdis before Commerce during the review. That is, if Kangtai had desired to avoid ceding to Commerce that the quality of the data of every country on the OP List had to be disproved before Commerce would consider the data quality of a country not on the OP List, then it seems to the court that it should have been incumbent upon Kangtai to press for consideration of Indian data foremost.

For the *Final Results*, Commerce concluded that "Kangtai has not demonstrated that the selection of the Philippines is inappropriate, or that Thailand represents a more suitable alternative primary surrogate". *IDM* cmt. 1 at 6. Assuming, again *arguendo*, support on the record for that statement, Commerce's conclusion is not otherwise unreasonable. Kangtai here complains of Commerce's statement that it "would only resort to using Indian data sources when no other data from these economically comparable countries are available", *IDM* cmt. 1 at 9, as running counter to departmental practice and the agency's mandate to use the "best available information" whatever its provenance, Kangtai's Br. at 10, and, indeed, Commerce's position here would appear at odds with its articulation of its policy that its surrogate country lists are non-exhaustive and only a "*starting point*" (Commerce's emphasis) for the surrogate country selection process, pursuant to which all listed countries are initially regarded as equivalent and unranked. *See, e.g., Clearon Redetermination*, Court No. 13–00073, at 6. In that redetermination on the prior administrative review, Commerce stated that it

> considers other . . . countries that are not at the same level of economic development as the NME country, but nevertheless still at a level comparable to that of the NME country. As a general rule, the Department selects a surrogate country that is at the same level of economic development as the NME unless it is determined that none of the countries are viable options because (a) they either are not significant producers of compa-

> rable merchandise, (b) do not provide sufficient reliable sources of publicly available surrogate value (SV) data, or (c) are not suitable for use based on other reasons.[ ] Surrogate countries that are not at the same level of economic development as the NME country, but still at a level of economic development comparable to the NME country, are selected only to the extent that data considerations outweigh the difference in levels of economic development.[ ]

Id. (footnotes omitted). *Cf. id*. at 14 (selection of a country not on the list as the primary surrogate country "requires that data *or* significant producer considerations outweigh *per capita* GNI proximity concerns") (italics added), *with id*. at 15 ("as the *per capita* GNI disparity increases, [it reaches a point where] the Department can no longer discount this fact when selecting among competing surrogate countries"), *and id*. at 38 ("[W]hile India may have a significant chemical industry comparable to the PRC, as claimed by Kangtai, the significance of the chemical industry is irrelevant to the Department's analysis of the level of economic development. This argument goes to another factor entirely, that is of significant producer.").

In the final analysis of the matter at bar, at any rate, Commerce's position is that it had reliable information from the Philippines. Whether that is indeed the case, *see infra*, it is also arguable whether Commerce did, in fact, "consider" the information on India, albeit in the manner argued by Kangtai. *See supra*. The fact that Commerce claims to have had reliable information from the Philippines does not appear to have been what obviated any further or deeper consideration of the Indian data in this instance; rather, it appears to have been due to Kangtai's waiting until the post-preliminary stage to submit Indian FOP data. Commerce found that

> the submission of Indian FOP data itself was not untimely or inappropriate. However, the consideration of India as a potential surrogate country for the first time at the briefing stage of the instant review is exactly the type of scenario that the Department has previously found to "create undue administrative difficulties" and be "potentially unfair to the parties." Therefore, we are not in a position to address the merits of Kangtai's argument that India represents the best overall choice as a primary surrogate country.

IDM cmt. 1 at 10 (footnotes omitted).

The issue appears to have been one of persuasion, not of law or of application of policy, and Kangtai's arguments do not render Com-

merce's selection -- of a country that was on the OP List, found to be a significant producer of comparable merchandise, and found to have (*arguendo*) "reliable" data -- in this instance unreasonable. Commerce was simply not persuaded that India was an appropriate selection over the Philippines, based on the arguments for India, and, importantly, on the timing of Kangtai's presentment of the supporting data.

Nonetheless, the facts before the court are more akin to *Jiaxing Brother Fastener Co. v. United States*, 38 CIT ___, 961 F. Supp. 2d 1323 (2014) ("*Jiaxing Brother I*") than to *Amanda Foods* or *Ad Hoc Shrimp*. Because of defects in the analysis of certain surrogate values that led to the selection of the Philippines as the chosen primary surrogate country,[13] judicial *imprimatur* of the selection thereof at this point would obviously be inappropriate, as Commerce must maintain discretion with respect thereto on remand, in particular with respect to further consideration of the data for India (concerning which the timing of the data's presentment is therefore no longer an issue) in accordance with the following.[14] *See, e.g., Clearon II*.

B. Selection of the Philippines over Thailand as the Primary Surrogate Country

Apart from India, Kangtai also argues that Commerce's selection of the Philippines rather than Thailand as the primary surrogate country was unsupported by substantial evidence, because Thailand was the most economically similar to the PRC based upon per capita GNI, was a more significant producer of comparable merchandise than the Philippines, and possessed superior quality of data over the Philippines based upon the quantity of suitable financial statements. Kangtai's Br. at 17–20.

Citing *Qingdao Sea-line Trading Co., Ltd. v. United States*, 766 F.3d 1378 (Fed. Cir. 2014), Commerce responds that Kangtai did not raise the argument that Thailand was more economically similar to the PRC than the Philippines during the administrative proceeding and is therefore barred from raising the issue here. Def's Resp. at 26–27.

[13] The *IDM* states that for the *Preliminary Results* Commerce found that the Philippines is the appropriate surrogate country based on the fact that: (1) the Philippines is at a level of economic development comparable to that of the PRC; (2) the Philippines is a significant producer of comparable merchandise; (3) the Philippines has publicly available and reliable data, especially for "important" inputs; and (4) the Philippines is the sole country with contemporaneous SV data for all inputs and surrogate financial statements for producers of comparable merchandise. *IDM* cmt. 1 at 6, referencing Prelim. Results SV Memo, PDoc 141 (July 2, 2013), at 2. That surrogate value memorandum does not elaborate, however, on what the important inputs are; therefore, consistent with the *Sixth Review*, the court will here presume chlorine to be foremost among them.

[14] *Intrinsecus*, the court has considered Kangtai's other arguments on the issue and finds them either unavailing or not meriting greater discussion here.

However, the court rejects the notion that Commerce's duty to determine the "best" information of record is constrained by the parties' arguments with respect thereto. *See*, *e.g.*, Policy Bulletin 04.1 (if more than one country satisfies the criteria of being economically comparable and a significant-producer of merchandise for surrogate country selection purposes, "the country with the best factors data *is selected*" as the primary source of surrogate information) (italics added).

Basing its surrogate country decision upon the "best factors" data, Commerce determined that the Philippine financial statement of MVC constituted the best available information to calculate financial ratios, because it was the only financial statement on the record that included specific line items for SG&A expenses, thereby allowing direct calculation of the surrogate financial ratios. *IDM* cmt. 1 at 8. Specifically, Commerce stated:

> With respect to the issue of subsidies, the Department's practice is not to rely on financial statements where there is evidence that the company received countervailable subsidies and there is other, more reliable and representative data on the record for purposes of calculating the surrogate financial ratios.[ ] Kangtai argues that MVC benefitted from countervailable subsidies, with the result that its financial statements are unsuitable to use. Our review of MVC's financial statements leads us to conclude that the alleged subsidies do not contain any reference to any of the specific programs that the Department has previously found to be countervailable.[ ]
>
> In sum, the Department finds that we have single financial statements from both the Philippines and Thailand that reflect no evidence of receipt of countervailable subsidies, are both publicly available, contemporaneous with the POR, and reliable.[ ] However, we note that only Philippine producer MVC's financial statements include specific line items for SG&A expenses that allow the Department to directly calculate the surrogate financial ratios. Therefore, the Department finds that the MVC's financial statements are the best available information for calculating the surrogate financial ratios for these final results.

IDM cmt. 1 at 8. By contrast, Commerce found that not all FOPs could be valued using Thai values, and that "[t]wo key inputs, in particular require the use of less contemporaneous data (labor), or rely on data from a country outside the Department's surrogate country list (chlorine from India)." *IDM* cmt. 1 at 7.

With respect thereto, Kantai raises three points. First, Kangtai notes that the *IDM* states that using Thailand would require valuing chlorine using data for the non-listed country India, and Kangtai continues to argue that Commerce cannot reasonably rely on *any* import value for chlorine because chlorine is not frequently traded internationally in commercial quantities, and therefore reliance on a chlorine import figure can never be "best" over a domestic source such as India's. To the extent Kangtai is here arguing for the use of Indian domestic chlorine data, the point is addressed *infra*; if Commerce ultimately rejects the Philippines as its primary surrogate country on the basis of overall data concerns, then obviously Commerce will need to revisit the pros and cons of Thailand in the parties' battle over primacy of surrogacy.

Second, Kangtai contends that if Commerce found the Philippine import statistic reliable, then "it stands to reason" that Commerce could have selected Thailand as the primary surrogate country and used the Philippine domestic chlorine values to supplement suitable Thai data. Kangtai's Br. at 19. Commerce, however, contends Kangtai failed to raise the argument during the administrative proceedings and therefore waived the ability to raise it here. Commerce further contends the administrative determination is in accordance with its preference of valuing all factors in a single country where possible. 19 C.F.R. §351.408(c)(2). The court finds that Kangtai has failed to exhaust this point, and therefore its argument does not provide independent ground for remand of this issue. *See*, *e.g.*, *Shandong Huarong Machinery Co., Ltd. v. United States*, 30 CIT 1269, 1305, 435 F. Supp. 2d 1261, 1292 (2006).

Third, Kangtai contends Commerce prefers multiple financial statements and that selecting the Philippines largely based on the only financial statement for that country was unreasonable because the financial statement shows evidence of countervailable subsidies. This point is addressed in the following section.

Kangtai's arguments to this point do not persuade that Commerce's selection of the Philippines over Thailand was erroneous; thus, whether Commerce's selection can be concluded as supported by substantial evidence and in accordance with law depends upon the following.

C. Selection of Surrogate Financial Information

As mentioned, an NME respondent's NV is calculated based on the FOPs for labor, materials, and energy, as well as manufacturing overhead and general expenses (SG&A), plus profit. *See* 19 U.S.C. §1677b(c)(1). SG&A expenses and profit are constructed via surrogate

financial ratios calculated, to the extent possible, from publicly available financial statements of producers of identical or comparable merchandise. *See* 19 C.F.R. §351.408(c)(4). Commerce has maintained a consistent preference for surrogate values that are contemporaneous with the period of review, publicly available, product-specific, representative of broad market average prices, and free of taxes and import duties, *see, e.g., Xiamen Intern. Trade and Indus. Co. v. United States,* 37 CIT ___, ___, 953 F. Supp. 2d 1307, 1312–13 (2013), as well as for valuing all FOPs from a single country, the primary surrogate, *see, e.g., Jiaxing Brother Fastener Co. v. United States*, 38 CIT ___, 11 F. Supp. 3d 1326 (2014) ("*Jiaxing Brother II*"). Commerce explained that mixing and matching SG&A and profit data from different countries was particularly inappropriate for SG&A expenses and profit, and sourcing FOPs from a primary surrogate country would curtail "margin shopping" of FOPs from different countries. *Antidumping Duties; Countervailing Duties*, 61 Fed. Reg. 7308, 7345 (Feb. 27, 1996). "Commerce has [also] a stated preference for the use of the domestic price over the import price, all else being equal." *See Rhodia, Inc. v. United States*, 25 CIT 1278, 1287, 185 F. Supp. 2d 1343, 1352 (2001) ("*Rhodia*"); *see also, e.g., Hebei Metals & Minerals Imp. & Exp. Corp. v. United States*, 29 CIT 288, 300, 366 F. Supp. 2d 1264, 1274 (2005) ("*Hebei Metals*").

For the *Final Results*, Commerce relied upon financial statements for Mabuhay Vinyl Corporation ("MVC"), a chemicals producer of the Philippines, for SG&A expenses and profit. Kangtai contends this is the sole financial statement for the Philippines of record and that MVC "likely benefitted from countervailable subsidies," thereby rendering the Thai data superior. By contrast, Kangtai continues, Commerce completely ignored the fact that one of the Thai financial statements, for Siam PVS Chemicals Co., Ltd. ("Siam PVS"), had no evidence of countervailable subsidies, and no party suggested that it did. As such, Kangtai argues, the data for Thailand were "better" from the standpoint that there was an "untainted" financial statement on the record to represent industry surrogate financial costs. Kangtai Reply at 9.

Commerce, however, did not completely ignore Siam PVS. The petitioners had argued to Commerce that Siam PVS's financial statement does not identify production or sales of sodium hypochlorite and contains no breakdown of the costs of goods sold, *see IDM* cmt. 1 at 5, and Commerce apparently agreed. The court is not free to disagree, as substantial evidence supports Commerce's conclusion. *See Universal*

Camera, *supra*, 340 U.S. at 488 (a court may not "displace the [agency's] choice between two fairly conflicting views, even though the court would justifiably have made a different choice had the matter been before it *de novo*").

Nonetheless, Kangtai disagrees that the MVC financial statement "reflect[s] no evidence of receipt of countervailable subsidies", arguing that the determination is not supported by substantial evidence. *Cf. IDM* cmt. 1 at 8 *with* Kangtai's Case Br. at 14–15 (arguing that Commerce had found several programs by the Philippines Board of Investment to be countervailable including "Tax Deduction of Direct Labor and Local Raw Materials," "Tax Credit on New Local Content," "Tax Exemption on Imported Capital Equipment," and "Tax Deduction to Export Trading Companies"), referencing Jiheng Final SV Submission at Ex. 17. Even if Kangtai is correct, the point does not completely render Commerce's finding on the usefulness of SG&A in the MVC statement unsupported by substantial record evidence or unreasonable, because Commerce stated in the *IDM* that its "practice is not to rely on financial statements where there is evidence that the company received countervailable subsidies *and* there is other, more reliable and representative data on the record for purposes of calculating the surrogate financial ratios." *IDM* cmt. 1 at 8 (italics added). The decision on whether to rely on a particular financial statement (even one tainted, *arguendo*, by subsidies) is record-dependent, *see, e.g., DuPont Teijin Films v. United States*, 37 CIT ___, ___, 896 F. Supp. 2d 1302, 1310–11 (2013) ("Commerce could have reasonably concluded that it would be the best available information if the other financial statements on the record were even more distorted"), referencing, *inter alia*, 19 U.S.C. §1677b(c), and it is not for the court to choose between arguably untainted but incomplete data and arguably complete but tainted data, as that is Commerce's province. Kangtai's arguments do not persuade that the substantial evidence of record could only lead to the conclusion that the Thai data unequivocally "bested" the Philippine data of record. *See Universal Camera, supra*, 340 U.S. at 488.[15]

D. Possible Double-Counting of Labor in Surrogate SG&A

1. Further Background

Regarding the labor FOP, Commerce now employs a rebuttable presumption that the industry-specific labor cost data, if available,

[15] *See also Consolo, supra*, 383 U.S. at 620 ("[t]he possibility of drawing two inconsistent conclusions from the evidence does not prevent an administrative agency's finding from being supported by substantial evidence").

prevailing in the primary surrogate country as reported in Chapter 6A the International Labour Organization's Yearbook of Labor Statistics ("Yearbook") "better accounts for *all* direct and indirect labor costs."[16] *Labor Methodology*, 76 Fed. Reg. at 36093 (italics added). Because ILO Chapter 6A data are intended to be all-inclusive of labor costs, Commerce further explained in *Labor Methodology*, that

> If there is evidence submitted on the record by interested parties demonstrating that the NME respondent's cost of labor is overstated, the Department will make the appropriate adjustments to the surrogate financial statements subject to the available information on the record. Specifically, when the surrogate financial statements include disaggregated overhead and selling, general and administrative expense items that are already included in the ILO's definition of Chapter 6A data, the Department will remove these identifiable costs items.

Id.

In the *Preliminary Results*, Commerce relied on data reported by the Philippines to the ILO in Chapter 6A of the Yearbook. *PDM* at 17. Commerce used as its basis for its labor calculation the hourly rate of US$ 3.63 (*i.e.*, the Php[17] equivalent) for the "compensation of employees" working in the manufacture of chemicals and chemical products, sub-classification 24 of ISIC-Revision 3. *See* Prelim. Results SV Memo at 7 and Appx. III.48.

Kangtai argued in its case brief that the Philippines ILO data do not provide the labor costs or employee compensation that Commerce seeks to calculate for Kangtai, and that Commerce should instead use data from the Philippines Bureau of Labor and Employment Statistics (BEAMS) from the 2012 Philippine Industry Yearbook of Labor Statistics for 2007, the most recent year in which appropriate labor

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[16] *Antidumping Methodologies in Proceedings Involving Non-Market Economies: Valuing the Factor of Production: Labor*, 76 Fed. Reg. 36092 n.3 (June 21, 2011) ("*Labor Methodology*"). *Labor Methodology* was the consequence of the Federal Circuit's invalidation of Commerce's prior regression-based analysis provided in 19 C.F.R. §351.408(c)(3). *See Dorbest Ltd. v. United States*, 604 F.3d 1363, 1372 (Fed. Cir. 2010). As explained in *Labor Methodology*, Commerce first resorted to reliance upon ILO Chapter 5B labor cost data, but because those data only cover direct labor compensation and bonuses, Commerce became concerned that such data were underinclusive. Thus, going forward, Commerce announced in *Labor Methodology* that it would rely on ILO Chapter 6A instead. And whereas in the past Commerce distinguished between direct labor cost and indirect labor cost that was accounted either as a part of the surrogate value for factory overhead or as part of labor, in accordance with *Labor Methodology* it now appears the cost of "labor" as a whole is to be calculated simply by multiplying the labor hour input by the relevant ILO-based unit labor cost figure.

[17] Drawing from *Clearon II*, Philippine pesos will herein be abbreviated either "Php" or "P".

statistics are available, because the BEAMS data for "Employment, Hours and Earnings Survey" are the sole source used to compile the Philippines ILO Chapter 6A labor data. *See* Kangtai's Br. at 27–28; Kangtai's Reply at 10–12.

For the *Final Results*, Commerce found inconclusive support for that claim, and that in any event "it appears that ILO Chapter 6A labor data and the BEAMS labor cost data are capturing the same labor costs." *IDM* at 16. Due to doubt on the BEAMS' data's contemporaneity and current useage, Commerce essentially found that Kangtai had failed to rebut the presumptive usefulness of the ILO Chapter 6A data. *Id*

Kangtai here argues Commerce misunderstood the entirety of its claim, to wit, that the BEAMS data, in addition to being source data, demonstrate that certain labor items are being double counted from the MVC financial statement upon which Commerce chose to rely upon for SG&A expenses. To bolster its argument before Commerce, Kangtai provided revised financial statement calculations that took into account, using BEAMS data, the costs for salaried directors, managers, executives, administrative personnel, and sales personnel. *See* Kangtai's Br. at 46–47, referencing, *inter alia*, Kangtai's Final SV Submission (Sep. 12, 2013) at SV-14, p. 1. Kangtai argues *Drawn Stainless Steel Sinks From the PRC*, 78 Fed. Reg. 13019 (Feb. 26, 2013) (final LTFV determ.) and accompanying I&D Memo at cmt. 4, pp. 14–15, for example, is comparable to this segment because the record reflects that domestic labor statistics are more detailed and more appropriate than these countries' ILO-reported labor data. Kangtai *See*, *e.g.*, Kangtai's Br. at 24; *see also* Kangtai's Case Br. at 47.

Arch echos the double-counting claim, albeit via a different analysis. Arch argued before Commerce for adjustments to Commerce's labor figures to account for "employee benefits" and "retirement benefits" included in the SG&A of the financial statement for MVC ("Financial Statement"), the company on which financial ratios were based, because those amounts are already included in Commerce's presumptive ILO Chapter 6A data. Arch's Br. at 17–20.

Commerce dismissed these claims in the *Final Results*. *IDM* cmt. 6.D. at 36–37. Commerce distinguished between "manufacturing costs" (costs initially allocated and capitalized as inventory and subsequently expensed as cost of goods sold) and "period costs" (expensed in full in the period when incurred) and took the position that when financial statements identify and classify labor costs as either manufacturing related labor costs or SG&A-related labor costs, it would rely on those classifications in the financial statements unless there

is a good reason to believe the classifications are inaccurate. Agreeing that retirement benefits were provided to all of MVC's "regular employees," Commerce nonetheless concluded that this meant that because MVC's Financial Statement included separate classification of manufacturing costs and operating expenses, it would presume that the reported costs of the retirement benefits in the "operating expenses" section (*i.e.*, period costs) reflected only those costs relating to administrative staff, and that the manufacturing cost section properly included all manufacturing-labor related items, including any employee and retirement benefits for direct and indirect labor. *See id*.

2. Analysis

Kangtai and Arch here contend that by failing to make adjustments to account for the labor figures in MVC's SG&A, Commerce has overstated the financial ratios' labor component. Kangtai's Br. at 23–24; Arch's Br. at 17–20. Commerce responds that the arguments do not identify specific line items in the ILO Chapter 6 data and MVC's financial statements that indicate that employee benefits were overstated or improperly allocated between the "cost of sales" and "operating expenses" sections. Def's Resp. at 33. However, to the extent Arch drew attention to those items in the Financial Statement that Arch (and Kangtai) contends are being double-counted, Commerce's statement is incorrect, and the remainder of Commerce's argument establishes a burden that is not present in Commerce's announced practice: there is no support for the proposition that a respondent must go "behind" the ILO data that Commerce has already determined is the best labor rate in order to identify the line item within the reported earnings that shows that MVC's retirement benefits are included in the ILO data, as those data are presumptively all-inclusive, and such a requirement would be impossible to prove in any event, given that the ILO data are not company-specific.

Commerce also argues that it had substantial reason to believe that the retirement benefits related to the administrative personnel only, because although Note 21 of the Financial Statement states that retirement benefits "are provided to all its regular employees", there is no definition provided for "regular employees."[18] Clearon adds that Jiheng and Kangtai do not provide any "direct evidence" to contradict

[18] The defendant further argues that because Commerce was unable to conclude whether "regular employees" included any direct laborers or factory workers and might only encompass administrative personnel, and because it is not unusual for administrative personnel to have retirement benefits and for production workers not to have such benefits, Commerce reasonably concluded that the retirement benefits were properly included in the operating expenses section of the income statement and that it did not include benefits, if any, for the factory workers whose salaries fell under the cost of sales section of the income statement. Arch argues this is indefensible *post hoc* rationalization. *See, e.g., SEC v. Chenery Corp.*,

Commerce's interpretation of the Financial Statement, that the reference in Note 21 of the Financial Statement to MVC's "defined benefit retirement plans" is ambiguous, and that Commerce could reasonably "disagree that this statement means that retirement benefits for the entire company, including the factory workers whose salaries are included in the costs of goods sold section of the income statement, are included in the operating expenses section of the income statement and are being double counted." *IDM* cmt. 6.D. at 37.[19] Clearon argues that the Financial Statement itself supports Commerce's construction to a substantial degree and that the construction is consistent with "accounting practice." Clearon Resp. at 28–29.

In short, Commerce's position rests upon cost accounting practice in interpreting the employee and retirement benefits among MVC's SG&A as pertaining solely to administrative staff, while Arch's position is that Commerce has not indicated any evidence to support the assumption that all retirement benefit expenses incurred for its "regular employees" are only for the administrative staff. Commerce did not, for example, find from the record that the inclusion within SG&A of employee and retirement benefits for all of the company's employees, including those involved in manufacturing, would have been *inconsistent* with Philippine accounting standards -nor could it, since the record does not include relevant statements of Philippine accounting standards.

The court concludes that Arch, supported by Kangtai, has provided a cogent and persuasive analysis of the Financial Statement indicating that Commerce's conclusion lacks substantial evidence on the record. The MVC 2011 Financial Statement relied upon by Commerce states that "The Company has a registered, non-contributory retirement plan" and that "*All regular employees are covered from the President down to the rank and file*"[20] and MVC's 2012 Annual Report states that "The Company has a funded, noncontributory defined benefit retirement plan, administered by a trustee, covering its per-

318 U.S. 80, 87 (1943). The court agrees. Nowhere in the *Final Results* or the *IDM* did Commerce mention this interpretation of "regular employees" as only referring to administrative personnel; rather it seemed to acknowledge that factory workers received retirement benefits but disagreed where those expenses were classified. In any event, the defendant's argument is not supported by substantial evidence. *See infra*.

[19] Clearon also notes that retirement and employee benefits to "key management personnel" alone account for one-half of the total retirement and employee benefits identified under operating expenses. *See* Clearon's Final SV Submission, PDoc 153 (Sep. 12, 2013), Ex. 1, at 35.

[20] *See* Clearon's Prelim. SV Submission, PDocs 92, 93 (Mar. 15, 2013) parts 2 and 3, Ex. 8, p. 18 (italics added).

manent employees";[21] Arch argues that by using such statements, MVC thereby "confirmed" that the references to "regular employees" are consistent with the normal meaning of the business term,[22] and thus the term "regular employees" means retirement benefits apply to all of MVC's permanent employees -- "from the President down to the rank and file." Arch thus argues that the Financial Statement itself explains that all retirement benefit expenses incurred for its regular employees "are reported as operating expenses."

Continuing, Arch also points to Note 18 to the Financial Statement as identifying the details of "Cost of Sales"[23] and breaking out direct labor as one of the items included therein (albeit without further detail of what, precisely, is included in the labor costs) and also providing "extensive" information on the retirement benefits at pages 13–14. Arch notes that the Financial Statement's brief description of the plan, including how the benefits liability is determined, again provides no distinction between direct labor and administrative staff, and that the Financial Statement at page 19 discusses how retirement benefit costs are estimated, again without distinguishing between the costs for direct labor and other labor. Most importantly, Arch notes that this portion of the Financial Statement concludes: "The retirement benefits payable amounted to P 18.42 million and P 18.12 million as of December 31, 2011 and 2010, respectively. *The retirement benefits costs recognized amounted to P 7.30 million in 2011*, P 7.91 million in 2010 and P 9.40 million in 2009 (See Note 21)." *Id*. at 19 (italics added). Arch summarizes that this discussion describes generically how the costs are determined. Critically, it does not itemize P 7.30 million (the amount reported under operating expenses) for administrative staff *and some other amount for direct/indirect labor* but rather the context demonstrates that the P 7.30 million reflects the total cost of the retirement benefits for 2011 for "*all* regular employees."

That is not all. Arch also directs attention to Note 21 to the Financial Statement, in which MVC reiterates, to wit, that the "funded, noncontributory defined benefit retirement plan" is for all regular

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[21] *See* Clearon's Final SV Submission, Ex. 1, p. 18.

[22] Arch argues that the term "regular employee" is a common business term used extensively, as found, for example, in the U.S. Department of Labor regulations at 29 C.F.R. §§ 553.30, 779.234, and 1910.120(F)(4), and that U.S. Department of State regulations even provide a definition:

A regular employee means for purposes of this subchapter:

(1) An individual permanently and directly employed by the company, or

(2) An individual in a long-term contractual relationship with the company where the individual works at the company's facilities . . .

22 C.F.R. § 120.39(a).

[23] *See* Clearon's Prelim. SV Submission, PDocs 93 & 94 (Mar. 15, 2013), at Ex. 8, p. 26.

employees and that "The following tables summarize the components of net retirement expense recognized in the consolidated statements of income and the funding status and amounts recognized in the consolidated balance sheets." *Id*. at 28. Note 21 then provides several tables, one identifying the components of the retirement expenses charged to operations (the P 7.30 million); the second providing the details of the retirement benefits payable; the third the changes in present value of the retirement benefit obligations; the fourth the fair value of plan assets; the fifth the actual returns on plan assets; the sixth the major categories of the net plan assets; the seventh the assumptions used to determine retirement benefit obligations; and the eighth the information regarding yield rates. *Id*. at 28–30. "At no time does the Financial Statement distinguish the costs between direct labor and other labor or between factory workers and administrative staff." Arch's Br. at 19.

Arch argues that for Commerce's assumption to make sense, at some point in the Financial Statement's extensive discussions of the retirement plan costs it would have indicated that it was only discussing the portion of the plan relating to administrative staff, whereas Note 21 states that it is discussing the "net retirement expense recognized in the consolidated statements of income." If the Financial Statement were recognizing that expense in two different fields -- one in direct labor and the remainder in operating expense -- it would seem incumbent to provide *some* information on the retirement benefit expenses included in the direct labor; otherwise, Note 21 would not reflect the "net retirement expense recognized in the consolidated statements of income." The context, Arch contends, demonstrates that P 7.30 million is the benefit cost of the entire retirement benefit plan, not just the portion for administrative staff, and "[w]hen the annual report, itself, states that the retirement benefit expense reported in the SG&A line item expense covers all retirement benefit expenses incurred by the company and that all regular employees receive retirement benefits, there is simply no basis for Commerce's assumption" regardless of whether it may be said that such assumption is "consistent" with Philippine accounting standards.

Commerce's reasoning, by contrast, does not appear to be a cogent rebuttal of the foregoing. In view thereof, Arch and Kangtai thus persuade that remand is necessary in order to ensure that indirect labor costs are not being double counted. This is not an instance of "displac[ing] the [agency's] choice between two fairly conflicting

views", *Universal Camera*, *supra*, 340 U.S. at 488;[24] the administrative interpretation, that the retirement and employment benefits itemized as SG&A expenses in MVC's financial statement pertain *only* to administrative staff, simply lacks substantial evidence of record -- in particular those accounting standards that would demonstrate Commerce's interpretation to be a reasonable assumption. The court has been referred to no evidence on the record as to what the "consistent" accounting treatment of these types of employee and retirement benefits should be, and thus no evidence as to the "required" accounting treatment, and there is no finding on the record that Arch's and Kangtai's argued interpretation is inconsistent with accounting practice or standards. *Cf. Thor Power Tool Co. v. CIR*, 439 U.S. 522, 544 (1979) ("Accountants long have recognized that 'generally accepted accounting principles' are far from being a canonical set of rules that will ensure identical accounting treatment of identical transactions[, and they] tolerate a range of 'reasonable' treatments, leaving the choice among alternatives to management."). In sum, Commerce's assumption is insufficient to address the salient points Arch makes by its more thorough and detailed analysis of the MVC's financial statement. Whether Arch's interpretation, as supported by Kangtai's arguments, presents the more accurate and reasonable interpretation of the MVC's financial statement, which finding the court is not at liberty to make, the assumption of the type upon which the *IDM* analysis rests is not based on substantial evidence but on an incomplete analysis, and the issue must therefore be remanded for further explanation or reconsideration anew, resulting in adjustment of impacted financial ratios, if that is the consequence thereof.

E. Surrogate Valuation of Chlorine

1. Further Background

As in the prior review, for the *Final Results* Commerce had to select a surrogate value for Kangtai's chlorine input.

Kangtai's chlorine requirements were in excess of 15,000 metric tons during the POR.[25] The six surrogate countries on the OP List combined together only imported about 5,900 metric tons of chlorine. Kangtai therefore argued, *inter alia*, that the nature of chlorine has not suddenly changed, that Commerce should continue to find, for

[24] *See also Consolo*, 383 U.S. at 620 ("[t]he possibility of drawing two inconsistent conclusions from the evidence does not prevent an administrative agency's finding from being supported by substantial evidence").

[25] *See IDM* cmt. 2.G. at 20 (stating that "Kangtai alone purchased over 15 million kilograms of chlorine during the POR").

that reason and others, that chlorine is not "frequently traded in commercial quantities," and that for the purposes of surrogate valuation of the chlorine input Commerce should use domestic prices from India, for which it pointed to the annual production from one particular company of 29,539 metric tons of chlorine, valued at about 5,581 rupees per metric ton (approximately US$ 112 during the POR), on display at page 60 of the 2010–2011 Annual Report for Kanoria Chemicals & Industries Ltd. ("Kanoria"), an Indian producer of chemical intermediaries. *See* PDoc 109 at Ex. SV-7.

The petitioners argued for the use of Global Trade Atlas ("GTA") import price statistics, which revealed a total of 1,611 metric tons of chlorine imported into the Philippines, with an average unit value ("AUV") of US$ 0.21 per kilogram ("kg"), or US$ 210 per metric ton.

Kangtai argued against this GTA data for several reasons. Commerce, however, took the position that it had previously addressed most of these arguments in the prior *Sixth Review*. In that review, it found that Philippines GTA import data were the only data available to value chlorine from the Philippines and were not aberrational. For the review at bar, Commerce again selected the Philippines GTA data as a surrogate value for chlorine because it did not find the AUV for Philippine chlorine import data aberrant, with the Philippine import volume being the third highest among the other equally economically comparable countries' imports, and because 1,611 metric tons represents "commercial quantities". *IDM* cmt. 2.G. at 21, referencing, *inter alia*, *Glycine from the PRC*, 77 Fed. Reg. 64100 (Oct. 18, 2012) (final rev. results) ("*Glycine from the PRC*"), and accompanying I&D Memo cmt. 1 at 6 (finding total volume of 2,000 metric tons of imported chlorine to represent imports of "commercial quantities").[26]

2. Analysis

While Commerce has discretion in choosing among surrogate values for FOPs, *see*, *e.g.*, *Nation Ford Chemical Co. v. United States*, 166 F.3d 1373, 1377 (Fed. Cir. 1999) ("*Nation Ford*"), the statute requires that valuation of FOPs "be based on the best available information regarding the values of such factors in a market economy country or

[26] More specifically, in *Glycine from the PRC*, Commerce selected Indonesian GTA import data to value chorine upon finding that they represented commercially significant quantities, and that the Indonesian GTA import prices for chlorine were not aberrational because Indonesia's average unit value was within the range of values from countries included on the surrogate country list and because Indonesia imported the highest volume of chlorine among the countries on the list. *See Glycine*, I&D Memo at cmt. 1. Commerce stated that the *Glycine from the PRC* review was unlike prior reviews, in which it had rejected import prices to value chlorine on the basis of import volume of one metric ton, because the import volume for Indonesia exceeded 2,000 metric tons. *See id.* Commerce thus determined that Indonesian import data were commercially representative. *See id.*

countries" that Commerce considers "appropriate." 19 U.S.C. §1677b(c). In that consideration, it is Commerce's duty to ensure that the antidumping rates are as accurate as possible. *See Rhone Poulenc, Inc. v. United States*, 899 F.2d 1185, 1191 (Fed. Cir. 1990).

To value material inputs, Commerce has expressed a general preference for using import statistics, because they are "publicly available published information" and do not include domestic taxes or subsidies. *See Hand Tools Final Results, Heavy Forged Hand Tools, Finished or Unfinished, With or Without Handles, from the PRC*, 60 Fed. Reg. 49251, 49252 (Sept. 22, 1995) (final rev. results) ("*Hand Tools*"). This appears consistent its with administrative practice of selecting the "best available information" for valuing FOPs that are product-specific, representative of a broad-market average, publicly available, contemporaneous with the period of review, and free of taxes and duties. *See Certain Polyester Staple Fiber From the PRC*, 75 Fed. Reg. 1336 (Jan. 11. 2010), and accompanying I&D Memo at cmt. 1.

If the import data reveal a "small" total quantity over the period under consideration, Commerce's practice is to determine if the price for the imports is aberrational. *See Shakeproof Assembly Components Div. of Ill. Tool Works, Inc. v. United States*, 23 CIT 479, 485, 59 F. Supp. 2d 1354, 1360 (1999). Commerce has determined aberration by comparing the average import price against other sources of market value. *See*, *e.g.*, *Certain Cut-to-Length Carbon Steel Plate From the PRC*, 62 Fed. Reg. 61964, 61981 (Nov. 20, 1997) (final LTFV determ.) ("[f]or pig iron, we were unable to use the Indian Monthly Statistics as we determined that the import price was aberrational because the Indian data was based on a very small quantity and was almost two times the price of the Indonesian pig iron."); *see also Hand Tools*, *supra*, 60 Fed. Reg. at 49253 (Commerce's practice is to check import statistics against "sources of market value if the total quantity imported under a specific category was small"; if the value was found to be aberrational, *i.e.*, "too" high or "too" low, Commerce chooses another surrogate value).

Similar to its arguments in the *Sixth Review*, Kangtai makes several broad points: (1) Commerce does not reasonably explain its departure from prior determinations finding that the high costs associated with transport of hazardous chemicals like chlorine makes import statistics therefor suspect; (2) "useable" chlorine data is not the standard, "best available" data[27]; (3) it is misleading to aggregate an unspecified number of smaller import transactions into the Philippines into a total commercial "quantity" (or quantities) of 1,611

[27] Kangtai's Br. at 26–27, referencing *Jiaxing Brother I*, *supra*, 38 CIT at ___, 961 F. Supp. 2d at 1333.

metric tons from all import transactions collectively over the POR, which amount is not commercially significant especially when compared with the fact that Kangtai purchased over 15,000 metric tons during the POR; (4) the total imported volume of chlorine into the Philippines cannot validly be compared to its own chlorine requirements; (5) the GTA data for the Philippines are "wide-ranging" and aberrant; and (6) Commerce does not adequately explain why the Philippine GTA data are the "best" available information above the Indian data proffered for the record in light of the administrative preference for domestic data over import data for the type of chemicals at bar (*see* first point).

Several of these points are interrelated, but Kangtai's last point overreaches, somewhat. Kangtai argues that Commerce has stated that it prefers domestic over import prices "especially when, like in the present case, the import value is significantly higher than the domestic price,"[28] but there is no indication on the record as to what the Philippines domestic price was during the POR. Kangtai's argument, rather, is for comparing, at a minimum, the Philippines import price with the Indian domestic price *à la Jiaxing Brother I*, *supra*, 38 CIT at ___, 961 F. Supp. 2d at 133235, which observed that the significantly lower domestic Indian price, as compared to the Indian import price and the fluctuation in the Indian import volumes and prices, revealed comparable disparities and fluctuation in the Thai import volumes and prices, implying that the "only reasonable inference one could draw from the administrative record is that the Thai import values are similarly affected and thus do not reflect domestic Thai HCL prices." Kangtai argues the Indian data for chlorine in the record at bar are at least relevant for that purpose, *i.e.*, analysis of the Philippine data. Remand for that purpose is at least appropriate in accordance with *Clearon II*.

Adhering to the course of *Clearon II* here, the court finds that validity of Kangtai's first point, *supra*, ultimately depends upon the

[28] Kangtai's Br. at 29–30, referencing *Hebei Metals*, *supra*, 29 CIT at 300, 366 F. Supp. 2d at 1274 ("[T]he preference for domestic data is most appropriate where the circumstances indicate that a producer in the hypothetical market would be unlikely to use an imported factor in its production process. The most obvious circumstances occurs where the import price is significantly greater than the domestic price.") and *Yantai Oriental Juice Co. v United States*, 26 CIT 605, 617 (2002) (rejecting more contemporaneous import data because the agency failed to explain why the industry would purchase more expensive imported coal over domestic source). *See also*, *e.g.*, *Zhengzhou Harmoni Spice Co., Ltd. v. United States*, 33 CIT 453, 492, 617 F. Supp. 2d 1281, 1316 (2009) and cases cited.

validity of Commerce's ultimate conclusion.[29] Doubt arises on that conclusion.

With regard to Kangtai's argument that it is misleading to aggregate an unspecified number of smaller import transactions into the Philippines into a "commercial quantity" total of 1,611 metric tons, Commerce contends that, similar to *Glycine from the PRC*, for this *Seventh Review* it determined that the Philippines imported the third highest volume of chlorine determined from among the countries included on the surrogate country list, *IDM* cmt. 2.G. at 21–22, and that given the *Glycine from the PRC* determination of 2,000 metric tons of chlorine imports as commercially significant, 1,611 metric tons of chlorine imports into the Philippines cannot be dismissed as commercially insignificant.[30] The court previously noted that *Glycine from the PRC* is under appeal,[31] and as explained below, other evidence of record detracts from this commercial significance finding.

With regard to Kangtai's argument that the total imported volume of chlorine into the Philippines cannot validly be compared to its own chlorine requirements, Kangtai's Br. at 30–31, Commerce and Clearon both contend that in the determination of whether import volume data represent commercially significant commercial quantities, the administrative policy is to make cross-country comparisons of import volumes of potential surrogate countries to one another, rather than comparing import volume to the purchases of respondent companies, and that the policy is due deference so long as it is reasonable. The court has previously agreed with Commerce that "the question is whether the *relative* quantity of imports is distortive." *Trust Chem Co. Ltd. v. United States*, 35 CIT ___, ___, 791 F. Supp. 2d 1257, 1265 (2011) ("*Trust Chem*"). Providing an example thereof, *Trust Chem* noted that a country's import data representing "only a small fraction" of a country's "domestic consumption" of the imported good would result in a distorted comparison. *See id*. Here, there is some indicia on this record of what the Philippines' domestic con-

[29] Final findings in prior reviews become the law of the case and "agency action is arbitrary when the agency offers insufficient reasons for treating similar situations differently". *See Dongbu Steel Co., Ltd. v. United States*, 635 F.3d 1363, 1371 (Fed. Cir. 2011).

[30] Clearon also responds that the reliability of the Philippine data were proven because they were "within the range" of data for countries on the OP List and that Kangtai provides no evidence that those transactions were commercially insignificant. Clearon's point suffers from the same shortfalls, however, in that obviously the Philippine import data would be "within the range" (*i.e.*, circular reasoning is not proof), and Commerce's conclusory statement that the aggregate of the import transactions forms a "commercial quantity" does not mean that the underlying transactions were (*i.e.*, absence of evidence is not evidence of absence).

[31] *See generally Baoding Mantong Fine Chemistry Co., Ltd. v. United States*, Court No. 12–00362; *see also id*., ECF No. 30, Motion for Judgment (July 22, 2013) at 20–23.

sumption of chlorine was during the POR, but that is not the only "relative" comparison that would shed light on the Philippines' chlorine import data (and the reasonableness of Commerce's position) in accordance with *Trust Chem* and other decisions.

As indicated, Commerce states that its policy is "not to compare import volume to the purchases of respondent companies", *e.g.*, *IDM* cmt. 2.G. at 21, and it claims that the reason behind the policy is that in the calculation of NV, the price the producer in the surrogate country pays for the input in the production of subject merchandise is determinative, *i.e.*, that it does not need to "duplicate" the exact production experience of the respondents. *E.g.*, Def's Resp. at 44, referencing *Longkou Haimeng Mach. Co., Ltd. v. United States,* 33 CIT 603, 612–13, 617 F. Supp. 2d 1363, 1372–73 (2009) ("*Longkou Haimeng*"). But, regardless of whether Commerce need not duplicate the exact production experience of the respondents, the respondents' actual production experiences may not be ignored in that consideration. *See*, *e.g.*, *Taian Ziyang Food Co., Ltd. v. United States*, 33 CIT 828, 862–64, 637 F. Supp. 2d 1093, 1126–27 (2009) ("*Taian Ziyang Food*").

As previously noted in *Clearon II*, Commerce's statement and position is at odds with the fact that it focused on respondent production experience as part of its consideration in *Polyethylene Terephthalate Film, Sheet, and Strip from the PRC*, 73 Fed. Reg. 55039 (Sep. 24, 2008) (final LTFVdeterm.)[32] and accompanying I&D Memo at 2, and again in *Polyethylene Terephthalate Film, Sheet, and Strip from the PRC*, 77 Fed. Reg. 14493 (Mar. 12, 2012) (final rev. results) and accompanying I&D Memo at issue 4, and Commerce has done likewise in numerous other contexts.[33] It is true, as Commerce high-

[32] *See also Fuwei Films (Shandong) Co., Ltd. v. United States*, 36 CIT ___, ___, 837 F. Supp. 2d 1347, 1355 (2012) (noting Commerce's reason for rejecting import statistics in that case, to wit, that they "contained an insignificant quantity of imports not representative of the DuPont Group's PET chip purchase volume or consumption experience").

[33] Commerce has repeatedly considered the importance of a respondent's production experience in such cases as, *e.g.*, *Certain Steel Wheels From the PRC*, 77 Fed. Reg. 17021 (Mar. 23, 2012) (final LTFV determ.) and accompanying I&D Memo at cmt. 8 ("these data allow for separate valuation of rim and disk HRS inputs based on width and thickness of the input (consistent with respondents' production experience)"), *Drill Pipe From the PRC*, 76 Fed. Reg. 1966 (Jan. 11, 2011) (final LTFV determ.) and accompanying I&D memo at cmt. 6 ("the Department has determined that HTS 8431.43.90 is not representative of the input consumed by the DP-Master Group"), *Freshwater Crawfish Tail Meat From the PRC*, 75 Fed. Reg. 79337 (Dec. 20, 2010) (final rev. and new shipper results) and accompanying I&D Memo at cmt. 3 ("the Spanish import prices may or may not, arguably, constitute information that is directly representative of the production experience of the respondents in these reviews"), *Circular Welded Austenitic Stainless Pressure Pipe from the PRC*, 75 Fed. Reg. 51788 (Sep. 5, 2008) (prelim. LTFV determ.) and accompanying I&D Memo at "Selection of

lights, that *Nation Ford*, *supra*, stated that "[t]he 'best available information' concerning the valuation of a particular factor of production may constitute information from the surrogate country that is directly analogous to the production experience of the NME producer . . . *or it may not*" (italics added), 166 F.3d at 1377, but that does not give Commerce license to overlook a respondent's actual production experience when choosing an appropriate surrogate value. Essentially, the only reason Commerce offers here for doing so seems to be "because we say so." The court continues to hold that a chosen import dataset must "adequately approximate[ ] the respondents' production experience". *Taian Ziyang Food*, *supra*, 33 CIT at 862, 637 F. Supp. 2d at 1126.

In *Glycine from the PRC*, Commerce acknowledged, but was not persuaded by, the respondent's arguments therein that its own purchases during the period reviewed amounted to 62% of all of the primary surrogate country's imports of chlorine during that period. Kangtai's production experience here, by contrast, is far in excess of that comparison, comprising requirements of chlorine that were over *nine times* the total imports into the Philippines during the POR. The *IDM* also provides the conclusory statement that "[t]he Philippine import data are not aberrational based on the quantity and the per-unit value when compared to the other countries found by the Department to be equally economically comparable to the PRC." *IDM* cmt. 2.G. at 21, referencing Kangtai's Case Brief, PDoc 181 (Nov. 29, 2013), at 37. On page 37 of that referenced brief, Kangtai lists the import data for each country on the OP list (Indonesia, Costa Rica, the Philippines, Colombia, South Africa, and Thailand), the total US$ value and total quantities in kilograms, the AUV, and the percentage out of total kilograms for all listed country's import data. Of those, the Philippines' AUV is the lowest at US$ 0.21/kg (or US$ 210 per metric ton), while Indonesia and Costa Rica, with total imports in metric tons of 2,305.6 and 1,887.2, respectively, both show AUVs of US$ 0.54/kg (US$ 540 per metric ton). Colombia, South Africa, and Thailand, with total imports in metric tons of 84.0 9.7 and 3.0, respectively, display AUVs of US$ 0.50, US$ 3.54, and US$ 3.40, respectively.

The court here is not engaged in re-weighing the evidence, merely observing. Notwithstanding that the Philippines is the lowest AUV of record (and more proximate to the India value for which Kangtai argues), the average AUV of the listed countries is over twice that of the Philippines chlorine import data and the Thai data is over seven

Surrogate Country" ("because India better represents the experience of producers of subject merchandise and provides better financial data[,] we have selected India as the surrogate country").

times that average. However, the *IDM's* dismissal of the variability of these AUVs was only conclusory, and therefore unreasonable, particularly in light of the fact that the import prices of chlorine in this review are evidently far more wide-ranging than the chlorine import prices rejected by Commerce in the 2009–2010 review.[34] *See* Kangtai's Br. at 29. The *IDM* addressed the argument that the Philippine import data were wide-ranging only to the extent of quoted acknowledgment in the *Sixth Review* I&D Memo that the rejected Indian import data considered in the 2009–2010 administrative review ("*Fifth Review*") had been found wide-ranging as compared to other potential surrogate countries, thereby justifying in part their disregard and resort to other data (to wit, "because other viable source information from the primary surrogate country was on the record, the Department opted to disregard the Indian GTA data"). *IDM* cmt. 2.G. at 21, quoting *Sixth Review* I&D Memo at cmt.7. The *IDM* then states that in the *Fifth Review*, Commerce had been able to conclude from a comparison of import prices and domestic prices in the primary surrogate country "that, due to a discrepancy in the pricing between domestic prices and import prices, as well as the average unit price ranges of the potential surrogate countries, chlorine was not frequently traded", whereas in the present review it had no domestic prices for chlorine from the primary surrogate country (the Philippines) to make such a comparison. *Id*. at 22.[35]

But, the fact that there were no domestic Philippine price data of record against which to compare the Philippine import data does not resolve the question of aberrancy or end the analysis. Commerce was not restricted to relying only upon Philippine domestic price data in that analysis, as it had at least one other source of domestic market information of record with which to compare the import data -- India. In that regard, the situation here bears similarity to *Shanghai Foreign Trade Enterprises Co., Ltd. v. United States*, 28 CIT 480, 494–96, 318 F. Supp. 2d 1339, 1352–54 (2004) ("*Shanghai Foreign Trade*"), in which the record thereof "reveals indications that the 1,132 metric tons of pig iron imported into India during the period of investigation are not commercially significant." 28 CIT at 495, 318 F. Supp. 2d at 1352.

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[34] *See, e.g., AR09–10 Chlor-Isos* Prelim. Results SV Memo at 12 and Att. XXXII(a) (India AUV US$ 0.31/kg; Philippines AUV US$ 0.18/kg; Indonesia AUV US$ 0.70/kg; Peru AUV US$ 0.48/kg; Thailand AUV US$ 7.83/kg).

[35] Commerce also reiterated that in *Glycine from the PRC* it "recently found that chlorine is being traded internationally." *IDM* cmt. 2.G. at 22 (citation omitted).

There, as here, Commerce's decision was essentially *ipse dixit* and failed to establish that the amount imported into India "was statistically or commercially significant and demonstrates no apparent consideration of that issue." *Id.* There, as here, Commerce "did not explain its decision to deviate from its past practice, under which it normally would ensure that a small quantity of imports did not produce a price that is aberrational relative to other sources of market value." *Id*. The Indian data of record here are "sources of market value" that Commerce could have, but did not, consider. *Cf. id.* Commerce states that it refused to consider the Indian chlorine data simply because India is not on its "economically comparable" list. But that is not a sufficient reason for disregarding that data altogether, or simply for the purpose of testing the normality or aberrancy of the import data.

Commerce's preference for valuing all FOPs from a single surrogate country "to the extent possible" has not been held unreasonable, but "to the extent possible" must still yield to reason and the sourcing of particular surrogate values from outside the primary surrogate country if the record so compels. Commerce's policy statement on why it prefers to value all FOPs from a single surrogate country is in order to prevent "margin shopping", 61 Fed. Reg. at 7345, which assumes a certain equivalence in and between the qualities of the competing data sources to act as an accurate surrogate representation of the FOP or FOPs under consideration. That is not the case here, nor was it in the *Sixth Review*, when Commerce chose India as its "secondary" surrogate country in the preliminary determination thereof, even though India, then as now, was not on Commerce's list of "primary" economically comparable countries. Further, Commerce's reasoning with respect to the *Fifth Review*, above, only addressed Kangtai's argument in part but did not address its point regarding the agency's stated preference for domestic over import prices where these types of chemical products are concerned, which in prior reviews was particularly emphasized in Commerce's taking official notice of the factual issue of chlorine's "special concerns" in packaging and transport as a hazardous material. As such, with respect to Kangtai's remaining arguments on the point, Commerce's response is a *non-sequitur*.

Aside from Kangtai's interest in valuing chlorine on the basis of Indian data, as between Indian domestic prices and import statistics for the Philippines, Commerce's fundamental explanation in the *IDM* rests on the finding that the Philippines had useable (*i.e.*, "reliable") data. That does not explain why all of the Philippines data points relied upon are the "best" data in comparison with each of their respective other data points of record, in particular those argued for

by Kangtai, *cf. Jiaxing Brother I, supra*, whereas Kangtai's point is that while Commerce prefers to value all inputs from the primary surrogate country, it has appropriately looked to data sourced from other countries, even outside of the surrogate country list (and GNI band), and that the record evidence of data for Kanoria, a domestic Indian source, is "far superior", Kangtai alleges, to the Philippine import statistics for chlorine. Kangtai's Br. at 25–27. Kangtai additionally pointed out that Kanoria's production capacity dwarfs that of the entire Philippines' annual imports, easily encompassing all of Kangtai's annual chlorine requirements as well, and Kangtai summarizes that it was not asking Commerce to "duplicate" its exact production experience,[36] it was offering its own experience and that of Kanoria, a chlorine producer of record, as evidence of what is a reasonable commercial quantity for purposes of this proceeding, because Commerce had not offered any reason or basis, beyond its reference to *Glycine from the PRC*, for finding, now and in the prior review, that suddenly chlorine is shipped in commercial quantities, and that its previously expressed concerns regarding import statistics for these chemicals were suddenly no longer of concern. *See, e.g.*, Kangtai's Reply at 15. Kangtai also pleads that the fact that the only commercial entities on the record consume and produce significantly more than an entire country's imports during an entire year "must" bear additional weight on Commerce's "unsupported understanding of what a commercial quantity is." *Id*. Kangtai, thus, frames the issue, as it perceives it, as follows:

> The fundamental question that looms over the AR6 and AR7 appeals is why a rational producer dependant on chlorine inputs would abandon India, with its vast chemical production, for the Philippines with almost no domestic chlorine production or imports.

Kangtai's Br. at 13.

Of interest here is Clearon's response. In arguing that the comparison offered by Kangtai is "misleading," Clearon argues that MVC, the Philippine producer upon whose financial statements Commerce determined to rely for SG&A, is itself a "major" domestic producer of chlorine, and therefore it is untrue that the Philippines had "almost no" domestic chlorine production:

> It is not surprising therefore that the volume of chlorine imports might be small relative to Kangtai's usage rate. *Large-volume customers would logically source from a domestic producer.* At

[36] Kangtai's Reply at 15. *See Longkou Haimeng*, *supra*, 33 CIT at 612–13, 617 F. Supp. 2d at 1372–73, citing *Nation Ford*, *supra*, 166 F.3d at 1377.

> the same time, there is no evidence to suggest that the import prices are different from domestic Philippine prices or that import prices are affected by the market price in the Philippines. Therefore, as it did in the *Sixth Review*, Commerce was correct to rely upon the GTA import data to value chlorine and its determination in this regard is supported by substantial evidence on the record.

Clearon's Resp. at 38.

The point calls attention, again, to Commerce's apparent preference for domestic prices over import data. As to a lack of evidence of import-domestic price difference, it is Clearon and Commerce, rather, who bear that burden, which amounts to a presumption as to the impact of prior pronouncements on the nature of these chemicals, and which Commerce has not adequately addressed for purposes of this review. Commerce only addressed that "preference" to the extent of implying that it had no Philippine domestic prices for analysis, and that the Philippine import data were therefore, *ipse dixit*, "reliable" (in the sense of being "best"). If the quality of the Indian domestic data with respect to chlorine are in fact the most representative of Kangtai's actual experience than the data of record for chlorine from all the other countries on the surrogate country list (*e.g.*, minute import transactions over the entire course of the POR that had to be aggregated to make one "commercial quantity"), as argued by Kangtai, Commerce needs to explain how it can be the case that those Indian data for chlorine must yield, nevertheless, to an administrative preference for valuing all FOPs from a single primary surrogate country without relegating the statutory term one "*or more* market economy countries" (italics added) to "second-class" status, as above indicated. *See, e.g., Camau Frozen Seafood Processing Import Export Corp. v. United States*, 37 CIT ___, ___, 929 F. Supp. 2d 1352, 1355–56 (2013) ("*Camau Frozen Seafood*") ("it is not sufficient for Commerce to cite the policy of using a single surrogate country where, as here, there is reason to believe that the primary surrogate country may not provide the best available information for a particular FOP").

Clearon argues (1) that India is not a "comparable" economy that made the GNI band, (2) that so long as the Philippine GTA chlorine statistics were product-specific, representative of a broad-market average, publicly available, contemporaneous with the period of review and free of taxes and duties, the regulation "called for" the use of these data, (3) that the fact that an Indian company, Kanoria, reported chlorine prices below the level of imports into the Philippines does not undermine the Philippine data because India is not economi-

cally comparable, and (4) that even if the Philippine chlorine values had not been available on the record it would "not be appropriate" to use Indian domestic prices so long as values from one of the other surrogate countries were available. These points do not logically follow from 19 C.F.R. §351.408(c)(2), however. At best, Clearon describes the "normal" situation, not the exception.

Clearon also stresses, again, that "it is well-settled that Commerce need not duplicate the respondent's exact behavior",[37] but, again, that only highlights the exception, not the "norm" or larger point: "a surrogate value must be as representative of the production process in the NME country as is practicable, if it is to achieve the statutory objective of assigning dumping margins as accurately as possible." *Longkou Haimeng, supra*, 33 CIT at 613, 617 F. Supp. 2d at 1372. The commercial significance of import statistics is not something in the abstract, they must be reflective of, if not "exactly" reflecting, such significance in comparison with actual experience, of the producers or exporters of the input under consideration, to the extent possible. *Cf. Fuwei Films, supra*, 36 CIT at __, 837 F. Supp. 2d at 1355; *Taian Ziyang Food*, *supra*, 33 CIT at 862, 637 F. Supp. 2d at 1126 ("Commerce has failed to establish that its chosen dataset . . . adequately approximates the respondents' production experience"); *Shanghai Foreign Trade*, *supra*, 28 CIT at 495, 318 F. Supp. 2d at 1352 (indications on record that amount of input imported into India was not commercially significant included fact that it was one-half of one percent of half the annual amount produced by just one Indian domestic company); *cf. also Shakeproof Assembly Components Div. of Ill. Tool Works, Inc. v. United States*, 23 CIT 479, 485, 59 F. Supp. 2d 1354, 1360 (1999) ("*Shakeproof*") (if import statistics are based on a small quantity of imports for the period under consideration, administrative practice is to determine if the price for those imports is aberrational).

Because Commerce's explanation on the issue as a whole does not appear to encompass full consideration of Kangtai's arguments,[38] it is appropriate that the issue of surrogate valuation of chlorine be remanded for additional consideration or reconsideration as a whole, for the above reasons and for consistency with *Clearon II*.

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[37] Clearon's Resp. at 37–38 (citation omitted).

[38] However, regarding Kangtai's contention that the BIS data indicated that Philippine imports from Hong Kong were not liquid chlorine, Commerce also found that "Kangtai did not demonstrate how the BIS data tie to the total import data reported in the GTA." *Id*. at 22. On this point, the court agrees with Commerce that Kangtai failed to definitely establish that non-liquid forms of chlorine were included in the Philippine GTA data.

F. Surrogate Valuation of Ammonium Chloride

In the *Final Results*, Commerce used GTA import data from the Philippines to value ammonium chloride. Commerce found that 5,464 kilograms of ammonium chloride imported into the Philippines is within the range of import quantities from other countries, *i.e.*, from 380 kilograms to 1,168,873 kilograms, albeit at the low end. *See IDM*, cmt. 2.H. at 23; PDoc 155 at Ex. SV-4. Again, of course, they are "within range" -- by definition -- and the average unit values ranged from US$0.54 to US$ 26.72 per kilogram. The Philippines' average unit value was US$ 4.70, which was at the low end of the range. Commerce concluded therefrom that these data were not aberrational or otherwise unreliable; in particular, the *IDM* states that the fact that "import quantities and an input may be smaller than a company's annual consumption does not mean that the import quantities are non-commercial or aberrational." *IDM*, cmt. 2.H. at 23.

Similar to the issue of valuing chlorine in this matter, Kangtai argues that the Philippine import data are aberrant and unrepresentative, comprising a small quantity of ammonium chloride imported at a substantially higher per-unit value than larger quantity imports of ammonium chloride imported into the other listed surrogate countries. Kangtai's Br. at 31–34, citing *Shakeproof*, 23 CIT at 485, 59 F. Supp. 2d at 1360 ("administrative practice with respect to aberrational data is to disregard small-quantity import data when the per-unit value is substantially different from the per-unit values of the larger quantity imports of that product from other countries") (internal quotes and citation omitted). Kangtai argues Commerce should have used the Indian domestic source or the South African import source.

Commerce again responds that the quantity and average unit values were "within the range" of imports of ammonium chloride into the other countries on the surrogate country list, and that therefore the data were not aberrational. *Shakeproof*, Commerce argues, did not order exclusion of Indian import prices simply because they were high but rather because they had the highest value after an Indonesian rate that was "clearly aberrational", and it further argues the court has elsewhere recognized that numerical differences alone do not necessarily indicate that the price data are distorted or misrepresentative. *See Trust Chem*, *supra*, 35 CIT at ___, 791 F. Supp. 2d at 1263–64. Commerce again notes that its policy is to compare total import volumes across potential surrogate countries, not to compare import volumes to the purchases of respondent companies or other companies which it determines to be less economically comparable,

and that simply because import quantities may be smaller than a company's annual consumption does not mean that import quantities (or prices) are non-commercial or aberrational. Clearon adds that *Shanghai Foreign Trade* requires that the quantity be a "commercial" quantity, not a "respondent's" quantity, and that when there are domestic sources for a particular input as here (MVC is a major domestic producer of chlorine in the Philippines), it is not reasonable to require that imports alone be sufficient in volume to supply an NME factory.

The latter part of the argument may have a certain appeal, but it falls short here, because the Philippine domestic data for MVC are not being used to evaluate the reasonableness of the import value of either chlorine or ammonium chloride. Commerce does not mention it. As for what constitutes a "commercial" quantity, the relevant context would include the fact that the Philippine import quantity of ammonium chloride is 128 times smaller than Kangtai's purchases, and Commerce has not offered a reason why a respondent's individual requirements are not relevant to its analysis of record information. Comparing cross-country quantities and average unit values may impart some significance, but simply informing that it is Commerce's policy to ignore, in effect, the commercial realities of the producers or exporters being considered does not explain that policy or make the policy reasonable. Moreover, as discussed regarding the valuation of chlorine, doubt arises as to whether this is even consistent policy as applied.

A determination that does not consider all record information is contrary to law, based on long-established court decisions, and the statutory requirement to base factor values is on the "best available information." 19 U.S.C. § 1677b(c)(1)(B). *See Atlantic Sugar, Ltd. v. United States*, 744 F.2d 1556, 1562 (Fed. Cir. 1984) ("substantial evidence" must be measured by a review of the record as a whole, "including whatever fairly detracts from the substantiality of the evidence"). There may be instances when only a cross-country comparison of import quantities and average unit values will suffice, but Kangtai pointed out that an international shipping container used to transport a raw material typically will contain 20,000 kilograms, and that Kangtai alone consumed many times more ammonium chloride than was theoretically available in the surrogate country (700,000 kgs compared to an available 5,464 kg). As with chlorine, Commerce had to aggregate the entire amount of ammonium chloride imported into the Philippines during the POR in order to find a "commercial quantity" of approximately 5,000 kilograms, or one quarter of one commercial container. Apart from the rest of the Philippine chemicals

industry, Kangtai alone would not have been able to even come close to maintaining its operations in the Philippines or producing the subject merchandise, due to a shortage of this commodity (and also that of chlorine). To assume that the Philippine import data could possibly reflect the commercial reality of Kangtai is not a reasonable assumption, and therefore substantial evidence of record does not support that the Philippine import data reflect the commercial reality of this FOP in this case.

G. Surrogate Valuation of Sodium Hydroxide

As in the prior review, for the *Final Results*, Commerce selected Philippine GTA import data collected by GTA for the HTS number for sodium hydroxide to value "sodium hydroxide".[39] *See IDM* cmt. 5.D. at 33. Kangtai argues that the record reflects that it consumed sodium hydroxide at a concentration of 32%, which is lower than the 50% concentration that it claims is reflected in the GTA HTS data, and that Commerce should have made a downward adjustment to the surrogate value for sodium hydroxide in accordance with *Synthetic Indigo*,[40] Commerce, it claims, should make a downward adjustment. Kangtai's Br. at 35.

Commerce declined, explaining that the record contains information that sodium hydroxide is commercially traded at different levels of concentration, not just 50% as asserted by Kangtai, and that there is no information on the record regarding the concentration level reflected in the Philippine GTA import data for sodium hydroxide. Clearon adds that the Explanatory Notes to the HTS provision under which sodium hydroxide is imported, heading 2815, do not put any limitation or range on the concentration classified in that heading. Clearon's Resp. at 41, referencing PR 169 at Ex. 8. Commerce contends Kangtai's argument ignores the fact that in *Synthetic Indigo* it had been able to determine that the surrogate value data source in question (the "Monthly Statistics of the Foreign Trade of India") represented prices for chemicals at commercially traded concentration levels, whereas there is no such information regarding the Philippine GTA import data on this record.

Kangtai argues that it presented in full that as a general matter of international commerce sodium hydroxide is traded at a 50% concentration, and that it is specifically imported at a 50% concentration by

[39] The parties sometimes refer to sodium hydroxide (NaOH) as lye or caustic soda. The court notes that the common names would also cover potassium hydroxide (KOH).

[40] *See Synthetic Indigo from the PRC*, 68 Fed. Reg. 53711 (Sep. 12, 2003) (final admin. review) ("*Synthetic Indigo*") and accompanying I&D Memo at cmt. 5, referencing *Saccharin from the PRC*, 68 Fed. Reg. 27530 (May 20, 2003) (final LTFV determ.) and accompanying I&D Memo at 2.

at least one major chemicals company in the Philippines, MVC, the only company identified as a producer of comparable merchandise in that country. Kangtai complains that Commerce's response is "to point to out a small piece of record evidence for the possibility of a different conclusion", and that Commerce "would have the [c]ourt accept its conclusion that the Philippines trades in atypical concentrations that are not normally traded." Kangtai's Reply at 18. Kangtai insists that it is uncontradicted on the record that sodium hydroxide is typically and normally sold commercially at 50% concentrations (and notwithstanding that HTS heading 2815 or the Explanatory Notes do not distinguish between concentrations), and therefore a downward adjustment to the Philippine GTA import data for sodium hydroxide was and is appropriate.

The court is not persuaded that Kangtai offered sufficient proof of what a downward adjustment would entail. Certainly it offered proof that its production relies on a 32% concentration and that MVC imports at a 50% concentration, but that does not overcome what Commerce considered would be an "arbitrary" adjustment, given the uncertainty of what concentrations the GTA data actually encompass via Philippine HTS 2815 . The court cannot substitute its judgment for that of Commerce on this issue. *See*, *e.g.*, *Bristol Metals L.P. v. United States*, 34 CIT 478, 484, 703 F. Supp. 2d 1370, 1376 (2010) (refusing to "substitute its own evidentiary evaluation for Commerce's" and "its own judgment for the agency's in considering and weighing the relative importance of various criteria applied") (quoted source omitted).

H. Surrogate Valuation of Electricity

For the *Final Results*'s surrogate valuation of electricity in the Philippines, Commerce analyzed *Camarines Sur* rate data, National Power Corporation ("NPC") rate data, and Manila Electric Company ("Meralco") rate data pursuant to the usual factors of public availability, broad market average, product specificity, contemporaneity, and freedom from taxes and duties.[41] As in the prior review, Commerce selected the *Camarines Sur* data on the ground that they are "publicly available from the primary surrogate country, represent electricity rates for industrial users in two cities in the Philippines, and do not appear to include taxes or duties." *See IDM* cmt. 2.E. at 18–19.

Kangtai argues that Commerce should have used either the NPC data or, here joined by Arch, the Meralco data. Kangtai's Br. at 35–39;

[41] *See, e.g., Certain Polyester Staple Fiber From the PRC*, 75 Fed. Reg. 1336 (Jan. 11. 2010), and accompanying I&D Memo at cmt. 1.

Arch's Br. at 16–17. Commerce responds that Arch and Kangtai are merely asking this court to reweigh the evidence, while referring to administrative determinations that do not support their arguments.

1. Publicly Availability

Relying on *Certain Steel Threaded Rod From the PRC*, 78 Fed. Reg. 21101 (Apr. 9, 2013) (prelim. rev. results) and accompanying prelim. SV memo at 4 ("*Threaded Rod*"), which in turn relies upon or references *Certain Steel Nails from the PRC*, 78 Fed. Reg. 16651 (Mar. 18, 2013) (final admin. review 2010–2011) and accompanying I&D Memo at cm. 1 ("*Steel Nails 2010–2011*"), Kangtai argues the *Camarines Sur* data are no longer publicly available because the source link to those data "is no longer working and this information is now absent from the webpage[,] signifying the electricity rates are no longer publicly available." Kangtai's Br. at 36. *Steel Nails 2010–2011* stands for the proposition that when the web link that was placed on the record to corroborate the public availability of a certain statement became non-functional, Commerce was unable to duplicate the search; therefore it deemed the web link unusable and the statement non-public.

Commerce argues *Threaded Rod* (and *Steel Nails 2010–2011*) should be disregarded here, because it is a surrogate value memorandum pertaining to an entirely different proceeding. *See* Def's Br. at 43, referencing 19 U.S.C. § 1516a(b)(2)(A) and *Shandong Huarong Machinery Co. v. United States*, 29 CIT 484, 491 (2005) (recognizing that each administrative review is a separate segment of proceedings with its own unique facts). Commerce also argues Kangtai's contention is illogical, because a dataset that has been placed in the public record as a publicly available document in a prior review cannot subsequently become "non-public" information, and Kangtai does not cite any record evidence to controvert Commerce's determination that the *Camarines Sur* data is publicly available.

Kangtai responds that Commerce has indicated

> an absolute threshold policy that a value source must be actively publicly available, *i.e.*, capable of duplication by Department researchers, to be considered usable. Kangtai is not claiming that the *Camarines Sur* source was never public. However, on the record of this particular segment -- which the United States elsewhere insists must stand alone -- the link was disabled and the source was not available. When this occurred in past cases, the Department specifically ruled that it could not duplicate the source; and hence it was not public or reliable. *See* Kangtai's R.56.2 Br. at 36. This should be the end of the matter because

> there is another usable source for electricity on the record that the Department previously relied upon.

Kangtai's Reply at 19–20.

On this argument, Kangtai prevails. Kangtai is not asking for consideration of a "fact" that has not been made a part of the administrative record before the court, *see* 19 U.S.C. § 1516a(b)(2)(A), it is asking for consideration of a matter of law, in the form of a prior decision by Commerce on a similar circumstance, and arguing for consistency with that decision. At the very least, Commerce needs to explain why this matter compels a different result on its public availability determination, and remand therefore is appropriate.

2. Representative of a Broad Market

There appears to be no dispute that the Meralco and NPC data provide market coverage that is broader than the *Camarines Sur* data. Commerce found that "both the Meralco and NPC rates provide broader market averages inherent in the larger coverage area than the cities identified in the *Camarines Sur* data." *IDM*cmt. 2.E. at 18. Commerce, however, considered that this factor was outweighed by the other factors, and that the *Camarines Sur* data have "sufficiently broad coverage" to be a surrogate value of the Philippine market.

Kangtai argues Commerce "vastly understates" the *Camarines Sur* data's deficiency and relies upon them in the face of "longstanding and logical" departmental policy that instructs that a source that is not "countrywide" is unlikely to be representative of costs in the surrogate country. Kangtai highlights that the *Camarines Sur* region is "tiny" and "mostly rural" as compared to the "large industrial regions covered by Meralco" (and NPC). For this reason, Kangtai argues Meralco (and NPC) are "many times more specific and many times more representative in the coverage of the Philippines." Kangtai's Reply at 20.

Commerce would probably agree, *see supra*, but the final analysis of reliance upon the *Camarines Sur* data also depended upon the remainder of the five-factor test, discussed below.

3. Specificity

The production factor that Commerce was valuing is the kilowatt hours of electricity used to make the subject merchandise (chlor-isos). Commerce observed that the *Camarines Sur* data contained specific industrial electricity rates in kilowatt hours, and are, therefore, specific to the electricity factor.

Regarding the NPC data, Commerce found that they did not contain any industrial rates and are therefore "inferior to other information available on the record." *IDM* cmt. 2.E. at 18. Additionally, it determined that although the Meralco data contained industrial rates, the data were broken down into more categories than the *Camarines Sur* data. *IDM* cmt. 2.E. at 18. Commerce determined that "there is a meaningful degree of variability in [the Meralco] rates based on the primary and secondary industry classifications assigned to that rate," but that "[n]either respondent company . . . provided an explanation and information to support the industry power classification it should be assigned." *Id*. Commerce explained that the "use of more precise and specific data such as Meralco requires that [it] have sufficient information on the record to properly assign these rates to the respondent companies due to the variability found in the rates themselves." *Id*. Because no evidence existed on the record for Commerce to determine which Meralco rate it should assign to the respondents, Commerce selected the *Camarines Sur* data as the best available information.

Kangtai, first avers that the NPC, not the *Camarines Sur* data, is the "best available" information on the record. Kangtai Br. at 38–39. In doing so, it does not claim that the NPC data is comparable to the *Camarines Sur* in terms of specificity, instead it argues that the specificity factor should have carried less weight. *Id.* Once again, however, the court cannot reweigh and substitute its judgment for that of Commerce on this issue. *See, e.g., Bristol Metals, supra*, 34 CIT at 484, 703 F. Supp. 2d at 1376 (2010).

Kangtai further contends that Commerce should use the Meralco rate that it assigned to other respondents in *Hardwood Plywood from the PRC*, 78 Fed. Reg. 58273 (Sep. 23, 2013) (final determ. of sales at less than fair value) and *Steel Wire Hangers from the PRC*, 77 Fed. Reg. 66952 (Nov. 8, 2012) (final rev. results), and accompanying I&D Memo at 19. But, Kangtai does not identify how the facts of those reviews are similar to those in this case. Commerce's surrogate value determination is based upon the best available information on the record of each review. Accordingly, Commerce's use of a certain Meralco rate in other reviews has no bearing upon Commerce's determination in this case. *IDM* cmt. 2.E. at 18.

Kangtai also claims that Commerce makes the incongruous argument that because Meralco has several categories of industrial users, it is less specific than the *Camarines Sur* source, which only has one category. Kangtai discussed at length in its moving brief, at pp.

38–39, how the Meralco and NPC (the other source) data are indeed more detailed and specific schedules that cover industrial areas of the Philippines.

Arch augments Kangtai's observation by adding that Commerce contradicts itself. First, it points out Commerce first states that the *Camarines Sur* rate is more specific than the other rates on the record, Def's Resp. at 50, and then in the next paragraph states that Meralco's rates are so specific that they cannot be applied because Commerce didn't know which specific rates to use. *Id.* at 51. In either event, Arch contends, the Meralco rates are more specific and can be applied to Jiheng. Arch points out that it provided information for Commerce to classify its electrical usage, Arch Br. at 17 (stating that it had identified the correct classification as "GP 115 KV"), and concedes it failed to provide support establishing that it actually fell into that category. Nonetheless, it claims that Commerce should have accepted its description without support. *See id.* Alternatively, Arch argues, Commerce could have simply resorted to facts available in deciding which classification applied. On this point, Kangtai contends that Commerce did not request additional electrical usage information from it. Arch Br. at 17, Kangtai Br. at 39.

Commerce requires respondent companies to provide the information necessary to determine surrogate values and Commerce admits that Jiheng provided information on which Meralco classification would apply. *Id.* Commerce, however, claims the information was inadequate because Jiheng did not provide evidentiary support to back up this statement. Commerce's determination must be supported by substantial evidence on the record, and it is the respondents' burden to create an adequate record, something in this instance Commerce argues they failed to accomplish. Def's Resp at 51–52, referencing *Tianjin Mach. Imp. & Exp. Corp. v. United States*, 16 CIT 931, 936, 806 F. Supp. 1008, 1015 (1992). But Commerce apparently accepted Jiheng's statements regarding other factors, such as Filter Aid, without requiring such evidentiary support. *See* Jiheng's Section D Questionnaire Response, PDoc 67 (Nov. 26, 2012) (Pub. Appx.). Commerce must be consistent in its application of its evidentiary standards, and there is no evidence on the record otherwise calling Jiheng's statement into question. Commerce therefore, apparently, had what it needed and required, in order to apply Meralco's rates to Jiheng's electricity FOP. Arguably, facts available could also have been derived with respect to Kangtai, as it argues in its briefs.

Having apparently agreed that the Meralco and NPC data provide broader coverage, Commerce does not, on this record, justify resort to

the *Camarines Sur* data in light of its contradictory statement, as Kangtai and Arch pointed out, and based on the apparent sufficiency of the data presented by Jiheng. Remand for further explanation or reconsideration is appropriate.

4. Contemporaneity; Taxes and Duties

Arch argues that it identified the unsupported assumptions made by Commerce in determining to use *Camarines Sur* as the source of its electricity value, contrary to Commerce's declaration that contemporaneity, and taxes and duties are uncontested. Arch's Br. at 15–21. Specifically, Arch argues that Commerce assumed the source was tax and duty free, assumed that a 2009 rate was effective during the 2011–2012 period of review, and assumed that the data was quality data without "unknown variability." Arch points out that "[a]ssumptions are not decisions based on substantial evidence." Arch's Reply at 8. In this instance, that appears to be the case.

Commerce may infer a fact from the record, but it needs to support the validity of the inference by thorough reasoning, which is lacking on this record. Remand for that purpose as well as in accordance with the foregoing is appropriate.

I. Valuation of Steam

Commerce determined the value for steam in the *Final Results* by rejecting two contemporaneous steam values and selecting instead the GTA import data from the Philippines for natural gas, which it multiplied by a steam conversion factor and inflated to approximate contemporaneous parity with the POR. *IDM* cmt. 2.A. at 11–12. Commerce states this approach was consistent with several prior cases. *See id.*

Arch argues Commerce should have used either the Philippine domestic price quote from "Geothermal Energy Weekly" or the Thai domestic price quote from Glow Energy's 2011 Annual Report in accordance with *Xanthan Gum from the PRC*, 78 Fed. Reg. 2252 (Jan. 10, 2013) (prelim. determ. of sales at less than fair value) and accompanying I&D Memo at 15, and *Certain Activated Carbon from the PRC*, 78 Fed. Reg. 70533 (Nov. 26, 2013) (final rev. results) ("*Activated Carbon*") and accompanying I&D Memo. Arch's Br. at 20–21. Arch contends that Commerce's sole justification for using the import data -- to value all factors in a single surrogate country -- has again led to the selection of information that is not the best available and is an improper result because Commerce has improperly ignored the product specificity and contemporaneity of the data in selecting the surrogate value for steam. *See id.* at 21–22, referencing *Camau Frozen*

Seafood, *supra*, 37 CIT at ___, 929 F. Supp. 2d at 1355–56 (noting that Commerce has the statutory authority to use multiple surrogate countries, and stating that "it is not sufficient for Commerce to cite the policy of using a single surrogate country where, as here, there is reason to believe that the primary surrogate country may not provide the best available information for a particular FOP").

Commerce agreed that the Geothermal Energy Weekly quote and the Glow Energy 2011 Annual Report price were product-specific, publicly available, and contemporaneous with the POR, but it maintains that the record lacked actual information from the website providing the Geothermal Energy Weekly quote that supports the proposed conversion factor used to calculate the value of steam on a per metric ton basis, and it maintains it that did not choose the Glow Energy datum because Thailand was not the primary surrogate country and that *Xanthan Gum from the PRC* and *Activated Carbon* are distinguishable because the preliminary record of those proceedings did not contain any data for the Philippines, unlike the matter here.

The laws governing physics apply to Commerce's determinations. *Cf., e.g., Activated Carbon,*78 Fed. Reg. 70533 and accompanying I&D Memo at cmt. 9, n.192 ("natural gas and steam have the same British Thermal Unit content"). Arch used coal for steam generation and submitted surrogate values for coal. *See* Jiheng's Section D Questionnaire Response, at D-26. The papers before the court do not indicate the type of coal Jiheng used in that generation (*e.g.*, anthracite, bituminous, sub-bituminous), which also governs the applicable conversion factor, and the court was unable to access the precise webpage indicated in Tab 4 of Jiheng's Final SV submission. PDoc 161.

Even if Commerce could have, at the time in question, just as readily attempted similar inquiry,[42] because the court at this point is unable to examine (through pursuit of Arch's reference point) the conversion factor Arch claimed in its administrative submission, that

[42] *Cf., e.g., Altmeyer v. HHS*, 2013 WL 5316926 *1 & n.4 ("Petitioner did not submit a copy of Dr. Schwartz's curriculum vitae" but "[a]ccording to Dr. Schwartz's practice webpage, he has over twenty years of experience" *et cetera*). *But cf. also NEC Solutions (America), Inc. v. United States*, 411 F.3d 1340, 1346 (Fed. Cir. 2005) ("the bureaucratic difficulty of conveying Commerce's intent is irrelevant[; r]ather, the relevant inquiry is whether Customs would or could have reasonably comprehended the e-mail as being unambiguous") *with U.H.F.C. Co. v. United States*, 916 F.2d 689, 701 (Fed. Cir. 1990) ("whether . . . due to a legally erroneous interpretation of the regulation by the staff at the time or simply bureaucratic rigidity is immaterial . . . [t]he record consistently demonstrates that the only basis for ITA's decision to deny price adjustments was the failure of the manufacturers to supply cost of production information for individual grades which would establish that higher grades cost more to produce", but "[t]he government's reference to one instance where 300 bloomgram strength glue was sold during the review period for a lower price than an identical quantity of 210 bloomgram strength glue is comparable to finding one bad apple and concluding all in the bushel are spoiled").

circumstance in itself speaks volumes about the reasonableness of requiring hard copies of all information submitted for the record for Commerce's (and the public's) view. The burden is on the interested party to place relevant information on the record. Statement of Administrative Action, H.R. Doc. No. 103–316, vol. 1 (1994) ("SAA") at 829. *See supra* (Electricity -- Public Availability); *see also Essar Steel Ltd. v. United States*, 678 F.3d 1268, 1277 (Fed. Cir. 2012) (discussing circumstances when supplementation of record may be ordered).

As for the objective of maintaining consistency across proceedings, the court is unable to conclude that Commerce's explanations are unreasonable. Arch complains that Commerce chose to use a less specific, non-contemporary value for natural gas and apply a conversion factor that was on the record but for which no support existed on the record, although it had been used in another case (*see* Prelim. Results SV Memo at 6 and Appx. III.47), and Arch also argues it is contrary to reason to reject an otherwise better potential surrogate value due to a flaw that also exists with the surrogate value selected, but the court cannot reweigh the evidence, and Commerce's choice appears consistent with prior determinations, all other things being equal.

Arch's arguments therefore do not demonstrate that Commerce's surrogate valuation of steam was unreasonable.

J. By-Product Offset

1. Further Background

The antidumping statute does not mention (let alone address) the treatment of by-products generated during production of the primary product, and no regulation addresses that "gap." *See*, *e.g.*, *Guangdong Chemicals Import and Export Corp. v. United States*, 30 CIT 1412, 1422, 460 F. Supp. 2d 1365, 1373 (2006). Commerce's general practice has been to grant an offset for by products generated during the production of subject merchandise, provided the respondent could demonstrate that the by-product has commercial value by being either resold or re-entered into the respondent's production process. *See, e.g., Arch Chemicals, Inc. v. United States*, 33 CIT 954, 959 (2009).

In the original investigation and in the first through the fifth administrative review segments of the antidumping duty order, Commerce had acknowledged by-product offset claims for the intermediate products ammonia gas and sulfuric acid, which are reacted to produce ammonium sulfate. More precisely, for those proceedings Commerce acknowledged that its "downstream by-products practice"

for determining by-product credits did not apply to the process of subject merchandise production, and that ammonium gas and sulfuric acid were the relevant by-products at the "split-off" point in the production of subject merchandise. *See, e.g., Clearon II*, 39 CIT at ___, Slip Op. 15–91 at 46–47.

For its *Final Results*, however, and as "tee-ed up" by its discussion of the issue in the prior *Sixth Review*, Commerce, essentially reversed itself (but without so stating) by finding that ammonium sulfate, a downstream by-product, is the relevant by-product for purposes of the respondents' by-product offset claims. *See IDM*, cmt 5.B. at 30. This is revealed by returning to the previous *Sixth Review*. Between the preliminary and final determinations thereof, Commerce announced that it was changing the manner in which it calculates the by-product offsets for both Jiheng and Kangtai in order "to conform to the Department's recent practice." *Sixth Review* I&D Memo at 23. Commerce claimed that the new methodology was "consistent with the information the Department requests in our questionnaire, which asks respondents: "[i]f the byproduct for which you are claiming an offset is a downstream by-product, in addition to responding to the items above, please also: (i) Provide the per-unit usage rate of each input used to produce the downstream by-product." *Id*. (quotation source omitted). On appeal to the court, Commerce requested voluntary remand to address the interested party comments that it had not addressed, which was granted. The *Clearon Redetermination* for the *Sixth Review* then provided further explanation:

> In past reviews of this order and in the Preliminary Results, we determined Jiheng's and Kangtai's by-products of ammonia gas and sulfuric acid by starting with the amount of ammonium sulfate and calculating the amount of the two by-products chemically required to produce that amount of ammonium sulfate. We then applied SV's for ammonia gas and sulfuric acid to the two by-products. We stated in the *Chloro Isos 6th Final Results* that, at that time, we were "adjusting the manner in which we calculate the by-product offsets for both Jiheng and Kangtai to conform to the Department's recent practice."[ ] *We stated that it was still the Department's practice to first start with the value of the downstream product (i.e., ammonium sulfate) that was actually sold by the respondents and produced during the POR*. In a departure from our previous method in this case, we sought to deduct any costs associated with converting *the by-product* into the downstream product, such as labor and electricity, using an FOP and SV cost methodology. For the

Chloro Isos 6th Final Results, we did not have the FOPs to deduct, so we used the full value of the ammonium sulfate as the full value of the two by-products combined as the by-product offset.[ ] We modified the methodology we used in the *Chloro Isos 6th Final Results* to avoid overstating the value of the by-product offsets and . . . to bring the calculation into conformity with agency-wide policy. *To do this, we must grant an offset equal to the amount of value a company actually receives*, less any processing costs, and not a hypothetical value that is unrelated to a company's financial books and records.[ ] It is clear from the underlying review that ammonium sulfate is the product actually sold by the companies.[ ] Reviews under separate orders provide examples of the policy employed in this underlying review:

> As citric acid and dry high protein scrap are the saleable products that result closest to the split-off point, we started with SVs from the selected surrogate country[ ] for these products, then reduced the values by the cost of further processing each product after the split-off point. The further processing costs were calculated based on RZBC's reported FOPs after the split-off point and the respective SVs from the selected surrogate country for each FOP. This analysis demonstrated that the net realizable value (NRV) of high protein scrap at the split-off point is significant as compared to that of the liquefied liquid.[ ]

In other words, *to derive the NRV of each by-product, the Department obtains a reasonable market value for each by-product, as close to the split-off point as possible*. To do so, the Department starts with the value of the saleable products that result closest to the split-off point and then reduces this value by the cost of further processing each by-product after the split-off point. For the *Chloro Isos 6th Final Results*, we did not elaborate on this methodological change for the final results, or why we felt it was warranted, given the record facts.[ ] However, this policy is evident from our boilerplate questionnaire, used in the underlying review, which asks parties to report the FOPs required to process the by-products into the saleable downstream product. [ ]

Clearon Redetermination, Court No. 13–00073, at 28–30 (citations omitted; italics added in part).[43]

In contrast to the foregoing, for the *Final Results* of the proceeding at bar Commerce addressed the by-product offset issues as follows:

> For these final results, the Department is *continuing* to treat ammonium sulfate as *the by-product.* As explained in the previous review, "the Department first starts with the value of the downstream product actually sold by the respondents, ammonium sulfate, produced during the POR . . . [f]rom this amount, the Department would normally deduct the costs associated with converting *the by-products* into *the downstream product*, such as labor and electricity."[ ] As Petitioners accurately explain, it is the Department's well-established practice that the mere production of by-products, such as ammonia gas and sulfuric acid, is not sufficient to grant an offset. Indeed, the by-product must have *commercial sales* and revenue must be realized from these sales in the corporate accounts.[ ] Record evidence does not show that Jiheng sells either *ammonia gas or sulfuric acid*. Indeed, these products are used to make and sell ammonium sulfate.[ ] In order to receive an offset, a respondent must demonstrate that there were actual sales of *the by-product*.[ ] Jiheng has demonstrated that it sells ammonium sulfate, the downstream by-product. As a result, the Department is granting an offset for Jiheng in these final results.
>
> The record evidence for these final results does not support granting a by-product offset to Kangtai. In order to grant an offset, income from the by-product must be realized by the company (*i.e.*, it must be recorded in that company's accounting records).[ ] Kangtai argues that the Department fully confirmed and verified that Kangtai sold ammonium sulfate and realized revenue from its sales.[ ] Additionally, Kangtai noted that because it did book the income realized from the sales of by-product in the normal business of operation, and the Department fully verified that the payment was actually received by the company's financial department, it is entitled to an offset. This claim is not supported by the record and the Department's strict definition that in order to be "realized," income must be

[43] Those results go on to explain that Commerce has "specifically requested this cost information in other cases where parties did not provide the details in their initial questionnaire response" but because of the timing of the results for the *Sixth Review* Commerce did not have an opportunity to follow up and request from the parties the information it claims it required. Commerce was subsequently able to obtain the information it sought through voluntary remand of *Clearon.*

> recorded in the company's accounting records. Furthermore, the Department found at verification that "[b]eyond the warehouse journal, Kangtai does not maintain an inventory account for ammonium sulfate in its accounting system, nor do they have an inventory control process established for this by-product."[ ] Therefore, the Department finds that Kangtai is not entitled to an offset.
>
> Petitioners further argue that Kangtai did not provide the per-unit usage rate of each input used to produce that ammonium sulfate, and should not be granted an offset because the Department does not have the information necessary to make the proper adjustments. As the Department is not granting a by-product offset to Kangtai, this argument is moot.
>
> However, the Department notes that while Petitioners are correct in stating that Kangtai did not provide any per-unit usage rates, an exhaustive review of the ammonium sulfate production process during verification supports Kangtai's claim that these costs are included in the production of cyanuric acid, and that there is no accurate way to separate the costs associated with the production of ammonium sulfate from the cyanuric acid production costs.[ ]

IDM cmt. 5.B. at 30–31.

Numerous problems have been created by the alteration of the previous methodology. In addition to those identified in *Clearon II*, others are identified below.

1. Neither the New Methodology Nor the Reason For the Change Is Understandable

In *Clearon II*, it was unclear to the court what had transpired regarding Commerce's by-products methodology with respect to the respondents' by-product offset claims. *See Clearon II*, 39 CIT at ___, Slip Op. 15–91 at 55–60. Commerce's indication, *see id*., was that its change to its by-products methodology only amounted to a minor "tweaking" thereof, but it appears Commerce not only moved the goal-posts for the matter at bar, but did so radically, since the quoted passage of the *IDM*, above, indicates a further "evolution" of policy as applied in this matter, to the extent that Commerce has now announced that the relevant by-product is, in fact, ammonium sulfate, in contrast to its previous consideration in the investigation and the

first through the fifth administrative reviews that ammonia gas and sulfuric acid were the relevant by-products. In addition, not only is Commerce now requiring books and records of actual commercial *sales* of the downstream by-product and actual realization of revenue from these sales in the corporate accounts (in contrast to commercial *value*), it is now limiting the offset according to the "value" of the actual sales of such downstream by-product, or so the *IDM* appears to state.[44]

As a preliminary matter, because the explanation in the *IDM* is confusing as to what the relevant by-product(s) is/are for purposes of accounting for (or "granting") a by-product offset (*i.e.*, whether it is ammonium sulfate or are ammonia gas and sulfuric acid; *see IDM*, quoted *supra*), during consideration of *Clearon II* and also for the purpose of this matter, the court asked for additional briefing to clarify what Kangtai and Arch have been claiming as by-product offsets in the *Sixth Review* and in this *Seventh Review*. *See* Consol. Court No. 13–00073, ECF No. 89 (May 8, 2015). The government confirmed that Kangtai and Jiheng "made the same" claims in the *Sixth Review* and "made essentially the same by-product offset claims to recover offset amounts for ammonia gas and sulfuric acid, but with different factual circumstances pertinent to their respective positions" for this *Seventh Review*. Consol. Ct. No. 13–00073, ECF No. 92 (May 22, 2015) at 5.

With that in mind, after considering the *IDM* and the arguments on the issues, the court must conclude that Commerce in the *IDM* does not adequately "explain its departure from prior norms", *Atchison, Topeka & Santa Fe Railway Co. v. Wichita Board of Trade*, 412 U.S. 800, 808 (1973), nor does Commerce present a "rational connection between the facts found and the choice made", *Burlington Truck Lines, Inc. v. United States*, 371 U.S. 156, 168 (1962).

Commerce's rationale for its change in methodology still does not make sense, *cf. Clearon II*, 39 CIT at ___, Slip Op. 15–91 at 55–60, despite appeals to "agency-wide practice" and "accounting principles" and so forth, *see id*. It remains unclear, for example, whether Commerce has entirely abandoned its previous policy of granting an offset for a by-product if its commercial value is demonstrated, *e.g.*, through sales or reintroduction into production, and if so why. No rational explanation has been provided therefor beyond the conclusory statement that this produces "accuracy".

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[44] *See IDM* cmt. 5.B. at 30 & n.101, relying on *Lined Paper from the PRC*, 71 Fed. Reg. 53079 (Sep. 8, 2006) (notice of final determ. of sales at less than fair value) and accompanying I&D Memo at cmt. 11, in turn relying on *Non-Malleable Cast Iron Pipe Fittings from the PRC*, 68 Fed. Reg. 7765 (Feb. 18, 2003) (notice of final determ. of sales at less than fair value) and accompanying I&D Memo at cmt. 3.

It also remains unclear, in accordance with generally accepted accounting principles governing co- and by-product cost accounting, why a company must "realize" an actual sale from a downstream by-product before an offset claim pertaining to an intermediary by-product's value that has been generated during the production of subject merchandise will be recognized. Once the good is produced, arm's length transaction(s) in it would certainly provide monetized indication of its "value" for accounting purposes, but that is not the only recognized reasonable method of establishing its value. Simply put, if value is demonstrated, then it is entitled to cost allocation for accounting purposes, which is not an exact science. By contrast, accounting for the by-product's disposition, profit and loss are separate (but related) matters.

At a minimum, even taking into account Commerce's explanation in the *Clearon Redetermination*, *supra*, the matter before this court needs to be remanded for a clearer explanation of why Commerce has altered its methodology, which in the past simply relied upon the surrogate values of record for each of the relevant products (ammonia gas, sulfuric acid, and ammonium sulfate) and explanation of how, precisely, the much more complicated new methodology is an improvement over the old.

2. Denial of By-Product Offset for Kangtai

During verification of Kangtai, Commerce did not find any revenue from sales of ammonium sulfate in Kangtai's general ledgers and financial statements but it did verify that Kangtai maintained a warehouse inventory ledger for that by-product. In the *Sixth Review*, Commerce had granted a by-product offset to Kangtai without conducting verification to determine if the by-product sales were recorded in Kangtai's accounting records. *See Clearon II*, 39 CIT at ___, Slip Op. 15–91 at 50. For this *Seventh Review*, however, Commerce faulted Kangtai, *post facto*, for "not maintain[ing] an inventory account for ammonium sulfate in its accounting system, nor do[es Kangtai] . . . have an inventory control process established for this by-product." *IDM* cmt. 5.B. at 30. *See also* Verification Report for Kangtai, PDoc 176 (Nov. 18, 2013) at 32–33.

Commerce had verified detailed records maintained by Kangtai that document the production, sale, and collection of revenue for Kangtai's sales of ammonium sulfate contained in its company ledgers or warehouse journal and that the company had received payment for those sales. *See* Kangtai's Br. at 43–44 and cited references. Based on the policies existent when Kangtai made its sales and maintained its records in this period of review, the amount of

Kangtai's intermediate inputs (ammonia gas and sulfuric acid) generated during the production of subject merchandise therefore had commercial value, thus providing a basis for the by-product offset. Fundamentally, then, the "final" new requirement of the matter at bar is that the by-product revenue for the downstream by-product must be booked a particular way.

Commerce expressed concerns about the booking of sales of the downstream byproduct.[45] Kangtai complains that Commerce's briefing only makes the conclusory statement that the producer does not sell the immediate by-products on the market, so therefore using Commerce's previous by-product valuation methodology would be distortive, and that Commerce has not explained why this results in distortion nor does Commerce cite any record evidence in support of this conclusion.

The court needs further clarification from Commerce on this point. On the one hand, it appears as if Commerce has decided that the ultimate disposition of a co- or by-product that is identified at the split-off point is what is indicative of its "value," to the company, and is what grounds that value in reality and not in the abstract (whether sold, discarded, re-entered into production, or what-not). If such a new by-products valuation methodology is valid -- which is not settled --then it would not appear inappropriate to require precise documentation of how the downstream by-product has been transacted, which would establish its value to the company. In the absence of proper bookkeeping that documents such by-products' disposition and remuneration to the company therefor, it is understandable that Commerce would pause before concluding that such disposition was a commercial or corporate transaction or distribution, insofar as the company itself was concerned.

On the other hand, if Commerce is here denying what would appear to be an otherwise appropriate joint-cost allocation to the non-subject merchandise in defiance of its verification of Kangtai that proved that ammonia gas and sulfuric acid by-products were generated during the production of subject merchandise (as indicated by the respondents' evidence thereof at verification), then Commerce is effectively using the subject merchandise to bear the cost of its concern regarding the disposition of Kangtai's ammonium sulfate. A company's disposition of its by-product is not the only recognized method for accounting purposes of establishing value, which Commerce's prior by-products offset methodology recognized, and the disposition of by-product is not, necessarily, indicative of the carrying value of product that remains in inventory. Stated differently: simply because

[45] *Cf.* Kangtai's Br. (conf.) at 43–44 (re: handling of remuneration).

certain product is not "transacted" at arm's length does not mean that inventoried by-products generated during the production of subject merchandise do not have commercial value.

Kangtai argues here that Commerce verified that it transacted and received remuneration for ammonium sulfate as recorded in the company ledgers or warehouse journal. *See* Kangtai's Br. (conf.) at 43–44 and cited references. Kangtai also complains of a lack of opportunity to cure or address the consequences of Commerce's new policy. The court is inclined to agree that Kangtai had a right to anticipate that it could rely on Commerce's then-existing by-products offset practice at the time of its sales of the downstream by-product. Commerce has also apparently avoided Kangtai's arguments that there were options on the record to avoid the complete (and, Kangtai claims, "catastrophic") denial of any offset, and that any distortion potentially caused by the manner in which Kangtai booked by-product revenue is entirely addressed by the NME methodology. *See* Kangtai's Br. at 45–46. Kangtai argues by analogy to market economy cases in which Commerce has adjusted a respondent's figures rather than completely disregard reality; *e.g.*, when a respondent receives interest free shareholder loans, Commerce, has resorted to a "facts available" market interest cost to add to the respondent's constructed value rather than pretending these loans do not exist. *See*, *e.g.*, *Stainless Steel Bar From India: Notice of Final Results of Antidumping Duty Administrative Review*, 73 Fed. Reg. 52294 (Sept. 9, 2008), and accompanying I&D Memo at cmt. 7. Similarly here, Kangtai argues, Commerce could have added the surrogate value to booked revenue.[46] In any event, Kangtai continues, the use of surrogate financial statements precisely addressed any such potential distortions.

Be that as it may, it is up to Commerce to revisit Kangtai's contentions on remand in accordance with the foregoing.

3. By-Product Offset for Arch

Commerce granted Arch a by-product offset for the ammonia gas and sulfuric acid generated in the production of subject merchandise by calculating the by-product adjustment using a surrogate value for the downstream by-product ammonium sulfate, the actual downstream product sold by Jiheng. *See IDM* cmt. 5.B. at 30. From the selected surrogate value for ammonium sulfate, Commerce subtracted Arch's "surrogate value" costs associated with transforming

[46] *I.e.*, Kangtai not-unreasonably argues that if Commerce insists on costing an unbooked cost, then Commerce must recognize an unbooked but documented revenue in order to be consistent.

the ammonia gas and sulfuric acid into ammonium sulfate, resulting in a calculation of the "actual" value Arch received for the ammonia gas and sulfuric acid by-products.

a. Ammonium Sulfate versus Ammonia Gas and Sulfuric Acid Offset

As in the *Sixth Review*, Arch here also contests Commerce's determination that ammonium sulfate was the correct by-product upon which to base the offset instead of basing it directly upon ammonia gas and sulfuric acid surrogate values. Commerce states that its

> decision to use a value for ammonium sulfate to calculate the by-product offset amount represents the best available information and establishes Arch's antidumping duty margin as accurately as possible because it *reflects Arch's actual business experience*. Indeed, the very purpose of Commerce's factors of production methodology is to calculate an amount that reflects the production and sales experience of the non-market economy producer valued in a surrogate market economy country. *See* 19 U.S.C. § 1677b(c).

Def's Resp. at 63–64 (italics added). Commerce's position here is quite at odds with its position on choosing appropriate surrogate values for chlorine and hydrogen gas, *see supra*, among others. At any rate, as an initial matter Arch points out that Commerce's "distortion" theory amounts to *post hoc* rationalization[47] and that even if Commerce had claimed that non-sales of ammonia gas and sulfuric acid is distortive, Commerce fails to explain how or why it was distortive or why it was not distortive in the investigation and five subsequent reviews.

Echoing Kangtai, Arch's overarching argument is that Commerce never reasonably explained why it was no longer treating ammonia gas and sulfuric acid as the relevant by-products and instead switched to the downstream ammonium sulfate, and that the result is contrary to Commerce's long-standing practice both in this case and in general with respect to downstream by-products. Commerce has described its normal by-product offset practice as "limited to the total

[47] *Post hoc* rationalization is not part of the original determination, and agency action may only be upheld, if at all, on the grounds that the record shows were the articulated grounds. *See, e.g., Chenery, supra*, 318 U.S. at 87. Commerce never determined, as argued here, that it "determined that in using ammonia gas and sulfuric acid values to make an adjustment to normal values, the by-product offset was *distorted* because [Jiheng] did not actually sell these products in their raw form", Def's Resp. at 63 (italics added), but determined in the *IDM*as quoted above.

production quantity of the by-product . . . produced during the POR, so long as it is shown that the byproduct has commercial value."[48] As above indicated, neither the *IDM* nor Commerce's first *Final Results of Redetermination* for the *Sixth Review* provide adequate explanation on what the new methodology actually is, why it is needed, and how it results in improvement over the old methodology. In accordance with *Clearon II* and the foregoing, this issue is being remanded, and the court need not, therefore, address the remainder of Arch's arguments thereon as expressed in its briefing.

b. Selection of Surrogate Value for Ammonium Sulfate By-Product

Arch also contests Commerce's decision to use imported ammonium sulfate values instead of domestic values. In the *Final Results*, Commerce used GTA import data from the Philippines to value ammonium sulfate, which Commerce used as a by-product offset for Arch. *IDM* cmt. 2.C. at 14. Citing Commerce's preference to use domestic prices rather than imported prices, Arch contends that Commerce should have used the domestic retail price of ammonium sulfate as reported by the Philippine Government's Fertilizer and Pest Authority to value ammonium sulfate. Arch's Br. at 27–28.

Commerce here states that when it decides whether to use domestic or import prices of the primary surrogate country, it examines the facts of the case regarding the surrogate country purchaser's actual experience. Def's Resp. at 58, referencing *Rhodia*, *supra*, 25 CIT at 1286–87, 185 F. Supp. 2d at 1351–52 (stating that because the "the purpose of the statute [is] to construct the product's normal value as it would have been if the NME country were a market economy country", the preference in favor of using domestic data does not require that domestic data be used in circumstances where it would conflict with the goal of accuracy).

Commerce first states that it properly declined to use the domestic retail price for ammonium sulfate because Arch failed to provide any evidence or argument to establish that Philippine producers rely primarily on domestic sources of ammonium sulfate to produce comparable merchandise. *IDM* cmt. 2.C. at 14. Commerce states that it found that there were significant amounts of ammonium sulfate imported into the Philippines, thereby demonstrating a commercial

[48] *See, e.g., Frontseating Service Valves From the PRC: Final Results of Antidumping Duty Administrative Review; 2008–2010*, 76 Fed. Reg. 70706 (Nov. 15, 2011) (final rev. results) and accompanying I&D Memo at cmt 18; *Multilayered Wood Flooring From the PRC: Final Determination of Sales at Less Than Fair Value*, 76 Fed. Reg. 64318 (Oct. 18, 2011) (final determ. of sales at less than fair value).

demand for this product. *See id.* This rationale is flawed for at least two reasons: (1) Arch is a U.S. importer of subject merchandise, not a producer (Jiheng is the producer of subject merchandise), and (2) more importantly, ammonium sulfate is considered a by-product of the production process, not an input; ammonium sulfate is not used to produce comparable merchandise or subject merchandise, regardless of whether it is imported or produced domestically.[49]

Commerce also states that it determined that the Philippine Fertilizer and Pesticide Authority reported prices of ammonium sulfate based on 50 kilogram bags but without sufficient record evidence to conclude that Arch sold its ammonium sulfate in retail quantities to similar customers. *Id*. Commerce criticizes Arch's citation to Kangtai's verification report which states that Kangtai packs its ammonium sulfate in 50 kilogram bags, *see* Arch's Br. at 28, as irrrelevant to whether Arch sells ammonium sulfate in those retail quantities. In *Clearon Corp. v. United States*, 35 CIT ___, Slip Op. 11–142 (2011) at 9–14, the court rejected that specific argument before with respect to this very data source, although urea was the product at issue, not ammonium sulfate, finding that Commerce had not provided any reason to conclude that the packaging of the product is a material consideration, and remanding the decision back to Commerce with instructions to explain why this was a relevant consideration. Upon remand, Commerce found, as noted by the court, that because one of the two respondents purchased the urea in 50 kilogram bags, "Commerce has now concluded that neither market segmentation nor that the Philippine urea was sold in fifty-kilogram bags presents an obstacle to the use of Philippine prices." *Clearon Corp. v. United States*, 37 CIT ___, Slip Op. 13–22 at 7 (Feb. 20, 2013). Commerce here does not explain why the packaging was relevant, nor does it explain why the fact that there was evidence that at least one of the producers sold the ammonium sulfate in 50 kilogram bags was insufficient if packaging was relevant. Commerce states that it was unable to "confirm" that Kangtai actually made any sales of ammonium sulfate during the period of review ("[t]his claim is not supported by . . . the Department's strict definition"), *IDM* cmt. 5.B. at 30–31, but that appears to be of little relevance as far as Commerce's verification of Kangtai's packaging and Arch's contention is concerned.

[49] Arch also argues there is evidence on the record that Jiheng sold its ammonium sulfate domestically. *See, e.g*., Jiheng's Section D Questionnaire Response, at Ex. D-12.3 (invoice of sale of ammonium sulfate to a Chinese purchaser), CDoc 69; Verification of the Sales and Factors Response of Jiheng, PDoc 89 (Nov. 20, 2012), at 33. Arch does not explain, however, what this has to do with Commerce's argument.

Commerce states that it was also unable to discern whether the prices included by the Philippine Fertilizer and Pesticide Authority were tax exclusive, *see id.*, cmt. 2 at 14, and it acknowledges Arch's contention that Commerce had previously found the Philippine Fertilizer and Pesticide Authority prices for urea to be acceptable and tax and duty free and that Commerce had not distinguished between types of customer, Arch's Br. at 27, but Commerce contends Arch never raised these arguments during the administrative proceedings and is therefore barred by failure to exhaust. Commerce also contends that its findings with respect to this data source for an entirely different input are inconsequential in any event.

The court has no way of evaluating inconsequentiality at this juncture, but it finds exhaustion inapplicable here for two reasons.

First, the relevant data were not on the record in the preliminary proceeding; therefore, the first opportunity to argue for these data's use arose in the case brief, where Arch so argued. *See* Arch's Case Br., PDoc 180, at 16–18. Since Arch had no way of knowing that Commerce would ignore its previous finding with respect to this data source, Arch had no reason to argue that Commerce should uphold its previous acceptance of this source. Arch is not required to anticipate that Commerce will act contrary to its previous practice, and exhaustion does not apply if the first opportunity to raise the issue arises as the result of the final results of the review. *E.g., Dupont Teijin Films China Ltd. v. United States*, 38 CIT ___, ___ n.6, 7 F. Supp. 3d 1338, 1348, n.6 (2014) (exhaustion doctrine does not apply where issue was largely irrelevant until Commerce changed methodology in the final results).

Second, the fact that Commerce had previously found this data source to be acceptable is an extension of the argument raised in Arch's case brief that this data source provides the best available information with which to value ammonium sulfate. It is not a separate argument. The exhaustion doctrine does not prevent a plaintiff from expanding on an argument based on the final record before the court, and an argument raised below does not need to be worded exactly as it is to the court.[50] The fact that Commerce had previously approved this data source for urea, until it was demonstrated that

[50] *See, e.g., Trust Chem, supra*, 35 CIT at ___, n.27, 791 F. Supp. 2d at 1268 n.27 ("The determinative question is whether Commerce was put on notice of the issue, not whether Plaintiff's exact wording below is used in the subsequent litigation. . . . The specific information upon which Plaintiff relies, having been submitted by the Petitioners, is necessarily before the agency."); *Solvay Solexis SpA. v. United States*, 33 CIT 1179, 1183 n.2, 637 F. Supp. 2d 1306, 1309 n.2 (2009) (noting that because Solvay had raised the issue of whether the unaudited statutory financial statement represented the most accurate cost, it was not precluded from arguing on appeal that the problem with the financial statement

there was no domestic production of urea, was discussed at length at the hearing; therefore, Commerce was on notice, the issue was thoroughly discussed, and Commerce had a chance to consider the issue. *See, e.g.,* Hearing Transcript, PDoc 199, at 36 and 117.

Arch argues that Commerce has failed to demonstrate that it chose the best available information with which to value ammonium sulfate in light of its preference for domestic prices over imported prices, all else being equal. At any rate, the matter will be remanded for reconsideration in accordance with the foregoing.

K. Deduction of Value Added Taxes (VAT) from U.S. Price

In the *Final Results*, Commerce reduced the United States sales prices calculated for Kangtai and Arch by 8% to account for the un-refunded portion of a 9% rebate of the 17% in value added taxes (VAT) the PRC had imposed on certain of those companies' imported inputs. *IDM* cmt. 5.A. at 28. Noting Kangtai's and Arch's arguments that Commerce did not address their arguments concerning this issue during the administrative proceeding,[51] Commerce requests voluntary remand to consider and address their arguments in the first instance.

Kangtai and Arch oppose in part, arguing that the court should rule on the merits of their claims at this juncture as a *Chevron* step one problem of statutory interpretation. Kangtai's Br. at 38–43, discussing *Methodological Change for Implementation of Section 772(c)(2)(B) of the Tariff Act of 1930*, as amended in *Certain Non-Market Economy Antidumping Proceedings*, 77 Fed. Reg. 36481, 36483 (June 19, 2012); Arch's Reply at 16–17, referencing, *inter alia*, *SKF USA, Inc. v. United States*, 254 F. 3d 1022 (Fed. Cir. 2001) ("*SKF*") (discussing circumstances under which granting a request for a voluntary remand is appropriate and noting that a court has discretion when there is a *Chevron* step one issue). *See* 19 U.S.C. §1677a(c)(2)(B) (*inter alia*, the U.S. price "shall be . . . reduced by . . . the amount, if included in such price, of any export tax, duty, or other charge imposed by the exporting country on the exportation of the subject merchandise to the United States").

The court declines to consider whether the statutory language is a *Chevron* step one issue at this time, as exhaustion compels that Commerce should have first crack at the problem. *See United States v. L.A. Tucker Truck Lines, Inc.*, 344 U.S. 33, 37 (1952). Only in a technical sense has there been joinder on this issue (due to the

was how the goodwill was attributed; therefore, the goodwill argument was an extension of the same issue as was raised before Commerce).

[51] Kangtai's Br. at 39–43; Arch's Br. at 10–16.

peculiar nature of appeal and briefing of 28 U.S.C. §1581(c) cases before the court), but the full merits, including the agency's direct response to the respondent's arguments, regardless of whether the problem is indeed a *Chevron* step one problem, have not been administratively developed. Commerce on remand has the latitude to adopt a contrary position without the court's interference, for example, thus mooting the plaintiff's and intervenor-plaintiff's concerns, Commerce's motion for voluntary remand of this issue is therefore granted.

IV. *Conclusion*

For the above reasons, the matter must be remanded for further proceedings not inconsistent with this opinion. The results of remand shall be due December 21, 2015, whereupon by the fifth business day thereafter the parties shall file a joint status report as to comments, if any, on the remand results.

So ordered.

Dated: August 21, 2015
New York, New York

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

Slip Op. 15–94

UNITED STATES, Plaintiff, v. AMERICAN CASUALTY CO. OF READING PENNSYLVANIA, AND RUPARI FOOD SERVICES, INC. Defendants,

Before: Nicholas Tsoucalas, Senior Judge
Consol. Court No.: 10–00119
PUBLIC VERSION

[Plaintiff's request for leave to amend the Complaint is granted in part and denied in part. Defendant's Motion to Dismiss is denied.]

Dated: August 24, 2015

Mikki Cottet, Senior Trial Counsel, Commercial Litigation Branch, Civil Division, U.S. Department of Justice, of Washington, DC, argued for Plaintiff. With her on the brief were *Benjamin C. Mizer*, Acting Assistant Attorney General, *Jeanne E. Davidson*, Director, and *Patricia M. McCarthy*, Assistant Director, of Washington, DC. Of counsel on the brief was *Brian J. Redar*, Office of Associate Chief Counsel, U.S. Customs and Border Protection, of Long Beach, CA.

Lawrence M. Friedman, Barnes Richardson & Colburn, of Chicago, IL, argued for Defendant. With him on the brief were *Shama K. Patari*, Barnes Richardson & Colburn, of Chicago, IL, and *Peter A. Quinter*, Gray Robinson, P.A., of Miami, FL.

OPINION AND ORDER

Tsoucalas, Senior Judge:

Plaintiff, United States Customs and Border Protection, ("Customs") brought this action to recover civil penalties against Defendant, Rupari Food Services Inc., ("Rupari" or "Defendant")[1] for violations of Section 592 of the Tariff Act of 1930, 19 U.S.C. § 1592(a)(2012)[2], and Defendant American Casualty Co. of Reading Pennsylvania, ("American Casualty") to recover, under bonds, unpaid customs duties. Rupari moves for dismissal of this action, post-answer, on the grounds that the Complaint fails to state a claim upon which relief can be granted and Customs failed to plead fraud with particularity. Customs opposes dismissal and requests leave to amend its Complaint. For the following reasons, Customs' request for leave to amend the Complaint is granted in part and denied in part, and Defendant's Motion to Dismiss is denied.

JURISDICTION AND STANDARD OF REVIEW

The Court possesses jurisdiction to hear this action under section 201 of the Customs Courts Act of 1980, 28 U.S.C. § 1582 (2012).[3]

A motion to dismiss for a failure to state a claim may be raised by motion under USCIT R. 12(c) after the pleadings are closed but early enough not to delay trial. USCIT R. 12 (h)(2)(B). A Rule 12(c) motion is reviewed under the same standard as a motion to dismiss under Rule 12(b)(6). *Koyo Corp. of U.S.A. v. United States*, 37 CIT ____, 899 F.Supp.2d 1367, 1370 (2013). When reviewing a motion to dismiss for failure to state a claim, the court must accept as true the complaint's undisputed factual allegations and should construe them in the light most favorable to the plaintiff. *Bank of Guam v. United States*, 578 F.3d 1318, 1326 (Fed. Cir. 2009) (quoting *Cambridge v. United States*, 558 F.3d 1331, 1335 (Fed. Cir. 2009). To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face. *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570, 127 S. Ct. 1955, 1974, 167 L. Ed. 2d 929,

[1] Plaintiff also filed an action against William Vincent "Rick" Stilwell ("Stilwell") individually, however, all parties agreed to dismiss all claims as to him with prejudice and without costs, fees, and expenses on July 17, 2015. Stipulation of Partial Dismissal, July 17, 2015, ECF No. 104.

[2] Further citations to the Tariff Act of 1930 are to the relevant portions of Title 19 of the U.S. Code, 2012 edition, and all applicable amendments thereto, unless otherwise noted.

[3] Further citations to the Customs Courts Act of 1980 are to the relevant portions of Title 28 of the U.S. Code, 2012 edition, and all applicable amendments thereto, unless otherwise noted.

949 (2007). To be plausible, the complaint need not show a probability of plaintiff's success, but it must evidence more than a mere possibility of a right to relief. *Id.* at 556–59, 127 S.Ct at 1965–66, 167 L.Ed.2d at 940–41.

BACKGROUND

Rupari is a Florida corporation that purchased crawfish from abroad and sold it to restaurants in the United States. Compl. ¶¶ 3, 12, June 20, 2011, ECF No. 2; Pl.'s Opp'n to Mot. to Dismiss ("Pl.'s Br.") Purchase Agreement Ex. 10, at 13, Mar. 7, 1997, ECF No. 94–6. Rupari's seafood sales team consisted of Mr. Larry Floyd ("Floyd"), Vice President of Rupari's Seafood Sales Division, and Stilwell, a commissioned seafood salesman. Pl.'s Br. Tr. of Dep. of William Vincent Stilwell ("Stilwell Dep.") Ex. 1, at 13–14, Apr. 3, 2013, ECF No. 94–1; Pl.'s Br. Tr. of Dep. of Rupari Food Services Inc. ("Rupari Dep.") Ex. 2, at 15–16, 17, Apr. 4, 2013, ECF No. 94–2.

In 1997 and 1998, Rupari sold crawfish to members of the Popeye's Operator's Purchasing Cooperative Association ("POPCA"). Mr. Richard Porter ("Porter"), the POPCA director of purchasing and distribution, communicated with Rupari through Floyd regarding the sale of crawfish. Pl.'s Br. Decl. of Richard L. Porter ("Porter Decl.") Ex. 10, at ¶¶ 6, 7, Mar. 16, 2014, ECF No. 94–6.

On March 7, 1997, Porter and Floyd signed a Purchase Agreement wherein Rupari would sell POPCA 148,000 lbs. of "Chinese [c]rawfish [t]ail [m]eat." Pl.'s Br. Purchase Agreement Ex. 10, at 13, Mar. 7, 1997. The agreement also stated that a formal POPCA supply agreement would be sent shortly thereafter. *Id.* Floyd and Porter consummated the formal POPCA supply agreement on June 8, 1997. *Id.* at 14.

In August 1997, the United States Department of Commerce ("Commerce") conducted an antidumping investigation concerning crawfish tail meat from China. Commerce published the final determination of its antidumping investigation of freshwater crawfish tail meat from China on August 1, 1997. *Notice of Final Determination of Sales at Less than Fair Value: Freshwater Crawfish Tail Meat From the People's Republic of China*, 62 Fed. Reg. 41,347 (Aug. 1, 1997) (subsequently amended to correct ministerial errors at 62 Fed. Reg. 48,218 (Dep't of Commerce Sept. 15, 1997) ("*Final Determination*").

Yupeng Fisheries Ltd., ("Yupeng") a Chinese producer and importer of crawfish tail meat, was among the firms investigated by Commerce. *Id.* Yupeng did not receive a separate rate, and its crawfish tail meat exports were subject to the China-wide rate of 201.63 percent. *Id.* at 41,358. Whole crawfish, however, were excluded from the scope

of the antidumping duty investigation. *Id.* at 41,347. From 1996 to 1998, Yupeng sold Rupari whole cooked frozen crawfish and cooked frozen crawfish tail meat. Pl.'s Br. Stilwell Dep. Ex. 1, at 17–18.

Floyd and Stilwell mainly communicated with Mr. Tian Wei, a Yupeng salesman, but also communicated with Mr. Wang Yon Min, Yupeng's owner, ("Wang"), regarding the sale of crawfish to Rupari. *Id.* at 17, 21.

On October 17, 1997, POPCA sent Floyd and Rupari a letter confirming that Popeye's would purchase 1,500 cases of crawfish. Pl.'s Br. Crawfish Confirmation Letter from James Brailey, Purchasing Manager, POPCA, to Floyd Ex. 10, at 30, Oct. 17, 1997.

In November 1997, Wang, Yupeng's owner, created Seamaster Trading Company Ltd. ("Seamaster") which was located in Thailand. Compl. at ¶13. Yupeng shipped crawfish tail meat from China to Seamaster in Thailand. Pl.'s Br. Packing List, Bill of Lading, Invoice, Manifest or Freight List Ex. 6, at 1–12, ECF No. 94–5. Rupari was aware that Wang created Seamaster and was the principal owner of both Yupeng and Seamaster. Pl.'s Br. Rupari Dep. Ex. 2, at 5.

Wang approached Mr. Somchai Sriviroj, ("Sriviroj") the owner and managing director of Sea Bonanza Foods Company, Ltd., ("Sea Bonanza") a fish processing company in Thailand, and asked if Sea Bonanza could repackage frozen crawfish tail meat. Pl.'s Br. Tr. of Dep. of Sea Bonanza Foods Company, Ltd. Ex. 4, at 8, July 8–9, 2013, ECF No. 94–3.

On November 8, 1997, Seamaster entered into a contract with Sea Bonanza wherein Seamaster would ship crawfish tail meat from China to Thailand, and Sea Bonanza would repackage the crawfish tail meat in exchange for a processing fee. Pl.'s Br. Contract between Sea Master and Sea Bonanza Ex. 5, at 2, Nov. 8, 1997, ECF No. 94–4.

In January and April 1998, Yupeng shipped from China to Seamaster, in Thailand, product invoiced as "frozen crawfish." Pl.'s Br. Invoice Ex. 6, at 1, 3, Jan. 8, 1998, ECF No. 94–5.

Sea Bonanza repacked the frozen crawfish tail meat for Seamaster and labelled the meat a "product of Thailand." Pl.'s Br. Tr. of Dep. of Sea Bonanza Foods Company, Ltd. Ex. 4, at 8, 22. According to the Agricultural Affairs Office at the American Embassy in Bangkok, crawfish is not harvested in Thailand; moreover, Sea Bonanza never processed live crawfish. *Id.* at 7, 12; *see also* Pl.'s Br. Packing List Ex. 6, at 1, Apr. 18, 1998; Pl.'s Br. Facsimile from the Agricultural Affairs Office at the American Embassy in Bangkok, Thailand to Roy Johnson, Louisiana Dept. of Agriculture Ex. 8, at 1, Aug. 5, 1998, ECF No. 94–5.

Rupari assisted Seamaster with obtaining a customs broker and Seamaster became a non-resident importer of crawfish to the United States. Pl.'s Br. Rupari Dep. Ex. 2, at 4; Pl.'s Br. Entry Summary Ex. 11A, at 1–42, Mar. 13, 1998, ECF No. 94–7. Rupari stopped purchasing crawfish tail meat directly from Yupeng and began purchasing crawfish tail meat from Seamaster. *See* Pl.'s Br. Stilwell Dep. Ex. 1, at 18, 20. Rupari had never purchased crawfish from a source in Thailand prior to purchasing crawfish tail meat from Seamaster. *Id.* at 20.

On February 24, 1998, Porter sent a letter to Caro Produce regarding POPCA's Crawfish Etouffe promotion beginning March 9, 1998, and ending April 11, 1998. Pl.'s Br. Letter from Porter to Caro Produce-Angel Homan, Ex. 10, at 36, Feb. 24, 1998. The letter recited that POPCA ordered 1,200 cases of crawfish in 24.1 lb. bags from Rupari. *Id.*

On March 13, 1998, Seamaster filed a consumption entry describing the imported merchandise as 1,900 cartons of frozen crawfish, classified under U.S. Harmonized Tariff Schedule ("HTSUS") 0306.19.0010, free of duty, and marked as a product of Thailand. Pl.'s Br. Entry Summary Ex. 11A, at 1.

American Casualty issued customs bonds to Seamaster for the importation of crawfish tail meat. Compl. At ¶6, Customs Bonds Ex. A, at 2–5, Apr. 15, 1998, ECF No. 2–1. American Casualty, as surety, guaranteed payment for any duty, tax, or charge, or compliance with law or regulation, as a result of Seamaster's imports. *Id.*

On April 18, 1998, Seamaster filed three consumption entries that described the imported merchandise as 1,750 cartons of cooked crawfish meat, classified under HTSUS 1605.40.1000, free of duty, and marked as products of Thailand. Pl.'s Br. Entry Summary Ex. 11A, at 10. Seamaster did not identify any of the entries as being subject to antidumping orders as required by 19 C.F.R. § 141.61(c). *See id.* Rupari was listed as the notifying party on certificates of origin that accompanied these four entries. Pl.'s Br. Certificates of Origin Ex. 11A, at 7, 15, 26, 37. The entry summaries, entry documents, invoices, and certificates of origin all stated that the crawfish meat originated in Thailand. *Id.* at 1–42.

Seamaster, as the importer of record, entered four containers of crawfish tail meat into the commerce of the United States through the Los Angeles/Long Beach Seaport by means of documents filed with Customs that claimed the merchandise originated in Thailand. Compl. at ¶17. The four entries were released for consumption and Rupari sold some or all of the entries to POPCA. Pl.'s Br. Porter Decl. Ex. 10, at ¶10. All four entries were subject to a 201.63 percent

antidumping duty margin under the antidumping order. *Final Determination*, 62 Fed. Reg. at 41,358. Seamaster did not classify the entries as subject to antidumping duties, nor did it remit any amount of the applicable duties to Customs. Compl. at ¶18.

On May 4, 1998, Porter had a telephone conversation with Floyd, Rupari's Vice President of seafood sales, regarding the alleged crawfish tail meat purchased from Rupari and upcoming shipments of frozen crawfish tail meat. Pl.'s Br. Ex. 10, at 3–4, Porter Decl. at ¶10. According to Porter:

> During that conversation, I asked Larry [Floyd] how it was that Rupari could sell its Chinese crawfish tail meat so cheaply. I also commented that Rupari's crawfish was cheaper than all of the other Chinese crawfish tail meat being sold in the United States at that time. Larry responded that they, which I understood to be Rupari, "can get it in where it would not be known as Chinese crawfish." I asked Larry how and he explained that the Chinese crawfish tail meat was shipped to Thailand where it was "processed." He said that the country of origin could be the place where the crawfish is packed. Larry also used the word "tariff," stating that Rupari's crawfish would not have to pay the same amount in tariffs. I responded, "Is that on the up-and-up?" I was uncomfortable with this approach and shared my concern with Larry.

Id.

Also on May 4, 1998, Floyd sent Porter a facsimile on Rupari letterhead, in which he wrote the following:

> As per our conversation on the telephone earlier concerning cooked peeled crawfish meat from Thialand, [sic] this product was cooked in China and sent to Thialand [sic] in the whole round and totally processed in Thialand [sic] and packed under the Seamaster lable [sic]. I really don't understand what all the comotion [sic] is all about because we could bring in the whole cooked product into the United States and peel and pack it here and it would become product of the U.S.A.

Pl.'s Br. Fax from Floyd to Porter Ex. 20, at 1, May 4, 1998, ECF. No. 94–11.

Seamaster, as the importer of record, attempted to enter five more entries of crawfish tail meat into the United States between approximately June 13, 1998, and June 20, 1998. Pl.'s Br. Entry/Immediate Delivery Forms, Certificates of Origin, Bills of Lading, Invoices, Ex.

11B, at 1–28 ECF No. 94–8. Seamaster classified the crawfish tail meat in these five entries as duty free under 1605.40.1000 HTSUS. Id. Seamaster labeled all five entries as products of Thailand. *Id.* The crawfish tail meat was subject to antidumping duties of 201.63 percent, because it originated in China, but Seamaster did not classify the merchandise properly. *Id.* ; *see also Final Determination*, 62 Fed. Reg. at 41,358. Customs examined and seized the five entries of crawfish tail meat under 19 U.S.C. § 1595a(c)(2)(E), because the cartons were intentionally marked as products of Thailand in violation of 19 U.S.C. § 1304. Compl. at ¶21.

On June 26, 1998, Customs issued a request for information to Seamaster, as importer of record, asking them to substantiate the claimed Thai origin of the five seized entries, and asking for an explanation of Seamaster's relationships with Rupari and Sea Bonanza. Pl.'s Br. U.S. Customs Service Request for Information, Ex. 13, at 1, June 26, 1998, ECF No. 94–10.

On June 29, 1998, Customs commenced a fraud investigation against Rupari for the possible circumvention of antidumping duties. Pl.'s Br. Tr. of Dep. of C. Vernon Francis, Ex. 12, at 12, Sept. 24, 2013, ECF No. 94–9.

On July 1, 1998, Rupari, through its employee, Stilwell, filed a letter with Customs on behalf of Seamaster, the importer of record, wishing to clarify the origin of the crawfish meat. Pl.'s Br. Letter from Stilwell to Mr. David Shaw, US Customs Service, Ex. 15, at 1, July 1, 1998, ECF No. 94–11. Stilwell stated in the letter that the crawfish tail meat in the five seized entries was "cooked, peeled, and processed" by Sea Bonanza at its plant in Thailand. *Id.*

On July 6, 1998, Customs issued a second request for information to Seamaster asking for records from Sea Bonanza to substantiate the facts in the letter referenced claiming that the crawfish tail meat was processed in Thailand from raw crawfish harvested in Thailand. Pl.'s Br. Second Request for Information Ex. 13, at 2–4.

On July 10, 1998, Rupari, through its employee Stilwell, filed documents in response to this second request for information. Compl. at ¶25. One of those documents was a letter written by Seamaster that authorized Rupari to act as Seamaster's representative in all dealings with Customs related to the release of the seized entries of Chinese crawfish tail meat. Pl.'s Br. Letter of Authorization from Seamaster to U.S. Customs, Ex. 23, at 46, July 9, 1998.

On July 13, 1998, Customs issued a third request for information to Seamaster again asking for further substantiation of the claim that the crawfish originated in Thailand. Pl.'s Br. Third Request for Information Ex. 13, at 5, July 13, 1998.

On July 13, 1998, Rupari, through its employee Stilwell, filed a series of documents with Customs. Compl. at ¶27. Among those documents was a purported letter from Mahyam Tingham Fisheries Co. Ltd. stating that it cultivated crawfish in Bangkok, Thailand, which it sold to Sea Bonanza, complete with invoices for the sale of live crawfish. Pl.'s Br. Letter of Explanation from Mahyam, Ex. 15, at 2–5, July 10, 1998. The Bureau of Business Information of the Government Service Division in Thailand has confirmed that they failed to find any business registration for the name "Mahyam Tingham Fisheries Co., Ltd." Pl.'s Br. Letter from the Bureau of Business Information of Thailand to Ms. Barry Tang, Ex. 18, at 1, May 10, 2013.

There was also a letter from Sea Bonanza stating that it purchased raw crawfish from Mahyam that it processed into tail meat for sale to Seamaster, which Seamaster then imported into the United States. Pl.'s Br. Letter of Confirmation from Sea Bonanza, Ex. 23, at 47, July 10, 1998.

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On July 25, 1998, Wang, the owner of Yupeng, sent a facsimile to Rupari and Stilwell which stated that Yupeng did not have the money to pay the ocean freight to ship crawfish to Thailand; however, Yupeng would fulfill Rupari's order of "whole crawfish" which would be mixed with "ten tons of crawfish meat." Pl.'s Br. Facsimile from Wang to Rupari Ex. 16, at 1, July 25, 1998, ECF No. 94–11.

On August 5, 1998, the Agricultural Affairs Office of the American Embassy in Thailand confirmed that there was no commercial production of indigenous freshwater crawfish in Thailand. Pl.'s Br. Facsimile from Agricultural Affairs Office, American Embassy, Bangkok, Thailand, to Roy Johnson, Louisiana Dept. of Agriculture, Ex. 8, at 1, Aug. 5, 1998.

On April 9, 2001, Customs sent Rupari and Stilwell a Pre-penalty Notice which set the tentative determination of culpability at fraud, but also noted that "[i]nasmuch as the Government may plead in the alternative in any de novo proceeding before the Court of International Trade, Customs alternatively alleges that the violation in question occurred as a result of negligence or gross negligence." Pl.'s Br. Pre-penalty Notice, Ex. 19, at 2, Apr. 9, 2001, ECF No. 94–11. On November 14, 2001, Customs issued Rupari and Stilwell a Penalty

Notice which included the same language as the Pre-penalty notice mentioned above. Pl.'s Br. Penalty Notice, Ex. 24, at 18–20, Nov. 14, 2001, ECF No. 94–13.

On April 7, 2010, Customs filed a complaint against American Casualty claiming that it owed the United States $1,279,648.83 plus statutory interest for unpaid customs duties under bonds pursuant to 19 U.S.C. § § 1505, 1592(d), 1505(c), and 580. Compl. at ¶1, April 7, 2010, ECF No. 2.

On June 20, 2011, Customs filed a Complaint against Rupari for violations of 19 U.S.C. § 1592 (a). Compl. ¶1, June 20, 2011, ECF No. 2. The Complaint alleged that Defendant attempted to enter five containers of Chinese crawfish tail meat by means of documents falsely claiming that the crawfish tail meat originated in Thailand. *Id.* at ¶8. Customs sought the domestic value of the merchandise Rupari attempted to enter into the United States which was $2,784,636.18, or in the alternative, the maximum amount for grossly negligent or negligent violations of 19 U.S.C. § 1592. *Id.* at ¶52.

On December 22, 2011, this Court ordered that the case against American Casualty be consolidated with that against Rupari. Order, Dec. 22, 2011, ECF No. 22.

On May 13, 2013, Stilwell died. Def.'s Mot. to Dismiss Public Version, Death Certificate Ex. 5, at 1, July 19, 2013, ECF No. 75–5. Additionally, Floyd died, however, his date of death is not known by the court. On January 22, 2014, a confidential informant was deposed who recounted an alleged conversation with Stilwell in which Stilwell stated that [[

]] Pl.'s Br. Conf. Dep. of Confidential Informant Ex., 1 at 7, ECF No. 80.

Subsequently, Defendant filed a motion to dismiss arguing that Customs failed to properly allege fraud with particularity and Customs failed to exhaust its administrative remedies for Counts II (gross negligence) and III (negligence). Def.'s Br. at 4–5.

Customs opposes Defendant's Motion to Dismiss, and it also requests leave to amend its Complaint. Pl.'s Br. at 13.

DISCUSSION

There are three issues that the court must analyze in addressing Defendant's Motion to Dismiss: (1) whether the court should allow Customs to amend its Complaint; (2) whether Customs alleged fraud with particularity; (3) whether Customs failed to exhaust its administrative remedies with respect to negligence and gross negligence.

1. Whether the court should allow Customs to amend its Complaint.

Customs seeks leave to amend its Complaint, reasoning that Defendant would not suffer any prejudice, because this action has advanced significantly beyond discovery, Defendant answered the complaint, and Defendant waited until the close of discovery to file its Motion to Dismiss. Pl.'s Br. at 13–14. Customs also notes that this is its first request to amend the complaint. *Id.*

Defendant opposes Customs' request to amend, because it argues that waiting years after the Complaint was filed to amend by adding new information constitutes undue delay that prejudices their case. Def.'s Reply to Pl.'s Resp. to Def.'s Mot. to Dismiss Confidential Version at 5–6, Mar. 29, 2015, ECF No. 98 ("Def.'s Reply").

Rule 15 of the Rules of the U.S. Court of International Trade provides that "[t]he court should freely give leave" to amend a pleading "when justice so requires." USCIT R. 15(a)(2). While Rule 15 requires that leave to amend be freely given, the Court must also consider whether there was undue delay, bad faith or dilatory motive on the part of the Plaintiff, undue prejudice to the opposing party, a repeated failure to cure deficiencies by amendments previously allowed, and futility of amendment. *Foman v. Davis*, 371 U.S. 178, 182, 83 S.Ct. 227, 230, 9 L.Ed.2d 222, 226 (1962).

The view that delay becomes undue when it prejudices the opposing party is generally accepted. *Ford Motor Co. v. United States*, 19 CIT 946, 956, 896 F. Supp. 1224, 1231 (1995) (citing *United States v. Mex. Feed & Seed Co.*, 980 F.2d 478, 485 (8th Cir. 1992)). In turn, to demonstrate prejudice, Defendant "must show that it was unfairly disadvantaged or deprived of the opportunity to present facts or evidence which it would have offered had the amendment been timely." *Id.* (quoting *Cuffy v. Getty Ref. & Mktg. Co.*, 648 F.Supp. 802, 806 (D.Del. 1986)).

First, Defendant argues that the inclusion of the Declaration of Porter would prejudice it, because the Declaration details a phone conversation between Porter and Floyd, in which Floyd allegedly stated that the crawfish tail meat was from China. Def.'s Reply at 7. Floyd is now deceased, and Defendant contends that as a result of his death, it has been deprived of an opportunity to challenge Porter's statements. *Id.*

Although Floyd is deceased, Defendant argues that the May 4, 1998 fax from Floyd to Porter, occurring the same day as the phone call, shows that the conversation was limited to whole crawfish which are not within the scope of the antidumping order. Specifically, Defendant points out that the fax refers to crawfish "in the whole round" and

"whole cooked product." *Id.* at 8.

Defendant has not been deprived of an opportunity to challenge Porter's statements, because the contemporaneous fax to Porter could show that the conversation was limited to whole crawfish which are not within the scope of the antidumping order. *Id.* Defendant is not prejudiced by the inclusion of Porter's Declaration or the fax, because it has not been deprived of an opportunity to challenge Porter's statements. *See Ford*, 19 CIT at 956, 896 F. Supp. at 1231. The court will allow Customs to amend its Complaint to include information relative to the Declaration of Porter.

Defendant also argues that amending the Complaint to include additional facts to support Count I, fraud, would be futile. Def.'s Reply at 5. Specifically, Defendants argue that including facts relating to the facsimile from Wang, Yupeng and Seamaster's owner, to Rupari and Stilwell would not survive a motion to dismiss, because the government's conclusion that the goods were transshipped to the U.S. from China and that Rupari and Stilwell were aware of the transshipment does not logically flow from the facsimile. *Id.* at 8.

If an amendment would not survive a motion to dismiss pursuant to USCIT Rule 12(b)(6), it is deemed futile. *United States v. Active Frontier Int'l, Inc.*, 37 CIT ___, Slip Op. 13–8 (Jan. 16, 2013). To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face. *Twombly*, 550 U.S. at 570, 127 S. Ct. at 1974, 167 L. Ed. 2d at 949. To be plausible, the complaint need not show a probability of plaintiff's success, but it must evidence more than a mere possibility of a right to relief. *Id.* at 556–57, 127 S. Ct. at 1965–66, 167 L. Ed. 2d at 940–41.

The court finds that amending the Complaint to include the information discussed in the facsimile would not be futile, because the amendment would survive a motion to dismiss. *See Active Frontier Int'l, Inc.*, 37 CIT ___, Slip Op. 13–8 (Jan. 16, 2013). The amendment would survive a motion to dismiss, because it evidences a more than a mere possibility of a right to relief, as one could reasonably interpret the fax to show that Rupari was aware of the transshipment of crawfish tail meat. *See Twombly*, 550 U.S. at 570, 127 S. Ct. at 1974, 167 L. Ed. 2d at 949; *see also* Pl.'s Br. Facsimile from Wang to Rupari Ex. 16, at 1.

Next, Defendant argues that the inclusion of the deposition testimony of a confidential informant who recalled a verbal, unrecorded, conversation with the now deceased Stilwell will prejudice its case. Def.'s Reply at 10. Customs seeks to amend the Complaint to include the deposition testimony, because [[

]] The Defendant has been deprived of an opportunity to present evidence it would have offered had the amendment been timely, specifically Stilwell's testimony, to rebut the confidential informant's account of the purported conversation with Stilwell, because Stilwell died on May 13, 2013, and the deposition of the confidential informant occurred afterwards on January 22, 2014. *See Ford*, 19 CIT at 956, 896 F.Supp. at 1231; Def.'s Br. Stilwell Death Certificate Ex. 5 at 1, ECF No. 75–5; Pl.'s Br. Dep. of Conf. Informant Ex. 1, at 1. Consequently, inclusion of this deposition will prejudice Defendant, and the court will not permit Customs to amend its complaint to add this information.

2. Customs alleged fraud with particularity.

The Defendant argues that Customs' Complaint fails to contain sufficient underlying facts creating a plausible inference that Rupari knew the statements contained in letters and other documents to Customs were false and that they intended to deceive Customs. Def.'s Br. at 5–6. The Court disagrees.

Rule 9(b) of the Rules of the Court of International Trade requires that Customs "state with particularity the circumstances constituting fraud or mistake. Malice, intent, knowledge, and other conditions of a person's mind may be alleged generally." USCIT R. 9(b). Even though knowledge and intent may be alleged generally, the pleadings must "allege sufficient underlying facts from which a court may reasonably infer that party acted with the requisite state of mind." *Exergen Corp. v. Wal-Mart Stores, Inc.*, 575 F.3d 1312, 1327 (Fed. Cir. 2009). "A fraud pleading must include informational elements of 'who, what, when, where, and how: the first paragraph of any newspaper story.'" *United States v. Islip*, 22 CIT 852, 869, 18 F.Supp.2d 1047, 1063 (1998) (quoting *DiLeo v. Ernst & Young*, 901 F.2d 624, 627 (7th Cir. 1990)). "Most courts have required the claimant to allege at a minimum the identity of the person who made the fraudulent statement; the time, place, and content of the misrepresentation; the resulting injury; and the method by which the misrepresentation was communicated." *Islip*, 22 CIT at 869, 18 F.Supp.2d at 1063 (citing 2 Moore's Federal Practice § 9.03, at 9–18 n.12 (3d ed.1998)).

Defendant contends that the bare fact that Rupari had done business with Seamaster's Chinese parent company, Yupeng, prior to the imposition of antidumping duties does not permit the inference that Rupari knew that the crawfish originated in China. Def.'s Br. at 7. Defendant is correct that this fact alone does not permit the inference that Rupari definitively knew the origin of the crawfish to be China,

but this individual fact cannot be viewed in a vacuum as suggested by Defendant. Rather, this fact must be viewed in light of the other facts mentioned in the Complaint, as discussed below.

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Customs argues that the Declaration of Porter shows that Rupari knew that the crawfish tail meat was from China, and thus Customs pled fraud and intent with particularity. Pl.'s Br. 17–18. In his Declaration, Porter recounts a conversation on May 4, 1998, with Floyd, in which Floyd allegedly told him that Rupari's "Chinese crawfish tail meat" was cheaper than all of the others, because the meat was shipped to Thailand where it was processed and then it "would not be known as Chinese crawfish." Pl.'s Br. Porter Decl. Ex. 10, at ¶10.

In contrast, Defendant claims that the facsimile from Floyd to Porter on May 4, 1998, sent the same day as the conversation, shows that the conversation was limited to whole crawfish, which is not within the scope of the antidumping order, as the fax referred to crawfish "in the whole round" and as "whole cooked product." Pl.'s Br. Fax from Floyd to Porter Ex. 20, at 1.

Nevertheless, given that POPCA and Rupari previously signed a contract for the supply of "Chinese [c]rawfish [t]ail [m]eat," and that the court construes the facts in the light most favorable to the plaintiff in reviewing a motion to dismiss, the court finds that Customs pled knowledge and intent with enough particularity that its fraud claim survives the Motion to Dismiss. *See* Pl.'s Br. Purchase Agreement between POPCA and Rupari, Ex. 10, at 13; *see also Bank of Guam*, 578 F.3d at 1326.

Moreover, Plaintiff pled fraud with particularity, because the complaint detailed the identity of the person who made the fraudulent statement; the time, place, and content of the misrepresentation; the resulting injury; and the method by which the misrepresentation was communicated. *See Islip*, 22 CIT at 869, 18 F.Supp.2d at 1063. Specifically, the complaint alleged that Stilwell, an employee of Rupari, fraudulently stated in a letter dated July 1, 1998, to Customs on behalf of Seamaster, the importer of record, that the crawfish tail meat in the five seized entries was processed and packed by Sea Bonanza in Thailand from raw crawfish harvested by Mahyam in

Thailand. Compl. ¶23; *see id.* Customs further alleged that these statements had the potential to influence its assessment of antidumping duties. Compl. at ¶35. Moreover, the complaint alleged that Rupari, through its employee Stilwell, filed on July 13, 1998, a series of documents with Customs which it knew to contain false representations that Thailand was the country of origin of the crawfish tail meat. *Id.* at ¶27. The documents included the following: a purported letter from Mahyam stating that it cultivated live crawfish which it sold to Sea Bonanza, invoices for the sale of live crawfish, and a letter purportedly from Sea Bonanza stating that it purchased crawfish from Mahyam that it processed into tail meat for sale to Seamaster. *Id.*

Finally, Defendant contends that Customs failed to plead fraud with particularity, because the fax from Yupeng to Rupari does not demonstrate that Rupari knew that the crawfish tail meat was from China at the time it responded to Customs. Def.'s Br. at 8. The fax was sent on July 25, 1998, after Stilwell made representations and submitted documentation to Customs on July 1, 10, and 13, 1998. Pl.'s Br. Facsimile from Wang to Rupari Ex. 16.

Although the fax, in and of itself, may not show that Rupari knew that the statements were false at the time they were made to Customs, as the statements occurred before the fax, the fax could plausibly show that Rupari discovered that its statements were false after it sent its last response to Customs on July 13, 1998, and that it failed to inform Customs that its previous statements, made just days before, were untrue. Thus, Plaintiff pled fraud with enough particularity to survive Defendant's motion to dismiss.

3. Exhaustion of Administrative Remedies

28 U.S.C. § 2637(d) provides that "[i]n any civil action not specified in this section, the Court of International Trade shall, where appropriate, require the exhaustion of administrative remedies." 28 U.S.C. § 2637(d). If a new level of culpability is first introduced in Court and not at the administrative level, the party against whom the claim is alleged has been prevented from seeking mitigation of the monetary penalty at the administrative level as contemplated by 19 U.S.C. § 1592(b) and 19 U.S.C. § 1618. *United States v. Optrex*, 29 CIT 1494, 1500 (2005) (not reported in federal supplement); *see also* Def.'s Br. at 12.

Defendants charge that Customs failed to exhaust its administrative remedies for Count II, gross negligence, and Count III, negligence, because, although the penalty letters indicated that Customs

alleged negligent and gross negligent violations in the alternative, Customs did not pursue such claims. Def.'s Br. at 11, 14. The court disagrees.

Defendants rely on *Optrex* to support their position. *See Optrex*, 29 CIT at 1500. In *Optrex*, Customs issued a pre-penalty notice which alleged that Optrex was negligent in providing insufficient information in the entry documents to enable Customs to determine the correct classification of its products. *Id.* at 1495. The final penalty claim against Optrex was based on negligence. *Id.* Customs then filed suit on a negligence theory. *Id.* at 1495–96. Subsequently, Customs sought leave of the court to amend its complaint to include penalties for fraud and gross negligence. *Id.* at 1496. The court in *Optrex* denied Customs' motion reasoning that "the statute was designed to give an importer an opportunity to fully resolve a penalty proceeding before Customs, before any action in this Court." *Id.* at 1500–03. In other words, Optrex was denied an opportunity to resolve the fraud and gross negligence claims before the action was filed in this Court, as these claims were not mentioned in the pre-penalty and penalty notices. *Id.* at 1495–1503.

The facts in the instant case are not analogous to those in *Optrex*. *See id.* Unlike in *Optrex*, here, Customs alleged negligence and gross negligence in the alternative in both the pre-penalty and penalty notices:

> Inasmuch as the Government may plead in the alternative in any de novo proceeding before the Court of International Trade, Customs *alternatively alleges that the violation in question occurred as a result of negligence or gross negligence.* (Emphasis added).

Pl.'s Br. Pre-penalty Notice, Ex. 19, at 2; Pl.'s Br. Penalty Notice, Ex. 24, at 18–20. Here, by listing the negligence and gross negligence claims in the notices, Customs put the Defendant on notice that they were pursuing penalties for negligence and gross negligence in the event they could not prove fraud. Customs thereby presented Defendant with the opportunity to resolve the negligence and gross negligence claims at the administrative level.

Defendant cannot say that it was deprived of a chance to mitigate the gross negligence and negligence penalties before Customs commenced this action. Defendant responded to the Pre-penalty notice by letter dated June 8, 2001, in which it argued that it acted in a commercially reasonable manner under the common law standard of care, and that there were several mitigating factors in favor of can-

celling the penalties for gross negligence and negligence. Pl.'s Br. Letter from Becker & Poliakoff to Customs, Ex. 23, at 1–19, June 8, 2001; *see United States v. CTS Holding, LLC*, 39 CIT ____, Slip Op. 15–70 (June 30, 2015) (finding that "Defendant's attempts to resolve the penalty claim before Customs, prior to Plaintiff's bringing this action, demonstrate that Defendant received sufficient, actual notice that the claim sounded in negligence.") Accordingly, Customs afforded Defendant an opportunity to resolve the negligence and gross negligence claims at the administrative level before the action was commenced in this Court. Defendant's own arguments show that it believed Customs pursued penalties for gross negligence and negligence in the event that fraud could not be proven.

As with *Optrex*, Defendant also mistakenly relies on *United States v. Nitek Electronics, Inc.*, 844 F.Supp.2d 1298, 1298 (2012) (Not reported in Court of International Trade Reports), *appeal filed and docketed*, Appeal No. 15–1166 (Fed. Cir. ____). In *Nitek*, the court barred a penalty claim and held that Customs failed to perfect its penalty claim where it sought to recover a penalty "based upon a degree of culpability (negligence) that differs from that alleged at the administrative level (gross negligence)." *Id.* at 1305. In *Nitek* the court also found that "nothing prevented Customs from bringing penalty claims for both negligence and gross negligence in the alternative, as it has done in the past." *Id.* at 1308.

By contrast, in this case, the degrees of culpability alleged in the complaint, (fraud, or in the alternative gross negligence, or negligence) were exactly the same as those alleged at the administrative level (fraud or in the alternative gross negligence, or negligence). *Id.* at 1305. Unlike in *Nitek*, here, Customs brought the negligence and gross negligence claims in the alternative. *See id.* It cannot be said that Customs did not perfect its penalty claim or that Defendants were robbed of an opportunity to resolve the negligence and gross negligence claims at the administrative level. *See id.*

Defendant also contends that the gross-negligence and negligence claims must be dismissed, because Customs failed to disclose all material facts establishing those violations in its Pre-Penalty notice. Def.'s Br. at 14.

In order to bring a section 1592 claim in this Court, several statutory requirements must be met at the administrative level. 19 U.S.C. § 1592 (b)(1). When Customs has reasonable cause to believe there has been a violation of section 1592 it must issue a pre-penalty notice which "disclose[s] all the material facts which establish the alleged violation." *Id.* at (b)(1)(A)(iv).

A violation is grossly negligent where it results from an act or omission done with actual knowledge of or wanton disregard for the relevant facts and with indifference to or disregard for the offender's obligations under the statute. 19 C.F.R. Pt. 171, App. B (C)(2). In the Pre-penalty Notice, Customs wrote that Rupari purchased crawfish from Yupeng Fishery Ltd. in China, knowing that the crawfish originated in China, and prepared invoices and entry documents falsely stating that the crawfish originated in Thailand. Pl.'s Br. Pre-penalty Notice, Ex. 19, at 3. The notice further alleged that this was done to avoid paying antidumping duties in contravention of Rupari's obligations under the statute. *Id.* The court finds that Customs disclosed all material facts which establish gross negligence and it denies Defendant's motion to dismiss the gross negligence claim.

Negligence requires facts that establish that a duty of reasonable care and competence existed and that Defendant failed to exercise reasonable care and competence in making statements or providing information to Customs. 19 C.F.R. Pt. 171, App. B (C)(1). Here, although Customs did not explicitly state that Rupari owed a duty and breached that duty in the Pre-penalty and Penalty notices, clearly, Rupari was adequately apprised of the fact that this negligence claim involved allegations that Rupari breached a duty of reasonable care, as evidenced by Rupari's own arguments against a finding of negligence by Customs at the administrative level:

> Rupari conducted itself in a commercially reasonable manner . . . . [A] general custom, use, or practice by those in the same business or trade may be considered some evidence of what constitutes reasonable conduct in that trade or business . . . . Other domestic buyers of crawfish and other seafood will, if necessary, testify that Rupari's actions were no different than most such other domestic buyers in similar situations.

Pl.'s Br. Letter from Becker & Poliakof to Customs, Ex. 23, at 4–5, June 8, 2001; *see also United States v. Dantzler Lumber & Export Co.*, 16 CIT 1050, 1059, 810 F.Supp. 1277, 1285 (1992) (finding that as long as Defendants were adequately apprised of the scenario of the action, Customs has met the requirement of disclosing all material facts establishing the violation). Thus, the court declines to dismiss the negligence count.

CONCLUSION

For the reasons stated above, Plaintiff's request for leave to amend the Complaint is granted in part and denied in part consistent with this opinion. It is further

ORDERED that Defendant's Motion to Dismiss is DENIED; it is further

ORDERED that Plaintiff's Request for Leave to Amend the Complaint is **GRANTED IN PART AND DENIED IN PART**, consistent with the court's opinion; it is further

ORDERED that Plaintiff shall file an Amended Complaint, consistent with this opinion, no later than August 31, 2015; it is further

ORDERED that Defendants must submit their Amended Answer no later than September 21, 2015; and it is further

ORDERED that Plaintiff and Defendants must submit a joint proposed scheduling order no later than September 28, 2015.

SO ORDERED.

Dated: August 24, 2015
New York, New York

/*s*/ *Nicholas Tsoucalas*
NICHOLAS TSOUCALAS SENIOR JUDGE

Slip Op. 15–95

DUPONT TEIJIN FILMS, et al., Plaintiffs, v. UNITED STATES, Defendant, and TERPHANE, INC., AND TERPHANE, LTDA., Defendant-Intervenors.

Before: Mark A. Barnett, Judge
Court No. 15–00048

OPINION

Barnett, Judge:

Plaintiffs, DuPont Teijin Films, Mitsubishi Polyester Film, Inc. ("Mitsubishi"), and SKC, Inc. ("SKC"), move the court to stay this case pending the outcome of the appeal of the Department of Commerce's ("Commerce") scope determination (the "Scope Ruling") in *Mitsubishi Polyester Film, Inc. v. United States*, No. 13–00062 (filed Feb. 6, 2013). (Pls.' Mot. to Stay ("Mot."), ECF No. 22.) Defendant, the United States, through the United States International Trade Commission ("ITC" or "Commission"), takes no position on the motion. (Def.'s Resp. to Mot., ECF No. 24.) Defendant-Intervenors, Terphane, Inc., and Terphane, Ltda., (together, "Terphane") oppose staying the case. (Def.-Intervenors' Resp. in Opp'n to Mot. ("Opp'n"), ECF No. 25.) For the reasons discussed below, the court grants Plaintiffs' motion.

BACKGROUND AND PROCEDURAL HISTORY

A. Commerce's Scope Ruling and the *Mitsubishi* Litigation

On November 10, 2008, Commerce issued an antidumping duty order on polyethylene terephthalate (PET) film from Brazil, China,

and the UAE. *Polyethylene Terephthalate Film, Sheet, and Strip from Brazil, the People's Republic of China, and the United Arab Emirates*, 73 Fed. Reg. 66,595 (Dep't of Commerce Nov. 10, 2008) (antidumping duty order). On February 22, 2012, Defendant-Intevernors requested a scope ruling from Commerce concerning certain copolymer surface films. On January 7, 2013, Commerce issued the Scope Ruling and found that certain PET film coextruded products manufactured by Defendant-Intervenor Terphane, Ltda., a Brazilian firm, are outside of the scope of the antidumping duty order. *Antidumping Duty Order on PET Film, Sheet, and Strip from Brazil*, A-351–841 (Dep't of Commerce Jan. 7, 2013) (final scope ruling). On February 6, 2013, Plaintiffs Mitsubishi and SKC, U.S. producers of PET film, appealed the determination to this court, initiating the *Mitsubishi* litigation.

B. The Sunset Review

On October 1, 2013, the ITC issued a Notice of Institution for the first five-year review of PET film from Brazil, China, and the UAE ("the Sunset Review"). *Polyethylene Terephthalate Film, Sheet, and Strip from Brazil, China, and the United Arab Emirates*, 78 Fed. Reg. 60,311 (ITC Oct. 1, 2013) (initiation of five-year reviews). In Terphane's responses to the notice, they argued that "Terphane's business strategy emphasizes out-of-scope value-added products and growth in the domestic Brazilian market," and noted that "Commerce's recent scope ruling confirms that several of Terphane's product lines are not subject merchandise." (Mot. Ex. 2.) Soon thereafter, Plaintiffs submitted comments to the ITC, stating that they "are concerned that Terphane's responses to the Commission are predicated on controversial and incorrect legal views regarding the definition of 'subject merchandise,'" and attached a copy of the *Mitsubishi* complaint. (Mot. Ex. 4.) On January 23, 2014, the ITC determined to conduct a full sunset review of the antidumping duty order. *Polyethylene Terephthalate Film, Sheet, and Strip from Brazil, China, and the United Arab Emirates*, Inv. Nos. 731-TA-1131–1132–1134 (ITC Jan. 23, 2014) (explanation of commission determination on adequacy).

In comments subsequently submitted to the ITC, Plaintiffs recommended that the Commission "[i]nstruct Terphane to provide two sets of questionnaire responses, one of which assumes that its Copolymer Surface Films . . . are within the scope of the order," and noted that Plaintiffs currently were challenging the Scope Ruling in *Mitsubishi*. (Mot. Ex. 8.) Nevertheless, the ITC approved questionnaires stating that the Terphane products in question were outside of the scope of

the order. (*See* Mot. Ex. 9.) On January 14, 2015, the ITC issued a final determination, in which it reached affirmative likely injury determinations with respect to China and the UAE, and a negative likely injury determination for Brazil. *Polyethylene Terephthalate Film, Sheet, and Strip from Brazil, China, and the United Arab Emirates*, USITC Pub. 4512, Inv. Nos. 731-TA-1131–1132–1134 (Jan. 2014).

In its analysis, the ITC cumulated imports from China and the UAE, but not from Brazil. *See id.* To support its decision not to cumulate Brazilian imports, the ITC stated:

> Given the additional capacity coming online in Brazil in the reasonably foreseeable future, the Brazilian industry's behavior prior to the imposition of the orders and *its continued interest in the U.S. market for out-of-scope merchandise*, and in light of the relatively low standard for a discernible adverse impact, we do not find that subject imports from Brazil would likely have no discernible adverse impact on the domestic industry if the order were revoked.

Id. at 13–14 (footnote omitted) (emphasis added). The Commission further found that Brazilian imports would face different conditions of competition than Chinese and Emirati imports for the following reasons:

> There is only one Brazilian producer of subject PET film, Terphane Ltda., which has a corporate relationship with its U.S. affiliate, Terphane, Inc.; Terphane, Inc. has control over all PET film sales in the U.S. market by Telphane Ltda., and ensures that no sales of any Terphane products are made to U.S. customers without its approval. As such, the general manager of Terphane, Inc. has effective veto power over imports to the U.S. market by Terphane Ltda., and is responsible for ensuring that any U.S. imports from Brazil are consistent with Terphane's overall coordinated corporate strategy. Terphane's strategy is detailed in its 2015 business planning documents . . . . This strategy calls for (1) a focus on the Brazilian home market and regional export market in Latin America; (2) the maximization of production and sale of value-added and specialty films; (3) investment in research so as to develop new value-added products; (4) seeking relief from dumped imports under the Brazilian antidumping laws; and (5) *being a "niche player" in the North American market by exporting out-of-scope higher value specialty films*.

Id. at 19–20 (footnotes omitted) (emphasis added). In its material injury analysis, the ITC again relied on Terphane's corporate strategy, i.e., that imports from Brazil would focus on out-of-scope merchandise, to find that subject imports from Brazil likely would not have significant negative volume and price effects. *Id.* at 40–41, 43. Together, these findings led the ITC to conclude that "revocation of the antidumping duty order on subject imports from Brazil would not likely lead to a significant adverse impact on the domestic industry" and that "if the antidumping duty order were revoked, subject imports from Brazil would not be likely to lead to continuation or recurrence of material industry to an industry in the United States within a reasonably foreseeable time." *Id.* at 43. Commerce revoked the antidumping duty order for PET film from Brazil on February 6, 2015. *Polyethylene Terephthalate Film, Sheet, and Strip from Brazil, the People's Republic of China, and the United Arab Emirates*, 88 Fed. Reg. 6689 (Dep't of Commerce Feb. 6, 2015) (continuation and revocation of antidumping duty orders).

Plaintiffs filed this suit, contesting the ITC's determination, on February 20, 2015, (*see* ECF No. 1 (Summons)), and filed their Complaint on March 23, 2015, (Compl., ECF No. 5). Of relevance, Count 1 of the Complaint challenges the ITC's cumulation determination because it relied on the Scope Ruling for support, (Compl. ¶¶ 15–16), and Count 3 alleges that the ITC's volume, price effects, impact, and material injury findings were predicated on the erroneous cumulation determination, (Compl. ¶¶ 21–22). Plaintiffs now move to stay the action, pending the outcome of the *Mitsubishi* litigation. (Mot.)

LEGAL STANDARD

A court's power to stay its proceedings "is incidental to the power inherent in every court to control the disposition of the causes on its docket with economy of time and effort for itself, for counsel, and for litigants." *Neenah Foundry Co. v. United States*, 24 CIT 202, 203 (2000) (citation omitted) (quoting *Landis v. N. Am. Co.*, 299 U.S. 248, 254 (1936)); *accord RHI Refractories Liaoning Co. v. United States*, 35 CIT __, __, 774 F. Supp. 2d 1280, 1284 (2011). Whether to stay a case lies "'within the sound discretion of the trial court.'" *RHI Refractories Liaoning Co.*, 35 CIT at __, 774 F. Supp. 2d at 1284 (quoting *Cherokee Nation of Okla. v. United States*, 124 F.3d 1413, 1416 (Fed. Cir. 1997)). When exercising its discretion, the court "'must weigh competing interests and maintain an even balance,' taking into account those of the plaintiff, the defendant, non-parties or the public, and even itself."

Neenah Foundry Co., 24 CIT at 203 (footnote and citations omitted); *accord RHI Refractories Liaoning Co.*, 35 CIT at __, 774 F. Supp. 2d at 1284.

"A court may properly determine that it is efficient for its own docket and the fairest course for the parties to enter a stay of an action before it, pending resolution of independent proceedings which bear upon the case." *Deacero S.A.P.I. de C.V. v. United States*, Slip Op. 15–87, 2015 WL 4909618, at *4 (CIT Aug. 17, 2015) (citation and quotation marks omitted). Without "a showing that there is at least a fair possibility that the stay . . . will work damage to some one [sic] else, there is no requirement" that the movant "make a strong showing of necessity or establish a clear case of hardship or inequity to warrant the granting of the requested stay." *An Giang Agric. & Food Imp. Exp. Co. v. United States*, 28 CIT 1671, 1677, 350 F. Supp. 2d 1162, 1167 (2004) (ellipses in original) (citations and quotation marks omitted). However, the movant "[n]ormally . . . must clearly identify the 'hardship or inequity' in moving forward with the case 'if there is even a fair possibility that the stay . . . will work damage to some one [sic] else.'" *RHI Refractories Liaoning Co.*, 35 CIT at __, 774 F. Supp. 2d at 1284 (footnote omitted) (second ellipses in original) (quoting *Landis*, 299 U.S. at 255).

DISCUSSION

A. Plaintiffs' Arguments

Plaintiffs argue that staying this case until the resolution of *Mitsubishi* will avoid the possibility of conflicting judgments. They urge that this case and *Mitsubishi* "involve a common legal question: whether Telephane's Products are properly within the scope of the antidumping duty order on PET film from Brazil." (Mot. 10.) In *Mitsubishi*, Mitsubishi and SKC are challenging the validity of Commerce's Scope Ruling, while in this case, the ITC's reasoning relied on the Scope Ruling to support its decision not to cumulate Brazilian imports with those from China and the UAE, leading to the negative sunset review determination. Because Commerce is the agency charged with defining the scope of antidumping duty orders, and because the ITC must defer to Commerce's scope rulings when making its own determinations, the court should not proceed with the present case until the conclusion of *Mitsubishi*. (*See* Mot. 10, 12–13.)

Plaintiffs also assert that granting a stay will preserve judicial resources. Because *Mitsubishi* and this case will require the court to determine whether Terphane's products fall within the scope of the antidumping duty order, staying this case until *Mitsubishi*'s conclusion will allow the court to avoid expending resources to resolve the

same issue twice. (Mot. 11, 15.) Plaintiffs further contend that a stay would not harm any of the parties. They note that Commerce already has revoked the antidumping duty order on PET film from Brazil, and that the court has not enjoined U.S. Customs and Border Protection ("Customs") from liquidating Terphane's PET film entries from Brazil. Therefore, neither Terphane nor the government will be injured by a stay. (Mot. 15–17.)

B. Defendant-Intervenors' Arguments

Terphane avers that the court should not grant Plaintiffs' motion because there is no risk of conflicting judgments between this case and *Mitsubishi*. They assert that Plaintiffs did not raise their scope argument before the ITC at the administrative level and, therefore, did not exhaust their administrative remedies. Because of this failure to exhaust, Plaintiffs are precluded from making a scope argument before the court in this matter, and, thus, there is no danger of conflicting judgments. (Opp'n 1–14.) Terphane also invokes Plaintiffs' alleged inability to raise the scope claim to argue that granting a stay will not promote judicial economy or conserve party resources. (Opp'n 14.) Furthermore, they contend that the complexity of trade cases renders them "not conducive to quick judicial review" and counsels against granting a stay. (Opp'n 14 (citation and quotation marks omitted).) Finally, Terphane maintains that a stay will harm them because "any delay to litigation imposes some harm," and "Plaintiffs' motion evinces an intent to cast a shadow and uncertainty over Terphane's commercial activities for as long as possible." (Opp'n 15–16 (citation and quotation marks omitted).)

C. Analysis

The court finds that the various interests of the parties and the court itself support staying this case pending the outcome of the *Mitsubishi* litigation. In *Mitsubishi*, Mitsubishi and SKC, plaintiffs in this case, have appealed the Scope Ruling, which found that certain of Terphane's imports from Brazil are outside the scope of the antidumping duty order. In this action, Plaintiffs' first claim challenges the ITC's decision not to cumulate Brazilian subject imports in reliance on the allegedly unlawful Scope Ruling. (Compl. ¶ 16.) Plaintiffs' third claim challenges the ITC's volume, price effects, impact, and material injury determinations, arguing that, "[h]ad Brazilian subject imports been cumulated with subject imports from China and the U.A.E., the Commission would have reached an affirmative likely material injury determination." (Compl. ¶ 22.) In other words, the ITC's reliance on the Scope Ruling, which underpinned its decision not to cumulate Brazilian subject imports, ultimately led to a nega-

tive injury determination. Thus, the validity of the Scope Ruling is central to both claims. In such circumstances, the court finds that staying this action pending the conclusion of *Mitsubishi* would best conserve the resources of the court and parties, as well as preclude the issuance of conflicting judgments. *See SKF USA, Inc. v. United States*, Slip Op. 12–74, 2012 WL 1999685, at *1 (CIT June 4, 2012) (granting motion to stay because cases raise the same general issue and "the pending litigation . . . is likely to affect the disposition" of one of the plaintiff's claims); *RHI Refractories Liaoning Co.*, 35 CIT __, 774 F. Supp. 2d at 1285; *see also Am. Life Ins. Co. v. Stewart*, 300 U.S. 203, 215 (1937) ("In the exercise of sound discretion[, a court] may hold one lawsuit in abeyance to abide the outcome of another, especially where the parties and the issues are the same." (brackets in original)); *An Giang Agric. & Food Imp. Exp. Co.*, 28 CIT at __, 350 F. Supp. 2d at 1166 (noting that, if "the effect of a stay [is] to narrow and sharpen the issues" in the stayed action, "that point counsels entry . . . of the stay").

Terphane's contention that the court should not grant a stay because Plaintiffs allegedly did not raise the Scope Ruling issue at the administrative level, is premature. Although the court "'shall, where appropriate, require the exhaustion of administrative remedies,'" the court "has discretion with respect to whether to require exhaustion." *SKF USA, Inc.*, 2012 WL 1999685, at *2 (quoting 28 U.S.C. § 2637(d)). The doctrine of exhaustion "serves 'the twin purposes . . . of protecting administrative agency authority and promoting judicial efficiency.'" *Gerber Food (Yunnan) Co. v. United States*, 33 CIT 186, __, 601 F. Supp. 2d 1370, 1377 (2009) (ellipses in original) (citation and quotation marks omitted) (quoting *Richey v. United States*, 322 F.3d 1317, 1326 (Fed. Cir. 2003)). The court finds that ruling on the exhaustion issue at this time would not be a prudent use of the resources of the parties or this court, because the outcome of *Mitsubishi* may render Plaintiffs' Scope Ruling arguments moot. *See NSK Corp. v. United States*, Slip Op. 12–76, 2012 WL 1999641, at *2 (CIT June 4, 2012); *SKF USA, Inc.*, 2012 WL 199685, at *2; *see also Union Steel Mfg. Co. v. United States*, 37 CIT __, __ n.7, 896 F. Supp. 2d 1330, 1336 n.7 (2013) (collecting cases in which "stays have been entered notwithstanding arguments that the plaintiff(s) failed to exhaust their administrative remedies"). The court therefore will grant Plaintiffs' motion notwithstanding the outstanding exhaustion issue.

Finally, Terphane has failed to show that it will suffer any harm other than the extended period of litigation if the court were to grant a stay. Commerce has revoked the antidumping duty order on PET film imported from Brazil, and the court has not enjoined Customs

from liquidating Terphane's entries. *See Polyethylene Terephthalate Film, Sheet, and Strip from Brazil, the People's Republic of China, and the United Arab Emirates*, 88 Fed. Reg. 6689. Consequently, Terphane's imports of PET film currently enter the United States free of any antidumping duty or security requirement. While Terphane argues that "some harm is inherent in any denial of the right to proceed," *Neenah Foundry Co.*, 24 CIT at 205, such effects, however, "are attendant to litigation generally. At most, a stay would (to some extent) prolong them." *An Giang Agric. Food Imp. Exp. Co.*, 28 CIT at __, 350 F. Supp. 2d at 1166. Terphane has not articulated any cognizable harm that would come to it as a result of a stay in this action.

Taking these factors into account, the court finds that staying this case pending the final outcome of the *Mitsubishi* litigation would conserve the resources of the parties and the court, and eliminate the potential for conflicting judgments.

CONCLUSION

For the reasons stated above, the court grants Plaintiffs' Motion to Stay. The court therefore orders this case stayed pending the outcome of the *Mitsubishi* litigation. The parties shall file a joint status report within 14 days of the final resolution of *Mitsubishi*.

Dated: August 26, 2015
New York, New York

/*s*/ *Mark A. Barnett*
MARK A. BARNETT, JUDGE