Slip Op. 06–131

Before: Judge Judith M. Barzilay

CLEO INC, CRYSTAL CREATIVE PRODUCTS, INC., and TARGET CORPORATION, Plaintiffs, v. UNITED STATES, Defendant, and SEAMAN PAPER COMPANY OF MASSACHUSETTS, INC., Defendant-Intervenor.

Consol. Court No. 05–00336
Public Version

[Plaintiffs' Motions for Judgment on Agency Record denied.]

Decided: August 31, 2006

Blank Rome, LLP (*Frederick L. Ikenson*), *Larry Hampel*, and *Roberta K. Daghir*, for Plaintiffs Cleo Inc, and Crystal Creative Products, Inc.

Mayer, Brown, Rowe & Maw, LLP (*Marguerite E. Trossevin*), *Kristy L. Balsanek*, and *James J. Jochum*, for Plaintiff Target Corporation.

Michael D. Panzera, U.S. Department of Justice, Commercial Litigation Branch, Civil Division; (*Mark B. Rees*, *Neal J. Reynolds*, and *James M. Lyons*), U.S. International Trade Commission, Office of the General Counsel, for Defendant.

Collier, Shannon, Scott, PLLC (*Adam H. Gordon* and *Kathleen W. Cannon*), for Defendant-Intervenor.

OPINION

BARZILAY, JUDGE: This action is before the court on Plaintiffs' motions for judgment on the agency record pursuant to USCIT Rule 56.2. The parties contest a final material injury determination issued by an evenly divided United States International Trade Commission ("ITC" or "Commission"), which found an industry in the United States materially injured by reason of imports of certain tissue paper products from the People's Republic of China ("China") already determined by the Department of Commerce ("Commerce") to have been sold at less than fair value ("LTFV") in the United States. The court has jurisdiction pursuant to 28 U.S.C. § 1581(c) (2000). For the reasons set forth below, the court upholds the ITC's determination.

BACKGROUND

This case arises from an ITC investigation instituted on February 17, 2004, by petitioners Seaman Paper Company of Massachusetts, Inc. ("Seaman" or "Defendant-Intervenor"), American Crepe Corporation ("American Crepe"), Eagle Tissue LLC ("Eagle Tissue"), Flower City Tissue Mills Co. ("Flower City"), Garlock Printing & Converting, Inc. ("Garlock Printing"), Paper Service, Ltd., Putney Paper Co., Ltd., and the Paper, Allied-Industrial, Chemical and Energy Workers International Union AFL–CIO, CLC. *See Certain Tissue Paper Products and Crepe Paper Products from China*, 69 Fed. Reg. 8232–01 (Feb. 23, 2004) (initiation notice (prelim.)). The petitioners alleged that domestic industries producing tissue paper and crepe paper were materially injured by reason of dumped imports of tissue paper and crepe paper from China. P.D. 1.[1]

In April 2004, the ITC made an affirmative material injury determination in the preliminary phase of its injury investigation. *Certain Tissue Paper Products and Crepe Paper Products From China*, 69 Fed. Reg. 20,037 (Apr. 15, 2004), P.D. 62A. It found that there were two domestic like products – tissue paper and crepe paper – and performed separate injury analyses for the industries producing these products. *See Certain Tissue Paper Products and Crepe Paper Products from China*, Inv. No. 731–TA–1070 (Preliminary), USITC Pub. 3682 (Apr. 2004), P.D. 70. After the ITC made its preliminary injury determinations, Commerce issued final affirmative LTFV determinations for crepe paper and tissue paper from China on December 3, 2004 and February 14, 2005, respectively. *Notice of Final Determination of Sales at LTFV and Affirmative Final Determination of Critical Circumstances: Certain Crepe Paper from the People's Republic of China*, 69 Fed. Reg. 70,233–01 (Dec. 3, 2004); *Notice of Final Determination of Sales at LTFV: Certain Tissue Paper Products from the People's Republic of China*, 70 Fed. Reg. 7475 (Feb. 14, 2005). The Commission then issued its final determination based on a three-to-three split vote. *See Certain Tissue Paper Products from China*, 70 Fed. Reg. 15,350 (Mar. 25, 2005), P.D. 307. The views of the Commission are published in *Certain Tissue Paper Products from China*, Inv. No. 731–TA–1070B (Final), USITC Pub. 3758 (Mar. 2005) (hereinafter "Final Results"), P.D. 308. The period of investigation ("POI") was July 1, 2003, through December 31, 2003. *See Notice of Final Determination of Sales at LTFV: Certain Tissue Paper Products from the People's Republic of China*, 70 Fed. Reg. at 7476.

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[1] Citations to documents contained in the public administrative record are designated as "P.D.," followed by the document number assigned by the ITC. Citations to documents contained in the business proprietary, confidential administrative record are designated "C.D.," followed by the document number assigned by the Commission. Confidential versions of the ITC's tissue paper views appear at C.D. 518 (majority "Confidential Views") and 519 ("Dissenting Views").

Plaintiffs Cleo Inc ("Cleo"), its wholly owned subsidiary Crystal Creative Products, Inc. ("Crystal"), (collectively "Cleo/Crystal") – domestic producers of tissue paper – and Target Corporation ("Target"), a domestic purchaser of tissue paper, challenge the ITC's tissue paper determination. They appeal the ITC's 1) finding that bulk and consumer tissue paper constitute a single domestic like product; 2) attribution of the increase in Target's imports of consumer tissue paper to dumping despite Target's special requirements for consumer tissue; 3) decision to attribute to dumping the increase in Cleo/Crystal's consumer tissue imports; and 4) analysis of the data on injury and impact.

STANDARD OF REVIEW

The Court will uphold a determination by the Commission unless it is not supported by substantial evidence in the administrative record or is otherwise not in accordance with law. *See* 19 U.S.C. § 1516a(b)(1)(B)(i) (2000). The ITC's determination is "presumed to be correct," and the burden of proving otherwise rests upon the parties challenging the determination. 28 U.S.C. § 2639(a)(1).

"Substantial evidence" is "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion," taking into account the record as a whole. *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 477 (1951) (quotations and citations omitted). " '[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.' " *Matsushita Elec. Indus. Co. v. United States*, 750 F.2d 927, 933 (Fed. Cir. 1984) (quoting *Consolo v. Fed. Mar. Comm'n.*, 383 U.S. 607, 619–20 (1966)); *see Am. Silicon Techs. v. United States*, 261 F.3d 1371, 1376 (Fed. Cir. 2001). That Plaintiffs seeking a review

> can point to evidence of record which detracts from the evidence which supports the Commission's decision and can hypothesize a reasonable basis for a contrary determination is neither surprising nor persuasive. It is not the function of a court to decide that, were it the Commission, it would have made the same decision on the basis of the evidence.

Matsushita, 750 F.2d at 936. Thus, under the substantial evidence standard, the Court may not, "even as to matters not requiring expertise . . . 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." *Universal Camera Corp.*, 340 U.S. at 488; *see also Grupo Industrial Camesa v. United States*, 85 F.3d 1577, 1582 (Fed. Cir. 1996). In sum, the Court "may not reweigh the evidence or substitute its own judgment for that of the agency." *Usinor v. United States*, 28 CIT ___ , ___ , 342 F. Supp. 2d 1267, 1272 (2004).

DISCUSSION

Commerce and the ITC have distinct functions in antidumping proceedings. Upon receipt of a petition, Commerce determines the scope of investigation by "determin[ing] that a class or kind of foreign merchandise is being, or is likely to be, sold in the United States at less than fair value." 19 U.S.C. § 1673(i); *see* §§ 1673a, 1673d. If Commerce finds that subject merchandise is being sold at LTFV, the ITC then must determine whether a U.S. industry is being injured, threatened with injury, or materially retarded by reason of imports of that merchandise. §§ 1673, 1673a, 1673b. First, the ITC determines the scope of the "domestic industry" by defining the "domestic like product" under investigation. *See* 19 U.S.C. § 1677(4)(A). The Commission then makes either negative or affirmative injury determination. *See* 1673d(b). "[O]nly where [Commerce's] and the ITC's determinations are both affirmative," can Commerce issue an antidumping order.[2] *Badger-Powhatan v. United States*, 9 CIT 213, 216, 608 F. Supp. 653, 656 (1985).

A. The ITC's Finding of a Single Like Product

To determine whether an industry in the United States is materially injured or threatened with material injury by reason of imports of the subject merchandise, the Commission first defines the "industry"[3] and the "domestic like product."[4] *See* 19 U.S.C. § 1673(1)–(2). "The Commission's decision regarding the appropriate domestic like product is a factual determination, where the Commission applies the statutory standard of 'like' or 'most similar in characteristics and uses' on a case-by-case basis." *NEC Corp. v. Dep't of Commerce*, 22 CIT 1108, 1110, 36 F. Supp. 2d 380, 383 (1998) (citing *Torrington Co. v. United States*, 14 CIT 648, 652 n.3, 747 F. Supp. 744, 749 n.3 (1990), *aff'd*, 938 F.2d 1278 (Fed. Cir. 1991); *Asociacion Colombiana de Exportadores de Flores v. United States*, 12 CIT 634, 638 n.5, 693 F. Supp. 1165, 1169 n.5 (1988)). "Although the Commission must accept the determination of Commerce as to the scope of the imported merchandise sold at less than fair value, the Commission determines what domestic product is like the imported articles Commerce has identified." *Id.* (citing *Makita Corp. v. United States*, 21 CIT 734, 748, 974 F. Supp. 770, 783 (1997)). Consequently, "Commerce's desig-

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[2] For the purposes of § 1673, subject merchandise refers to "that merchandise upon which both affirmative LTFV sales and material injury determinations have been made." *Badger-Powhatan*, 608 F. Supp. at 656.

[3] "The term 'industry' means 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).

[4] " '[D]omestic like product' means a product which is like, or in the absence of like, most similar in characteristics and uses with, the article subject to an investigation under this subtitle." 19 U.S.C. § 1677(10).

nation of the class or kind of merchandise sold at LTFV does not control the Commission's definition of the industry injured in its sales of like products." *Hosiden Corp. v. Advanced Display Mfrs. of Am.*, 85 F.3d 1561, 1568 (Fed. Cir. 1996).

In identifying a single like product, the ITC "disregards minor differences, and looks for clear dividing lines between like products." *Nippon Steel Corp. v. United States*, 19 CIT 450, 455 (1995) (not reported in F. Supp.). The ITC has employed the following factors in its "like product" analysis: (1) physical appearance, (2) interchangeability, (3) channels of distribution, (4) customer perceptions, (5) common manufacturing facilities and production employees, and where appropriate, (6) price. *See NEC Corp.*, 22 CIT at 1110. These factors are by no means exhaustive.[5]

Target claims that the Commission's analysis in this case rested on the notion that there is a legal presumption that the domestic like product is coextensive with the scope of the imports under investigation and was therefore legally flawed. Target S.J. Mem. 10–11. Cleo/Crystal, on the other hand, argues that the Commission imposed a stringent overlap requirement – "one that tolerates far less 'overlap' in the factors when looking for clear dividing lines between the two like products." Cleo Reply 3. Plaintiffs have not demonstrated how the ITC's analysis is distorted by these supposed presumptions. The ITC expressly refuted that it employed the presumption that the like product definition must be coextensive with the scope of Commerce's LTFV investigation. Def's S.J. Mem. 18–19; *see Acciai Speciali Terni S.p.A. v. United Staes*, 24 CIT 1064, 1065 n.3, 118 F. Supp. 2d 1298, 1300 n.3 (2000) (stating that it is ITC's task to determine "what domestic product or products is like the imported articles Commerce identified.") Plaintiffs also claim that the ITC's finding was not supported by substantial evidence and was not in accordance with law with respect to the six factors that the ITC employed to determine that bulk tissue paper and consumer tissue paper constitute a single like product.[6] As discussed below, the court's review of the adminis-

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[5] Legislative history demonstrates that when Congress tasked the ITC with making injury determinations in antidumping cases, it gave the ITC significant leeway in deciding what constitutes "like products:"

> The ITC will examine an industry producing the product like the imported article being investigated. . . . The requirement that a product be 'like' the imported article should not be interpreted in such a narrow fashion as to permit *minor differences in physical characteristics or uses* to lead to the conclusion that the product and article are not 'like' each other, nor should the definition of 'like product' be interpreted in such a fashion as to prevent consideration of an industry adversely affected by the imports under investigation.

S. Rep. No. 96–249 at 90–91 (1979), *reprinted in* 1979 U.S.C.C.A.N. 381, 476–77 (emphasis added).

[6] Plaintiffs argue that the split among the Commissioners supports their position. This Court has held that "[s]uch a split in the evidence, however, is not fatal to the ITC's determination. It is well-established that there may be substantial evidence on an administra-

trative record leads it to conclude that the ITC's finding of a single like product was supported by substantial evidence and in accordance with law.

1. Physical Appearance

According to the ITC, the

> [s]ubject tissue paper products are produced from rolls of flat tissue paper (*i.e.*, jumbo rolls) and are cut to length sheets that are either white, colored, decorated, or customized in a variety of ways. They are sold either flat or folded and are typically used by businesses as a wrap to protect customer purchases or by consumers to wrap objects, often in conjunction with gift bags. Key performance characteristics include appearance, strength, and durability.

Final Results at 3. The ITC established that "bulk tissue" is "sold in bulk to independent retailers, department stores, specialty stores, catalog stores, cosmetic companies and manufacturers, which typically use the tissue paper in their own businesses, often to wrap customer purchases." Final Results at 6. " 'Consumer tissue' is sold packaged to various retailers (*e.g.*, mass merchants, warehouse discount clubs, specialty stores, party supply stores, drug stores, and grocery stores) for retail sale." Final Results at 6.

The Commission found that bulk and consumer tissue paper share the same general physical characteristics and uses. This position is solidly supported by the following evidence in the record: 1) Both forms of tissue paper are made from flat tissue and consist of lightweight paper with a gauze-like, fairly transparent character, Final Results at 6; Confidential Staff Report at I–5; 2) Consumer and bulk tissue paper come in a variety of grades, colors, designs, dimensions, quantities, and packaging, and both are sold primarily as white or solid color sheets, Confidential Staff Report at I–6–I–9; 3) Consumer and bulk tissue paper may be sold in printed form or undergo specialty treatment in small amounts, Final Results at 6–7; Confidential Staff Report at I–11–I–12, I–22 & Tables I–1–I–2; and 4) Consumer and bulk tissue paper are used for wrapping an item within a box, or bag or as lightweight gift wrap, Final Results at 7; Confidential Staff Report at I–6–I–7.

2. *Manufacturing Processes*

The Commission found a reasonable similarity with respect to the production processes for bulk and consumer tissue paper.[7] *See* Confidential Views at 9; Confidential Staff Report at I–12–I–17, I–23–

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tive record to support two inconsistent determinations." *Siderca, S.A.I.C. v. United States*, 29 CIT ____, ____, 374 F. Supp. 2d 1285, 1298 (2005) (citing *Consolo*, 383 U.S. at 620).

[7] But see the views of the dissenting Commissioners:

I–24 & App. D. Bulk and consumer tissue paper are both made from jumbo rolls of flat paper. Final Results at 6; *see* Tr., *In the Matter of Certain Tissue Paper Products and Crepe Paper Products from China*, Inv. No. 731 – TA – 1070 (Final) (Dec. 2004) at 17, P.D. 239 (hereinafter "Revised Tr.") (testimony of George D. Jones, III, President, Seaman). Producers making both forms of tissue paper reported that production takes place in the same facilities, using overlapping equipment and employees. For example, one producer reported [[ ]], and another reported [[ ]]. Confidential Staff Report at D–4. Bulk and consumer tissue paper are printed on the same presses. Confidential Staff Report at I–15–I–16, I–24 & App. D; Revised Tr. at 18–19, (Mr. Jones), 38–40 (Peter Garlock, President, Garlock Printing).

With respect to manufacturing facilities and processes, Plaintiffs claim that there is a dividing line between the two products, pointing out that nine of twelve of the U.S. producers make only one product. In addition, the two companies that produce both products demonstrate a [[ ]]. Target's S.J. Mem. 20. Notably, Plaintiffs point out that a small number of producers that manufacture both types of tissue paper often produce them on different production lines or with different equipment. Target's S.J. Mem. 20 (Final Results, App. 1, Tab. 1). Finally, Plaintiffs ask the court to consider the fact that Seaman [[ ]] Target's S.J. Mem. 21. Plaintiffs maintain that this agreement "belies" the government and Seaman's position that there is only one like product. Target's S.J. Mem. 21. Nonetheless, as the Commission ultimately found, these factors do not outweigh evidence in the record showing that most producers and importers considered bulk and consumer tissue to be the same or similar products. Confidential Staff Report at I–23–I–24 & App. D.

3. *Customer Perceptions and Interchangeability*

The government admits that the record was mixed regarding consumer perceptions and interchangeability. Indeed, the data is mixed. Seven U.S. producers generally found that bulk and consumer tissue paper were interchangeable, while five found them non-interchangeable. Confidential Staff Report at I–24–I–25 & D–3–D4. [[ ]] indicated that the only similarity between consumer and bulk tissue is the base tissue stock. That company pointed to differences

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> Of twelve producers, only four manufacture both bulk and consumer tissue, and only one of these manufactures significant quantities of both. The evidence indicates that for the minority of firms that manufacture both bulk and consumer tissue paper, both products are produced in the same facilities with common employees and similar processes. Nevertheless, consumer tissue paper requires either different production lines and/or specialized equipment for the distinct packaging. Moreover, at least one large purchaser requires a lengthy design phase for the production of consumer tissue paper.
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> Dissenting Views at 7; C.D. 519, App. 4.

between consumer and bulk tissue paper based on the packaging, labeling, artwork, and folding of paper within packages. Confidential Staff Report at I–24–I–25 & D–3–D4. Eight importers affirmatively denied that there is interchangeability and five stated or suggested that they consider bulk and tissue paper interchangeable. *See* Confidential Staff Report at D–10–D–11.

Further, the Purchaser questionnaire revealed a limited consumer overlap between bulk and consumer tissue paper. Confidential Staff Report D–6–D–7. Out of five purchasers of bulk and consumer tissue paper, two perceived the products purchased as interchangeable, and one distinguished the two merely by size. Confidential Staff Report at D–6–D–7. [[ ]] denied any comparability between the tissue types. Confidential Staff Report at D–7. There is also evidence that many purchasers bought only one form of tissue paper. *See* Confidential Staff Report at D–6–D–7. The data does not reveal a discernible pattern. Because it is not the court's task to make its own evaluation based on the evidence before it, but to find whether the agency's finding has reasonable support in the record, the court will not upset the Commission's finding where sufficient evidence buttresses the agency's conclusion. *See, e.g., NEC Corp.*, 22 CIT at 1111.

4. *Channels of Distribution and Price*

In terms of distribution channels and price, the government concedes that there was only a limited level of overlap between the two types of tissue paper. Confidential Views at 8–9. In fact, consumer tissue paper was sold primarily to retailers in 2003 ([[ ]] percent of such shipments), while most domestic bulk tissue paper sales in 2003 were made to distributors ([[ ]] percent of such shipments). Confidential Staff Report at II–1 & Tables II–1–II–2. Plaintiffs claim that the Commission erred in finding that there was even a limited overlap between bulk and consumer tissue paper in terms of these distribution channels and price. *See* Cleo/Crystal S.J. Mem. 20; Target S.J. Mem. 27–28. However, the record demonstrates some overlap in the channels of distribution: [[ ]] percent of bulk tissue paper sales were made to retailers, the channel in which most consumer tissue paper was sold, while [[ ]] percent of consumer tissue paper sales were made to distributors, the channel in which most bulk tissue paper was sold. Confidential Views at 8–9; Confidential Staff Report at Table II–2.

Plaintiff Cleo effectively argues that this weak overlap reveals flaws in the ITC's prior position in *Folding Gift Boxes from China*, Inv. No. 731–TA–921 (Final), USITC Pub. 3480 (Dec. 2001): that an "overlap in terms of packaging quantities between [certain] . . . two [products is] a significant factor contributing to the blurring of any distinction between bulk and consumer tissue paper." Cleo S.J. Mem. 21 (citing Confidential Views at 10 n.49). Cleo argues that examining the sheet-count overlap "*in the context with the products being*

packaged and the channel of distribution to which they are marked discloses the overlap to be illusory." Cleo/Crystal S.J. Mem. 21. Specifically, Cleo explains that if bulk tissue paper is "overwhelmingly sold" by the ream (480 sheets) packaged in poly bags either as flat sheets or quire-folded sheets, and consumer tissue is usually packaged for sale as a retail item in smaller quantities of sheets (5 to 40 sheets), the overlap is minimal. However, as the ITC established, to the extent that there is an overlap,[8] the blurring in terms of packaging is not illusory, even in the context of different channels of distribution.

The ITC also found that the price of consumer tissue paper was generally higher than that of bulk tissue paper. Confidential Views at 9; Confidential Staff Report at I–19, I–26–I–27. On the other hand, as the Commission noted, the consumer tissue paper prices were more comparable to bulk with respect to larger packaging sizes, suggesting that sheet quantities per package played an important role in explaining price differences. Confidential Views at 9 & n.48; Confidential Staff Report at Table V–5; C.D. 440 at Ex. 4. Finding this overlap significant is a reasonable interpretation of the evidence. *See NEC Corp.*, 22 CIT at 1111.

Plaintiffs argue that the agency deviated from its prior practices, citing to several decisions that involved analogous factual scenarios. For instance, Plaintiffs refer to *Folding Gift Boxes from China*, where the ITC found that certain gift boxes sold to stores to give away to their customers and gift boxes sold to merchants for resale were separate like products. Inv. No. 731–TA–921 (Final), USITC Pub. 3480 (Dec. 2001). *See also Automotive Replacement Glass Windshields from China*, Inv. No. 731–TA–922 (Final), USITC Pub. 3494 (Mar. 2002); *Melamine Institutional Dinnerware from China, Indonesia, and Taiwan*, Inv. Nos. 731–TA–741–743 (Final), USITC Pub. 3016 (Feb. 1997). Plaintiffs argue that in each case, the Commission correctly found a clear division between the markets for consumer or retail goods and similar industrial or non-consumer goods. Drawing parallels between the present case and these prior decisions, Plaintiff asks the court to find the ITC's decision contrary to law because of its failure to adjudicate the case based on "the clear dividing line

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[8] The record shows that there are retail ready packages of seasonal consumer tissue folds with sheet counts between 90–120 sheets and "club packs" containing up to 400 sheets. Thus, while consumer tissue is often sold packaged in smaller quantities than bulk – in quantities ranging from 5 to 40 sheets – it is also often sold in seasonal packages and club packs containing from 90 to 400 (and even more) sheets, which are comparable in size to the packaging in which some bulk tissue paper is sold. Confidential Views at 7; Confidential Staff Report at I–9, I–22 & App. D; Amendment to Staff Report, C.D. 504 at I–10. Furthermore, although bulk tissue paper is usually sold in flat sheets, and consumer tissue paper in folded sheets, bulk tissue paper is also often sold in quire-folded sheets, while consumer tissue paper can be sold in unfolded flat sheet form. Confidential Views at 7; Confidential Staff Report at I–8–I–10.

between the consumer and non-consumer products." *See* Target's S. J. Mem. at 12.

While this argument is appealing at first, there are critical distinctions between the present case and these cases.[9] In addition, when an agency departs from its prior decisions, it must " 'explain the reasons for its departure,' " *Hussey Cooper, Ltd. v. United States*, 17 CIT 993, 997, 834 F. Supp. 413, 418 (1993) (quoting *Citrosuco Paulista*, 12 CIT at 1209), and here the ITC did so by explaining why it did not divide the markets for consumer or retail goods and similar industrial or non-consumer goods. *See* Final Results at 9 n.49; *see also Citrosuco Paulista*, 12 CIT at 1209 ("[T]he Commission's determinations must be based upon an independent evaluation of the factors with respect to the unique economic situation of each product and industry under investigation.").

"In reviewing the Commission's like product findings under the substantial evidence test, it is not the province of the courts to change the priority of the relevant like product factors or to reweigh or judge the credibility of conflicting evidence." *NEC Corp.*, 22 CIT at 1111; *see Nippon Steel Corp. v. United States*, No. 05–1404, 05 –1417, 2006 WL 2290991, at *3 (Fed. Cir. Aug. 10, 2006) (quoting *U.S. Steel Group v. United States*, 96 F.3d 1352, 1357 (Fed. Cir. 1996)) (Commissioners "presumably are selected to be Commissioners based on their expertise in, *inter alia*, foreign relations, trade negotiations, and economics. Because of this expertise, Commissioners are the fact finders in the material injury determination: 'It is the Commission's task to evaluate the evidence it collects during its investigation. Certain decisions, such as the weight to be assigned a particular piece of

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[9] The Commission explicitly explains how it distinguished *Folding Gift Boxes from China* from this case:

> [T]he significant overlap in physical characteristics and uses, and in manufacturing facilities, processes, and employees evident on this record was lacking in *Folding Gift Boxes*. Entire phases of production (*e.g.*, design and collating), involving different processes, facilities, and equipment, were unique to retail boxes as compared to give-away boxes. . . .
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> Final Results at 9 n.49. Similarly, in *Melamine Institutional Dinnerware*, the Commission found that melamine institutional dinnerware and melamine retail ware were different like products based on the fact that 1) there were clear physical appearance and distribution differences between the two products, 2) producers and purchasers uniformly considered them different products, and 3) the parties agreed that they were different like products. USITC Pub. 3016 at 10–13.

In rebutting Plaintiff's position, the government argues that the Commission's like product finding in this case resembles its findings in a number of previous determinations. *See, e.g., Certain Pasta from Italy and Turkey*, Inv. Nos. 701–TA–365–366 and 731–TA–734–735, USITC Pub. 2977 (July 1996) at 8–9 (rejecting argument that dry pasta packaged for sale to "the retail market" and dry pasta packaged in bulk for sale to industrial users were different like products, and noting that similarities in products' basic physical characteristics, end uses, and production processes outweighed differences between products with respect to their packaging, channels of distribution, price, and fact products had only limited degree of interchangeability).

evidence, lie at the core of that evaluative process.' "). Thus, the court must afford deference to the Commission's decision to give a greater weight to the physical characteristics, end use, and production similarities between bulk and consumer tissue paper as opposed to the differences in their distribution channels, pricing and interchangeability, and to uphold the ITC's conclusion that bulk tissue paper and consumer tissue paper constitute a single like product.

B. The Commission's Finding of Material Injury by Reason of Imports

"An affirmative injury determination requires both (1) present material injury 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). The relevant statute provides:

> The Commission shall make a final determination of whether –
> (A) an industry in the United States –
> (i) is materially injured, or
> (ii) is threatened with material injury, or
> (B) the establishment of an industry in the United States is materially retarded,
> *by reason of imports*, or sales (or the likelihood of sales) for importation, of the merchandise with respect to which the administering authority has made an affirmative determination under subsection (a)(1) of this section. If the Commission determines that imports of the subject merchandise are negligible, the investigation shall be terminated.

19 U.S.C. § 1673d(b)(1) (emphasis added). "In general [t]he term 'material injury' means harm which is not inconsequential, immaterial, or unimportant." 19 U.S.C. § 1677(7)(A). When determining the causal connection between imports and material injury, the "ITC is required to consider three factors . . . : 1) the volume of imports, 2) the effect of imports on prices of like domestic products, and 3) the impact of imports on domestic producers of like products." *USX Corp. V. United States*, 11 CIT. 82, 84, 655 F. Supp. 487, 490 (citing 19 U.S.C. § 1677(7)(B) (1982)). In addition, the ITC "may consider such other economic factors as are relevant to the determination regarding whether there is material injury by reason of imports." 19 U.S.C. § 1677(7)(B)(ii).

1. Import Volume Finding

"In evaluating the volume of imports of merchandise, the Commission shall consider whether the volume of imports of the merchandise, or any increase in that volume, either in absolute terms or rela-

tive to production or consumption in the United States, is significant." 19 U.S.C. § 1677(7)(C)(i). The ITC found that the volume of subject imports had been significant during the period examined in absolute and relative terms. It observed a sharp increase throughout the POI, rising from [[ ]] million square meters in 2001 to [[ ]] million square meters in 2002 and [[ ]] million square meters in 2003. Thus, the absolute volume of subject imports increased approximately [[ ]] percent between 2001 and 2003, with the subject imports gaining [[ ]] percentage points of market share during this period. Confidential Views at 23–24. The ITC concluded that the "domestic market share [of the subject merchandise] declined by approximately the amount that subject import market share grew, from 91.0 percent in 2001 to 87.2 percent in 2002 and to 70.9 percent in 2003." Final Results at 17 & Table IV–2. Moreover, "[s]ubject import volume relative to production in the United States increased throughout the POI, rising from [[ ]] percent in 2001 to [[ ]] percent in 2002 and to [[ ]] percent in 2003." Confidential Views at 24.

In its analysis, the Commission considered volume trends for bulk and consumer tissue paper. As the Commission found, the subject imports of bulk tissue paper increased from [[ ]] square meters to [[ ]] square meters between 2001 and 2003. Confidential Views at 24–25. The subject imports of consumer tissue paper increased from [[ ]] square meters to [[ ]] square meters between 2001 and 2003. Confidential Views at 25. Further, between 2001 and 2003, Target's imports of consumer tissue paper increased by [[ ]] square meters, and Cleo/Crystal's imports of consumer tissue paper [[ ]] square meters. Thus, Target and Cleo/Crystal accounted for [[ ]] percent of the total increase in subject import volume during the POI. C.D. 498 (Importer Comparison Data Run Sheet); *see* Confidential Staff Report at IV–4 ("[[ ]] accounted for [[ ]] of subject tissue paper imports from China in 2003."). Importantly, the Importer Comparison Data Run Sheet indicates that Target's share of growth of the consumer tissue paper imports between 2002 and 2003 was approximately [[ ]] percent, and Cleo/Crystal's share about [[ ]] percent. C.D. 498; *see also* Hr'g Tr. 21.

Plaintiffs urge the court to focus on the underlying reasons for increased imports rather than the mere volume of imports. *See* Target S.J. Mem. 31; Cleo/Crystal S.J. Mem. 30–31. They claim that they accounted for the vast majority of the consumer tissue paper imports in 2003 and that their imports were non-injurious because they were not by reason of dumped merchandise. *See* Target S.J. Mem. 31; Cleo/Crystal S.J. Mem. 29–32. Thus, they maintain that the Commission failed to establish the requisite causal nexus between subject imports and the injury to domestic industry required under 19 U.S.C. § 1673d(b).

a. Target's Imports

Target claims that its imports of consumer tissue paper were non-injurious because they "did not displace domestic production." Target S.J. Mem. 31. Citing to several prior cases where the Commission found that imports serving new or expanding markets without displacing domestic production did not have a significant adverse effect, Target claims that it opened and expanded a new market for specialty consumer tissue paper. Target S.J. Mem. 31 (citing, *e.g.*, *Fresh Cut Roses from Colombia and Ecuador*, Invs. Nos. 731–TA–684–685 (Final), USITC Pub. 2862 at 42 (Mar. 1995) (finding that "imports were sold into important new markets and did not significantly displace domestic fresh cut roses in their existing markets")). Since 2001, Target has seen significant growth in a new market for consumer tissue paper "driven by consumers' growing preference for gift bags, [sic] and Target's innovative concept that introduced fully coordinated, mix-and-match color programs." Target S.J. Mem. 32–33 (citing Admin. Tr. at 202–11, P.R. 239). Target explains that consumer tissue paper became part of a coordinated line of gift-wrapping products unique to the company. Target S.J. Mem. 32–33.

Target contends that domestic companies did not have the capacity for the kind of design, color, and quality that Target required. Target S.J. Mem. 34. It explained that domestic producers could not provide it with the specialized collated presentations and packaging that it needs. *See* Revised Tr. at 211–12. Finally, Target maintains that prior to 2004, no domestic industry actually attempted to meet its needs. In 2004, [[ ]] offered to supply Target with consumer tissue paper; however, Target found that [[ ]] did not maintain a design team, which itself would disqualify the company from two of Target's programs. Decl. Deborah Kelley, ¶ ¶ 7–8, Target's Post-Hr'g Br., Att. A (Jan. 12, 2005), C.D. 441 ("For [one of Target's programs], [[ ]] would have to develop design capabilities."). Target claims that the Commission unfairly focused on one transaction between [[ ]] and Target to conclude that Target was purchasing domestic consumer tissue. *See* Final Results at 23. Target's Senior Buyer also affirmed that to her knowledge, "none of the petitioners in this investigation have qualified as vendors to Target for" two of its product programs. Decl. Deborah Kelley, ¶ 2, Target's Post-Hr'g Br., Att. A, C.D. 441. Finally, Target maintains that the Commission also incorrectly considered Target's purchases of *bulk* tissue from certain domestic sources, which it considers "entirely irrelevant to the issue of whether the U.S. industry can meet Target's special requirement for *consumer* tissue." Target S.J. Mem. 35 & n.92 (citing Confidential Views at 34).

The Commission considered Target's claim that it only purchased growing amounts of subject consumer tissue paper imports because the domestic industry was unwilling or unable to meets its demands. It focused on bulk and consumer tissue paper and concluded that the

record demonstrated that Target's tissue paper needs could be met by domestic suppliers. Thus, one domestic producer was [[ ]]. Seaman's Post-Hr'g Br., Ex. 1, Answers to Commission's Questions at 27, C.D. 441; *see also* Confidential Views 33–34. In addition, one domestic supplier reported that [[ ]]. *See* Confidential Staff Report at V–19. Furthermore, although Target claims that it could not source certain specialty paper from the domestic industry, the ITC concluded that "[s]ales of specialty tissue in relation to the overall U.S. market for tissue paper appear small, and the record shows that the domestic industry competes for such sales." Confidential Views at 23; Confidential Staff Report at I–11 & Table I–2. Specifically, in 2003, specialty tissue constituted [[ ]] percent of the domestic industry's U.S. shipments of consumer tissue paper, and [[ ]] percent of importers' U.S. shipments of consumer tissue paper. Confidential Staff Report at I–11. Overall, therefore, the Commission reasonably concluded that Target could not argue that the domestic companies were unwilling to supply Target with tissue paper.[10]

The court " 'must affirm a Commission determination if it is *reasonable* and supported by the record as a whole, even if some evidence detracts from the Commission's conclusion.' In short, we do not make the determination; we merely vet the determination." *Nippon Steel Corp.*, 2006 WL 2290991 at *5 (emphasis added) (quoting *Altx, Inc. v. United States*, 370 F.3d 1108, 1121 (Fed. Cir. 2004)). Although Target's share in the growth of the *consumer* tissue paper imports between 2002 and 2003 was significant (approximately [[ ]] percent), and Target's "new market" theory is appealing, there is also reasonable support in the record that domestic producers could and were willing to meet its needs during the period examined as the ITC found. *See* Confidential Views at 34.

b. Cleo/Crystal's Imports

Cleo/Crystal argues that the majority of Commissioners "did not properly take into account the effect of Cleo/Crystal's supply interruption and subsequent plant closure in 2003, which were in no way due to subject imports, and of Cleo/Crystal's increased, non-injurious imports in 2003, which had become necessary, given the cessation of its domestic production." Cleo/Crystal S.J. Mem. 30. In October 2002, Cleo purchased Crystal, a tissue converter, and simultaneously entered into a renewable supply contract with [[ ]], Crystal's related paper-making company, for tissue stock (or jumbo rolls) to be delivered to Crystal's converting operation before the end of

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[10] Further supporting its position, the Commission explains that "there is no consensus within the industry as to what constitutes 'specialty' tissue paper." Confidential Staff Report at I–11. The Commission cites to several sources buttressing this observation. Confidential Staff Report at I–11–I–12 & nn.56–58.

2003.[11] *See* Cleo/Crystal's Post-Hr'g Br. (Jan. 12, 2005), App. at A–1 & Ex. 1 at 7–8, C.D. 440. However, in 2003, Cleo decided to terminate its production of consumer tissue following "the sudden and unexpected decision" by its supplier not to honor the supply contract and the loss of its supplier of rotogravure printing services. Cleo/Crystal S.J. Mem. 6. As a result, Cleo/Crystal claims that it could neither find an adequate source of roll stock, nor a new rotogravure printing company because only flexographic printing (inherently inferior in quality) was available in the United States. *See* Cleo/Crystal S.J. Mem. 24–25; Confidential Views 20–21. Consequently, Cleo/Crystal decided that its only viable option was to cease domestic production of consumer tissue and to increase imports.[12] *See* Cleo/Crystal's Post-Hr'g Br., App. at A–2, A–4–A–7; Cleo/Crystal S.J. Mem. 8.

Cleo/Crystal argues that instead of addressing this evidence, the majority of Commissioners improperly focused on what they believed Cleo/Crystal should have concluded regarding alternative domestic suppliers. Specifically, the Commission considered [[ ]] a viable supplier of roll stock and decided that Cleo/Crystal's printing needs could have been filled by domestically available flexographic printing. *See* Confidential Views at 20–21.

The parties do not dispute that as a result of its supplier's shutdown in 2003, Cleo/Crystal found itself in need of another supplier, but they disagree on whether Cleo/Crystal's decision to import resulted from the domestic industry's inability to meet its production needs. In parallel, Cleo/Crystal maintains that the cessation of its domestic production necessitated increased imports; thus, the requisite causal link between imports and injury under 19 U.S.C. § 1673d(b) cannot be met. *See* 19 U.S.C. § 1673d(b).

Indeed, in determining whether subject imports were significant under 19 U.S.C. § 1677(7)(C)(i), it is proper to consider the overarching requirement that there be a causal link between imports and injury required by 19 U.S.C. § 1673d(b). The ITC reasonably rejected Cleo/Crystal's claim that it imported significant amounts of subject consumer tissue paper in 2003 *only because* it experienced a raw material supply shortage in that year and the domestic industry could not meet its needs. Confidential Views at 19–21. First, the ITC found that even prior to Cleo's acquisition of Crystal, Cleo was already importing subject tissue paper [[ ]]. Final Results at 14. Cleo imported [[ ]] square meters of subject tissue paper from China in

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[11] As the record showed, Crystal was the largest domestic supplier of tissue paper in the U.S. market through [[ ]], when [[ ]]. Confidential Views at 13. Crystal had acquired its tissue rolls from [[ ]]. Cleo/Crystal S.J. Mem. 6.

[12] In July 2003, [[ ]] purchased Crystal's bulk tissue business, but not its consumer tissue business. That is, [[ ]] purchased Crystal's [[ ]]. *See* Cleo/Crystal's Pre-Hr'g Br. (Dec. 2, 2004) at 14–15 & Ex. 3; C.D. 378, App. 9.

2001 and then [[ ]] square meters in 2002. Final Results at 14; Amendment to Confidential Staff Report at Table III–1 n.3, C.D. 495. The ITC determined that this volume of imports constituted [[ ]] percent of its domestic production in that year. Final Results at 14; Amendment to Confidential Staff Report at Table III–1 n.3, C.D. 495. Thus, the Commission concluded that "Cleo was shifting substantial volumes of its sales to subject imports in 2001 and 2002, well before it experienced any raw materials shortage in 2003." Cleo/Crystal S.J. Mem. 30–31.

The Commission also found some evidence that, prior to the acquisition of its tissue paper operations by Cleo, Crystal believed that the subject imports were harming its tissue paper operations. Confidential Views at 19; *see, e.g.*, Revised Hr'g Tr. at 26–27 (Ted Tepe, Vice President, Seaman). In 2001, Crystal even sought legal advice concerning the possibility of filing an antidumping petition against the subject imports. Confidential Views at 19. In addition, at that time, Crystal's investment bankers also reported that [[ ]] Cleo Pre-Hr'g Br. Ex. 2 Tab. 5 at 41, C.D. 378 (excerpt from [[ ]] report). These pieces of evidence reasonably support the ITC's conclusion that Cleo/Crystal contemplated shifting its paper tissue supply from the United States to China because it "viewed low-priced imports as a significant source of competition." Confidential Views at 19.

The Commission's finding that there was a viable domestic source of tissue paper also is supported by the record. The ITC considered [[ ]] because [[ ]]. Amendment to Confidential Staff Report at IV–8 n.24, C.D. 495. This evidence led the Commission to conclude that "Cleo was more interested in continuing to shift its tissue paper supply overseas than it was in seeking domestic sources of raw materials." Cleo/Crystal S.J. Mem. 31.

Similarly, the Commission's rejection of Cleo's claim that it began purchasing subject imports because it lost its rotogravure printing company has support in the record. First, the Commission found that "state-of-the-art flexographic printing, for which there is ample domestic capacity, meets quality requirements of the tissue paper industry." Confidential Views at 20–21 (citing [[ ]], USCIT Tel. Int. (Jan. 31, 2005), C.D. 481; Revised Hr'g Tr. at 40–41); *see* Revised Hr'g Tr. 84 (testimony of Mr. Garlock, President, Garlock Printing & Converting, Inc.) ("[W]e actually looked at Target's current tissue line and found that we could print just about any one of those designs flexographically."). The Commission also established that rotogravure printing, albeit of a slightly inferior quality than one available in China, was available in the United States. Confidential Views at 21 (citing Confidential Staff Report at IV–8); *see* [[ ]], USCIT Tel. Int. (Jan. 31, 2005).

In this case, the Commission gave more weight to the testimony and assertions proffered on behalf of certain domestic companies, such as [[ ]] and [[ ]], than those of Cleo/Crystal and Target. How-

ever, the court cannot re-evaluate evidence in this case. *See U.S. Steel Group*, 96 F.3d at 1357 ("It is the Commission's task to evaluate the evidence it collects during its investigation. Certain decisions, such as the weight to be assigned a particular piece of evidence, lie at the core of that evaluative process."). In particular, this Court cannot second-guess the ITC's credibility determinations unless there is evidence undermining those determinations. *See Nippon Steel Corp.*, 2006 WL 2290991, at *9 ("The assessment of the proper weight to accord to testimony is within the role of the Commission, not this court and not the Court of International Trade.").[13]

Both Cleo/Crystal and Target advanced rigorous arguments concerning the significance of their imports and their impact on the domestic industry. The Importer Comparison Data Run Sheet to a large extent supported their respective positions because Target's share of the growth of consumer tissue paper imports between 2002 and 2003 was approximately [[ ]] percent, and Cleo/Crystal's share about [[ ]] percent. *See* C.D. 498; *see also* Ct. Hr'g Tr. 21. The court acknowledges that business judgment played a significant role in the companies' decision to source their needs from China; however, the court is constrained by its standard of review to uphold the ITC's finding with respect to the significance of imports. *See Nippon Steel Corp.*, 2006 WL 2290991 at *5.

2. The Effect of Subject Imports on Domestic Prices

The statute further provides that in evaluating the price effects of subject imports, the Commission shall consider whether

> (I) there has been significant price underselling by the imported merchandise as compared with the price of domestic like products of the United States, and (II) the effect of imports of such merchandise otherwise depresses prices to a significant degree or prevents price increases, which otherwise would have occurred, to a significant degree.

19 U.S.C. § 1677(7)(C)(ii). The significance of underselling need not be based on a finding that underselling actually suppressed or de-

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[13] During oral argument, the government advanced certain interpretations that it did not argue in its brief. It argued that the Commission's rejection of Cleo/Crystal's argument that at the time Cleo/Crystal made a business decision to import roll stock paper the domestic industry could not supply its demands was based on a credibility determination, which this Court cannot second-guess. Ct. Hr'g Tr. 39. The government explained that the Commission looked at the evidence and found roll stock available from domestic producers, specifically [[ ]], and concluded that Cleo/Crystal was wrong. Ct. Hr'g 39:2–14. Likewise, the government maintains that Cleo/Crystal's claim that the rotogravure printing could not be adequately replaced with flexographic printing was undermined by the Commission's credibility determination that there was not such a significant difference in quality between the two printing processes. Ct. Hr'g Tr. 41.

pressed domestic prices. *See Altx, Inc. v. United States*, 25 CIT 1100, 1109, 167 F. Supp. 2d 1353, 1365–66 (2001).

The ITC considered pricing data for four tissue paper products. Product 1 was white tissue paper; product 2, solid color tissue paper (other than specialty tissue paper products); product 3, combination (four print and four solid color) tissue paper; and product 4, white bulk tissue. Confidential Views at 26; Confidential Staff Report at V–7, V–10 – V–12 Table V–2–V–5. The ITC found that subject imports undersold the domestic product by comparing data on domestic and importer prices for all four products. Confidential Views at 27. It found that the "[s]ubject imports undersold the domestic product in 33 quarters [out of 45] by a combined weighted average of [[ ]] percent." Confidential Views at 27 (citing C.D., P.D. at Table V–7 (as revised by Mem. INV–CC–019)). It found that "the pricing data show[ed] some evidence of price depression, but [did] not demonstrate significant price effects of imports on domestic prices." Confidential Views at 28. The Commission concluded that significant underselling by subject imports led to substantial declines in the domestic industry's market share.[14] Confidential Views at 28–30.

Plaintiffs argue that the ITC's finding of underselling is not supported by substantial record evidence. Cleo/Crystal maintains that the ITC improperly combined price comparison data for all four products. Cleo/Crystal S.J. Mem. 33; *see* Target S.J. Mem. 39. Specifically, Cleo/Crystal claims that considering the data for each product separately shows no underselling. With respect to product 1, Cleo/Crystal's argument is straightforward. The majority found underselling in six of 15 quarterly comparisons, with margins ranging from [[ ]] percent to [[ ]] percent, Confidential Views at 27, indicating that underselling did not occur in nine of 15 comparisons. Regarding product 2, however, Cleo/Crystal's argument is tenuous. The Commission found that subject imports undersold the domestic product in 12 out of 13 comparisons, with quarterly average margins ranging from [[ ]] percent to [[ ]]. Confidential Views at 27. Cleo/Crystal claims that this finding is unsupported by substantial evidence because, as found by the dissenting Commissioners:

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[14] The large transfer of market share from domestic to Chinese producers is further borne out by the fact that eleven of twelve responding purchasers reported that since January 2001 they had shifted purchases from U.S. producers to Chinese importers. Three of nine stated that price was the reason for the shift, while one of seven stated that, since January 2001, U.S. producers reduced their prices in order to compete with prices of Chinese imports.

Confidential Views at 29. In further support of the ITC's position, [[ ]], reported that [[ ]]. Confidential Views at 29. Similarly, [[ ]]. Confidential Views at 29; Confidential Staff Report at Table V–9, V–19 – V–20, V–22.

> The [[ ]]. In contrast, [[ ]]. Therefore, the limited comparisons preclude a probative analysis of the price data for product 2.

Dissenting Views at 24. Explaining that the tissue paper industry offers discounts based on increased purchasing volume, Confidential Staff Report at V–3, Cleo/Crystal maintains that "[[ ]]" Cleo/Crystal S.J. Mem. 34. However, looking at the relevant comparison table, the numbers for U.S. sales to retailers are consistently higher than the numbers for the Chinese counterparts. *See* Confidential Staff Report at V–10 Table V–3. In addition, the quantity of U.S. sales to retailers declined, while the quantity of Chinese sales to retailers increased over the period examined. *See* Confidential Staff Report at V–10 Table V–3. Thus, while Plaintiff's argument is plausible, it fails to account for the entire data as it is subdivided with respect to retailers and distributors.

Regarding product 3, Plaintiff is correct that the U.S. sales data is available only for four quarters, making the comparison less meaningful. *See* Confidential Staff Report at V–11 Table V–4. As to product 4, Plaintiff concedes that the data supports the ITC's finding of underselling. Cleo/Crystal S.J. Mem. 35; *see* Confidential Staff Report V–12 Table V–5.

While viewing products 1 and 3 separately weakens the ITC's finding, the combined data supports its determination. As explained by the government, Plaintiffs appear to believe that the Commission's "aggregated" analysis involves making underselling comparisons between pricing products. The Commission, however, generally totals the number of underselling and overselling analyses for its pricing products in its analysis "in order to assess whether, as a whole, its price comparison data reflects consistent or prevalent price underselling throughout the market, as evidenced by the underselling data for its comparison products." Gov't Resp. 37; *see Altx, Inc.*, 167 F. Supp. 2d at 1365 ("The significance of underselling in an investigation will necessarily depend on the particulars of the product and industry at issue, not necessarily on the import of certain percentages understood in the abstract."); *see also Citrosuco*, 704 F. Supp. at 1087–88 (1988) ("[T]he Commission's determinations must be based upon an independent evaluation of the factors with respect to the unique economic situation of each product and industry under investigation.").

3. Impact on Affected Domestic Industry

In examining "the impact of imports of [subject] merchandise on domestic producers of domestic like products, but only in the context of production operations within the United States," 19 U.S.C. § 1677(7)(B)(i)(III),

> the Commission shall evaluate all relevant economic factors which have a bearing on the state of the industry in the United States, including, but not limited to –
>
> (I) actual and potential decline in output, sales, market share, profits, productivity, return on investments, and utilization of capacity,
> (II) factors affecting domestic prices,
> (III) actual and potential negative effects on cash flow, inventories, employment, wages, growth, ability to raise capital, and investment,
> (IV) actual and potential negative effects on the existing development and production efforts of the domestic industry, including efforts to develop a derivative or more advanced version of the domestic like product, and
> (V) in a proceeding under part II of this subtitle, the magnitude of the margin of dumping.
>
> The Commission shall evaluate all relevant economic factors described in this clause 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).

The Commission concluded that subject imports of tissue paper had a significant impact on the domestic industry. In its analysis, the Commission examined the production, trade, and financial data of the domestic industry and concluded that the industry's condition declined considerably during the period examined. Between 2001 and 2003, domestic output fell [[ ]] percent, capacity utilization [[ ]] percent, domestic shipments [[ ]] percent, and net sales [[ ]] percent. Confidential Views at 30–32. The number of workers employed by the industry fell from [[ ]] to [[ ]] in the same period, and total wages declined as well. Confidential Views at 31. In addition, the industry's profitability levels simultaneously fell, with operating income falling from [[ ]] to [[ ]] and operating profit margins falling from [[ ]] percent to [[ ]] percent. Confidential Views at 32.

Cleo/Crystal claims that its decision to "shutdown [its plant] was not due to subject imports and, as a consequence, it would be a fatal analytical error to combine Cleo/Crystal's various declining business and financial indicators with the indicators of other domestic producers" in evaluating the impact of subject imports domestic industry. Cleo/Crystal Reply 12. Specifically, it argues that "[i]n the consumer segment, the [[ ]]." Cleo/Crystal S.J. Mem. 38 (citing Confidential Staff Report at C–8, Table C–3A, C–7, Confidential Staff Report). For the same reason, Plaintiff invites the court to ex-

clude Cleo/Crystal's imports data from the [SG&A[15] values for consumer and all tissue paper to show that SG&A values did not decline contrary to the ITC's findings]. Cleo/Crystal Reply 12. Furthermore, Cleo/Crystal suggests that the Commission disregarded that the "[[ ]] not imports." Cleo/Crystal Reply 12.

Plaintiff's argument for exclusion of its data from the Commission' calculations is faulty because it is based on a circular logic. Only if the court rejects the ITC's reasonable finding that Cleo/Crystal's imports were significant does that argument stand. As addressed earlier, the Commission reasonably found that record evidence did not support Cleo's claim that it was unable to replace its lost raw material supply or to obtain printing services domestically. Confidential Views at 33–34. This finding, in turn, legitimizes the ITC's decision to include *all* domestic producers and resellers in its calculations, including Cleo/Crystal. Further, the Commission found that the industry's increased costs during the POI did not account for the industry's declining sales and production volumes. *See* Gov't Resp. 39; Confidential Views at 34. Instead, sales declines exacerbated "the increased unit costs of the industry, which grew as production and sales volumes fell." Gov't Resp. 39 (citing Confidential Views at 34). Plaintiffs do not point to any evidence to contradict this conclusion.

Plaintiffs also argue that the ITC was incorrect in combining bulk tissue and consumer tissue data in analyzing the domestic industry trends. They insist that "even if, *arguendo*, there were only one like product, there are two distinct market segments in which consumer and bulk tissue paper are sold." Cleo/Crytal S.J. Mem. 37; *see* Cleo Reply 13 (arguing that "segment analysis" would be appropriate because Cleo/Crystal's operations were separated in terms of its bulk tissue and customer tissue production). The ITC considered separately the volume trends and pricing trends for bulk tissue paper and consumer tissue paper products in its analysis "when appropriate." Confidential Views at 17 n.84; *see e.g.*, Confidential Views at 17 (demand), 22–23 (substitutability). The ITC found that the two forms of tissue paper were not sufficiently differentiated to warrant treating them as constituting different market segments. Confidential Views at 17 n.84. The ITC's task is to assess whether the industry "as a whole" has been injured by the subject imports. *See Copperweld Corp. v. United States*, 12 CIT 148, 165–66, 682 F. Supp. 552, 569–70 (1988) (finding that language in 19 U.S.C. § 1673d(b)(1) and § 1677(4)(A) (1980 & Supp. 1986) "makes manifestly clear that Congress intended the ITC [sic] determine whether or not the domestic industry (as a whole) has experienced material injury due to the imports"); *Nippon Steel Corp.*, 19 CIT at 471 (holding that ITC is

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[15] Selling, General, and Administrative Expenses. Labor cost and SG&A are considered to be non-import causes of stress when evaluating industry conditions. *See* Cleo/Crystal S.J. Mem. 37.

not required to conduct specific segmented market analysis). Plaintiffs did not demonstrate how the ITC's decision not to segment the markets for material injury is unsupported by record evidence or contrary to law.

Finally, Plaintiffs challenge the ITC's use of one set of financial data over another for [[ ]] in evaluating the domestic industry's condition. [[ ]] first submitted its 2003 financial data for the fiscal year ending in June. *See* Confidential Staff Report at VI–1 n.1. That data did not capture [[ ]] purchase of [[ ]] bulk business in July 2003. *See* Target Resp. Letter 1; Confidential Staff Report App. C. Thus, while [[ ]] bulk sales volume disappeared from the data, [[ ]] corresponding increase in production of bulk tissue does not appear in this data submitted by [[ ]]. Target Resp. Letter 1; Confidential Staff Report App. C. The ITC requested that the [[ ]] submit data for fiscal year 2004. *See* Confidential Staff Report at VI–1 n.1. The ITC then prepared two sets of charts indicating trends in the domestic industry's financial data from 2001 to 2003 using two different sets of data. The first set of charts incorporates the three years of financial data for [[ ]] ending with fiscal year 2003 results. *See* Confidential Staff Report Tables VI–1–VI–3 & App. C; see Gov't Resp. Letter 3. The second set covers the three years of financial data for [[ ]] ending with its fiscal year 2004 results. *See* Confidential Staff Report App. E. Plaintiffs claim that the ITC should have used the 2004 fiscal year data in its evaluation of the industry's performance.

In its analysis, the ITC considered both sets of data. *See* Confidential Views at 32 n.165. Importantly, both sets show notable declines in the industry's conditions during the POI. For example, looking at the first set of data, the domestic industry's net sales decreased from [[ ]] square meters in 2001 to [[ ]] billion square meters in 2003, or [[ ]]. *See* Confidential Staff Report Table C–1. The second set of data indicates a decline from [[ ]] square meters in 2001 to [[ ]] square meters in 2003, or [[ ]] percent. *See* Confidential Staff Report Table E–1. Remand would be proper if the ITC relied on erroneous or incomplete data. *See, e.g., Int'l Imaging Materials, Inc. v. U.S. Int'l Trade Comm'n*, Slip Op. 06–11, at 34–35, 2006 WL 270156 at **11–12 (CIT Jan. 23, 2006). However, other comparisons, such as profits and operating income, indicate that Plaintiffs did not demonstrate that the use of the alternative data for [[ ]] would have changed the ITC's conclusion that there were declines in domestic industry performance. *Compare* Confidential Staff Report Table C–1, *with* Confidential Staff Report Table E–1. Plaintiffs sidestep the ITC's finding that bulk and consumer tissue paper were part of the same like product, and pinpoint significant differences in numbers confined to the industry's bulk tissue paper operations. Plaintiffs do not show how the use of 2004 fiscal year data for [[ ]] would have changed the observed downward trends in operating performance of

the domestic industry.[16] Even if significant bulk shipments were included in the financial data, the ITC's ultimate conclusion has sufficient support in that alternative data. *See* Confidential Staff Report Table E 1.

The use of the 2004 fiscal year data for [[ ]]. *See* Cleo/Crystal Resp. Letter 2; Confidential Staff Report at E–4 Table E–2. Capitalizing on this trend, Cleo/Crystal more specifically argued that this data, combined with consumer tissue data, covering all domestic producers except for Cleo/Crystal, would show positive trends. Cleo/Crystal Resp. Letter 3. The court rejects this argument because it is based on the premise that Cleo/Crystal should have been excluded from the investigation as a domestic producer and importer without sufficient evidence to support it.

The court finds that substantial evidence supports the Commission' finding that the domestic industry's performance declined over the period examined. The ITC determined that the domestic industry was materially injured based on declines in the industry's production, capacity utilization, shipments, sales, employment, and profitability levels – all indicating that the subject imports had a significant adverse impact on the domestic industry.

CONCLUSION

Having reviewed the underlying record, this court concludes that the Commission's determination that consumer and bulk tissue paper constitute a single like product and that the domestic industry was injured as a result of increased imports of the subject merchandise is supported by substantial evidence and otherwise in accordance with law.

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[16] The court rejects Defendant and Defendant-Intervenor's interpretation of USCIT Rules 81(i) and 56.2(c) that Plaintiffs raised this argument before the court in a belated fashion. *See* Gov't Resp. Letter 4; Seaman Resp. Letter 1. Initially, Cleo/Crystal brought the issue to the court's attention with respect to the dissenting Commissioners' findings, arguing that their analysis of the bulk tissue industry was erroneous due to its use of the 2003 fiscal year financial data for [[ ]]. Thus, if the court were to adopt Plaintiffs' position that consumer and bulk tissue paper be analyzed separately, the court would have to use the 2004 fiscal year data for [[ ]]. *See* Cleo/Crystal S.J. Mem. 39 n. 102. Plaintiffs further pursued this argument and its variations in Cleo/Crystal's Reply Brief and during oral argument.

The parties do not dispute that this issue was properly raised in the administrative proceedings. *See* Target Resp. Letter 1–2; Cleo/Crystal Resp. Letter 1–2; Seaman Resp. Letter 2. Cleo/Crystal first raised the financial data issue in their post-hearing brief. *See* C.D. 422, at 10–12. After [[ ]] submitted financial data for fiscal year 2004 and the ITC reviewed it deciding to use the 2003 fiscal year data, Cleo/Crystal again raised the issue in its Final Comments. *See* Cleo/Crystal's Final Comments at 10–12, C.D. 514.

Slip Op. 06–133

SKF USA INC, SKF FRANCE S.A., and SARMA, Plaintiffs, v. UNITED STATES, Defendant, and TIMKEN U.S. CORPORATION, Defendant-Intervenor.

Before: WALLACH, Judge
Court No.: 03–00490
PUBLIC VERSION

[United States Department of Commerce's Final Results of Redetermination is Affirmed in Part and Stricken in Part.]

Dated: September 1, 2006

Steptoe & Johnson, LLP, (*Herbert C. Shelley*, *Alice A. Kipel*, and *Susan R. Gihring*) for Plaintiffs.

Peter D. Keisler, Assistant Attorney General; *David M. Cohen*, Director; *Jeanne E. Davidson*, Deputy Director; *Stephen C. Tosini*, Trial Attorney, U.S. Department of Justice, Civil Division, Commercial Litigation Branch; and *Rachael E. Wenthold*, Attorney-Advisor, Office of Chief Counsel for Import Administration, U.S. Department of Commerce, of Counsel, for Defendant.

OPINION

Wallach, Judge:

I
Introduction

This matter comes before the court following the court's order of August 24, 2005, remanding this matter to the United States Department of Commerce ("the Department" or "Commerce") to recalculate its antidumping duty margin for SKF USA Inc., SKF France S.A., and Sarma (collectively "SKF") in its administrative determination in *Ball Bearings and Parts Thereof from France, Germany, Italy, Japan and Singapore: Final Results of Antidumping Duty Administrative Reviews, Recission of Administrative Review in Part, and Determination Not to Revoke Order in Part*, 68 Fed. Reg. 35,623 (June 16, 2003) ("*Final Results*"). With regard to its recalculation of SKF's margin, Commerce's Remand Redetermination is found to be supported by substantial evidence and in accordance with law because Commerce properly supported its finding after conducting a re-verification of SKF's facilities in France. As a result, the portion of Commerce's Remand Redetermination recalculating SKF's margin is affirmed. Because the remainder of the Remand Redetermination attempts to improperly reargue issues already decided by this court, misstates the court's prior opinion, misconstrues its holding, and mischaracterizes the evidence before the court, it is hereby stricken. This court has jurisdiction pursuant to 28 U.S.C. § 1581(c) (2003).

II
Background

Plaintiffs are producers and exporters of ball bearings subject to the antidumping duty order on ball bearings and parts thereof from France published on May 15, 1989. *Antidumping Duty Orders: Ball Bearings, Cylindrical Roller Bearings, Spherical Plain Bearings, and Parts Thereof from France*, 54 Fed. Reg. 20,902 (May 15, 1989). On February 7, 2003, Commerce published its preliminary results of administrative review for the May 1, 2001, to April 30, 2002, period of review ("POR"). *Ball Bearings and Parts Thereof from France, Germany, Italy, and Singapore: Preliminary Results of Antidumping Duty Administrative Reviews, Partial Rescission of Administrative Reviews, and Notice of Intent to Revoke Order in Part*, 68 Fed. Reg. 6404 (February 7, 2003).

In the *Final Results*, Commerce held that because SKF and Sarma were unprepared at verification to segregate sales by market or by class or kind of subject merchandise Commerce was therefore unable to verify the accuracy of the reported information. Defendant's Opposition at 6. As a result, Commerce found that SKF did not act to the best of its ability and assigned a margin of 10.08 percent based on partial adverse facts available ("AFA") in the *Final Results*. Plaintiffs' Motion for Judgment Upon the Agency Record ("Plaintiffs' Motion") at 4.

The parties filed briefs on this matter in which Plaintiffs claimed they had offered to provide all necessary documentation at verification and were fully prepared to do so, and the Defendant directly disputed that allegation saying that at verification Plaintiffs' representatives had said they were unable to obtain or provide the necessary documentation. The parties to this proceeding were notified via an in-court status conference held on September 10, 2004, that the court intended to hold a hearing on this matter. The court held its hearing on November 19, 2004, to determine the accuracy of the directly conflicting factual statements made by the parties in their initial briefs. The court issued its order on August 24, 2005, instructing Commerce to re-evaluate and re-examine its decision by providing evidentiary support for utilizing partial adverse facts available, unrelated to SKF's alleged failure to offer evidence at verification, or in the alternative to re-calculate SKF's margin using SKF's own information. Commerce filed its Final Results of Redetermination on December 20, 2005, and recalculated SKF's margin as 6.19 percent for the period of review of May 1, 2001 to April 30, 2002. U.S. Dep't of Commerce, Final Results of Redetermination at 1 (December 20, 2005) ("Remand Redetermination"). Plaintiffs filed their Response on January 23, 2006, and Defendant filed its Reply on June 12, 2006. Oral argument was held on August 24, 2006.

III
Arguments

Commerce states that it has reconsidered its partial adverse facts available determination for SKF by reopening the record and allowing SKF to supply supporting documentation to re-calculate the antidumping duty margin. *Id*. Commerce further states that it complied with the court's order albeit under protest. *Id*.

Plaintiffs agree that Commerce properly recalculated SKF's margin without the use of partial adverse facts available and concur with the result of the Remand Redetermination, but not with much of its content. Plaintiffs' Comments on the Final Results of Redetermination ("Plaintiffs' Comments") at 1.

IV
Applicable Legal Standard

The Court of International Trade, when reviewing a challenge to the Department's final results of administrative review, will uphold Commerce's determinations 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) (2003). Substantial evidence is "more than a mere scintilla. It means 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, 71 S. Ct. 456, 459, 95 L. Ed. 456, 462 (1951) (quoting *Consol. Edison Co. v. NLRB*, 305 U.S. 197, 229, 59 S. Ct. 206, 217, 83 L.Ed. 126 (1938)). Substantial evidence has been defined by the courts as "something less than the weight of the evidence, and the possibility of drawing two inconsistent conclusions from the evidence does not prevent an administrative agency's finding from being supported by substantial evidence." *Consolo v. Fed. Mar. Comm'n*, 383 U.S. 607, 620, 86 S. Ct. 1018, 1026, 16 L. Ed. 2d 131 (1966). The court, however, "may not substitute its judgment for that of the [agency] when the choice is 'between two fairly conflicting views, even though the court would justifiably have made a different choice had the matter been before it de novo.' " *American Spring Wire Corp. v. United States*, 8 CIT 20, 22, 590 F. Supp. 1273, 1276 (1984) (quoting *Universal Camera*, 340 U.S. at 488).

V
Discussion

A
Commerce Properly Recalculated SKF's Antidumping Duty Margin in its Remand Redetermination

Commerce reopened the administrative record and conducted a second verification of SKF and Sarma on September 28–29, 2005.

Remand Redetermination at 4. Upon completion of the verification, Commerce recalculated SKF's margin using the company's own data and without the application of partial facts available. *Id*. According to Commerce the verification of Sarma's data required numerous steps and several personnel in order to demonstrate how Plaintiff compiled and reported its sales data. *Id*. at 11.

Commerce states in its Remand Redetermination that it disagrees with the court's August 24, 2005, Opinion. *Id*. at 4. It challenges the court's conclusions regarding Commerce's conduct during its administrative review and objects to the extra-record affidavits submitted by SKF for the court's review. *Id*. at 5. Defendant also states in its Remand Redetermination that it disagrees with what it calls "the court's 'verification test' " during the evidentiary hearing held on November 19, 2004. *Id*. at 12–13.

SKF agrees that Commerce properly verified Sarma's sales and properly recalculated SKF's margin. Plaintiffs' Comments at 2–3. SKF, however, disagrees with the Defendant's characterization of the proceedings before the Court of International Trade. *Id*. at 5–6.

B
Commerce May Not Relitigate This Matter

Defendant believes that it can reargue issues before the Court of International Trade based upon *dicta* in *Viraj Group, Ltd., v. United States*, 343 F. 3d 1371, 1376 (Fed. Cir. 2003). There, the Federal Circuit, addressed the issue of whether the government was a non-prevailing party and could assert a case or controversy. *Id*. In doing so, the court noted that "[e]ven though technically the prevailing party . . . the government prevailed only because it acquiesced and abandoned its original position, which it had zealously advocated, and adopted under protest a contrary position forced upon it by the court. Thus, in substance, the government is truly the non-prevailing party in this case." *Id*.

The government indicated at oral argument that it takes the Federal Circuit's reference to "zealous advocacy" as not only a predicate to preserving its rights of appeal, but as a virtual license to reargue and reject issues already decided by this court. Although the Defendant, like many litigants, may wish to re-argue and re-litigate issues already decided, it may not do so, without the prior permission of the court, at the trial court level.

This court simply does not read *Viraj* in the fashion asserted by the Government, nor does it understand the law to require reargument for purposes of preserving an appellate right. Rather, a party may preserve an issue by stating an objection or offering a document on the record. *See, e.g., Union Carbide Chem. & Plastics Tech. Corp. v. Shell Oil Co.*, 425 F. 3d 1366, 1374 (Fed. Cir. 2005) ("counsel . . . informed the district court that he 'would like to just read these [issues] into the record for purposes of preserving issues for appeal.'

After the district court allowed [counsel] to make his record, he objected to the jury instructions by requesting insertion of [specific] language. . . . Because [the party] sufficiently raised specific objections before jury deliberations, [it] did not waive its objections to the sufficiency of evidence on appeal."). Thus, if Defendant wishes to challenge this court's final decisions, the appropriate step is to file an appeal at the Court of Appeals for the Federal Circuit. It need not demonstrate any particular form of advocacy, it may not reargue its position before this court without first filing an appropriate motion for rehearing pursuant to USCIT R. 59, and it must not, in any case, act in a contumacious fashion.

As stated by the court, in its earlier opinion, the primary issue before it was "whether representatives of SKF did or did not offer to provide supporting documentation to Department officials from which they could verify the accuracy of Sarma's reported sales."[1]

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[1] In *SKF*, 391 F. Supp. 2d at 1329, the court stated:

> The core conflict between the parties is whether representatives of SKF did or did not offer to provide supporting documentation.

In its Remand Redetermination the Department of Commerce repeatedly characterized what the court did at the hearing which produced that opinion as a "verification test" which it argues, produced information which was insufficient for Department verifiers to have conducted a full audit. Remand Redetermination at 12–13.

In oral argument regarding this Remand Redetermination the court questioned Government counsel how the Department could take that position when at the oral argument, prior to the SKF opinion referenced above, the court stated:

> . . . . Mr. Tosini, let me state my concern to you as I did in September and October. *My concern is that somebody is lying to me.* Not whether the quantity of evidence is sufficient to meet the approval of the Department of Commerce, but rather–because that is discretionary on the part of the Department of Commerce, and I review it as to whether there is law or evidence to support it. I don't reweigh it. That is not what we are doing here.
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> *[I]t is about that specific factual question, did they make the offer to provide the information and was it turned down or not. . . .*

Transcript of November 19, 2004, Evidentiary Hearing ("Hr'g Tr.") at 228:5–24 (emphasis added).

Counsel for the United States informed the court that it was the Department's position that it could read the "core conflict" sentence in this court's opinion quoted above as meaning the court believed it was testing the adequacy of records offered at verification as opposed as to whether someone was lying about the offer of any records at all. Counsel also informed the court, that while the above quoted colloquy might make it clear that was not the court's intent, the Department felt it could look only to this court's opinion to determine its meaning, and not the discussion at oral argument or the pleadings or evidence before this court.

The court presumes that a competent and ethical agency official, adequately advised of the record before this court read this court's opinion in full, including its conclusion that ". . . there is well nigh irrefragable evidence that Commerce's representations regarding the events which occurred at verification were . . . not factually accurate. . . ." Nothing in that opinion or the record behind it identified the conflict between the parties as having been *which* information was offered as opposed to *whether* information was offered. *Id*. at 1333 (citing *Galen Med. Assocs., Inc. v. United States*, 369 F.3d 1324, 1337 (Fed. Cir. 2004)). Ac-

SKF USA Inc. et al. v. United States, Slip Op. 05–104 at 6, 391 F. Supp. 2d 1327, 1330 (CIT 2005). Commerce's attempts to characterize the course of events during the court's evidentiary hearing as a mini- verification is factually incorrect. *See* Remand Redetermination at 12–15. What the court determined at the hearing was that SKF and Sarma were able to provide the information requested by Commerce officials and would have done so at the time of the original verification. *SKF*, 391 F. Supp. 2d at 1331. That determination remains unchanged. What is particularly relevant to that conclusion is that "offers were made and persons, at Sarma, were able and available to send information to the verification site." Plaintiffs' Comments at 5. The court's Opinion of August 24, 2005, discusses the sequence of events that took place during Commerce's initial verification, the briefings, the evidentiary hearing, as well as the court's conclusion. *SKF*, 391 F. Supp. 2d at 1330–33. Commerce may not, by inaccurately recharacterizing the inquiry, findings, and holding of this court, be permitted to relitigate prior matters to the detriment of Plaintiffs, or of the judicial process.

The Department also challenges the court's conclusion that it should have "provided SKF with an opportunity to remedy its verification failure," pursuant to Section 782(d) of the Tariff Act of 1930, section 782(i) of the Act, and 19 C.F.R. § 351.307. Remand Redetermination at 16. As stated by the court in *SKF*, 391 F. Supp. 2d at 1336, Commerce's announcement of its decision to use partial adverse facts available in the *Final Results* without providing a cooperative respondent such as SKF the opportunity to respond is contrary to 19 U.S.C. § 1677m(d). Pursuant to 28 U.S.C. § 1581(c) and 19 U.S.C. § 1516a(b)(1)(B)(i), this court has the authority to remand matters to Commerce if it is "unsupported by substantial evidence on the record, or otherwise not in accordance with law" and instructed Commerce to re-examine the record of this case accordingly. *Id*.

C
Even If Commerce Could Reargue the Issues Previously Before This Court, It May Not Do So By Mischaracterizing, Misstating, and Misconstruing the Court's Opinion

Defendant states in its Remand Redetermination that "[a]t the center of this litigation are the questions of whether SKF/Sarma offered information to the Department's verifiers and, if so, whether the information would have supported Sarma's designation of sales to report and sales it did not report to the Department in its ques-

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cordingly, the Government's counsel having offered no better explanation, and based on the statements made in the Remand Redetermination this court has determined that the Department of Commerce's "interpretation" constitutes a mischaracterization of this court's opinion.

tionnaire response." Remand Redetermination at 6. The Department also claims that "[d]uring her depositions and during the Court hearing, [SKF Employee A] testified that, during the February 2003 verification, she recalled being asked to demonstrate the split between sales" but that the Commerce verifiers did not recall this offer. Remand Redetermination at 6–7. Defendant, however, continues to argue that "neither of the offers which [SKF Employee A] testified she made at verification would have been sufficient to verify the accuracy of the quantity and value figures Sarma submitted to the Department." *Id*. at 7.

What the court said at the hearing was the following:

> Court: [I]f any of those are available and she can get those materials and have them faxed to this Court, then I will accept that if they were capable of doing that, then if they can do it now without notice and without preparation, they certainly could have done it then, and it would weigh heavily in this Court's determination.

Hr'g Tr. at 11:8–14. The court expressly stated during the course of the hearing that:

> Court: Taken together, what I have right now is the testimony of [SKF Employee A] that she made the offer and [SKF Employee B] demonstrating that she has the ability to obtain information by calling her office.

Hr'g Tr. at 173:19–23. Thereafter, the court determined based upon the in-court hearing that "the court was able to test the recollections of Commerce officials as well as SKF officials. . . . Commerce officials did not clearly recollect whether they had specifically requested source documentation. . . . SKF officials on the other hand testified that they communicated their willingness and ability to provide such source documentation." *SKF*, 391 F Supp. 2d at 1332. The court did not at any juncture, opine or rule on whether SKF/Sarma's proffered documentation would have supported the information originally reported by SKF; it found that SKF/Sarma was able to physically provide the supporting documentation for the Department's review upon request. *Id*. Once again, the court stated on the record of the hearing that:

> Court: No, no, no. Once again, Mr. Tosini, let me state my concern to you as I did in September and October. My concern is that somebody is lying to me. Not whether the quantity of evidence is sufficient to meet the approval of the Department of Commerce, but rather–because that is discretionary on the part of the Department of Commerce, and I review it as to whether there is law or evi-

> dence to support it. I don't reweigh it. That is not what we are doing here.
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> [I]t is about that specific factual question, did they make the offer to provide the information and was it turned down or not. . . .

Hr'g Tr. at 228:5–24. Finally, the court summarized what transpired at the hearing on the record and clarified for the parties its basic concern:

> Court: [I]n the morning I asked [SKF Employee B], because my concern, and I don't know if you were told this, but what my concern is is that I have squarely contradictory testimony between the verifiers and the various Sarma representatives, be they outside or inside, as to the ability of Sarma to obtain information and ship it up to SKF so I said to [SKF Employee B] . . . "[i]t was a couple of years ago, but could you call your office right now and have them – talk to somebody and have them fax information to the United States?"
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> It seems to me if she could do it today, she could have done it a lot easier a couple of years ago, and it bothers me intensely, because what you and your colleague are testifying is "These individuals said we can't do it." Not that "We won't" or not that anything; specifically, "We can't do it," and she is in here and is incapable of doing it, and yet she vigorously in her deposition and in her affidavit statement said, "Oh, I could do it," so I asked her to do it and, by golly, she did it.

Hr'g Tr. at 254:17–256:6. Based upon this testimony and the court's observations of the witnesses' demeanor, it concluded that "SKF's versions of this particular series of events is strongly supported by the ability of SKF officials to provide the information from the subject period of review to the court on the day of the hearing." *SKF*, 391 F. Supp. 2d at 1332–33. In no instance did the court attempt to reweigh or verify the accuracy of the substantive data included in the provided documents and expressly stated that it "held a hearing on those conflicting presentations, not to reweigh the evidence presented, but to examine the very existence of the facts as stated by the parties." *Id*. at 1329. Defendant's attempt to mischaracterize, misstate, and misconstrue the court's processes, Opinion, and Order is improper in these, and in the following respects:

(1) The court found in its August 24, 2005, opinion that Commerce's decision was unsupported by substantial evidence. *SKF et al.*

v. United States, Slip Op. 05–104, 391 F. Supp. 2d 1327 (CIT 2005); *see* 19 U.S.C. § 1516a(b)(1)(B)(i); *see also Universal Camera Corp.*, 340 U.S. at 477 (stating that "substantial evidence is more than a "mere scintilla." It means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion."). Commerce in its Remand Redetermination argues that the issue of whether SKF offered to provide supporting documentation at verification "was addressed fully on the record of the administrative review. . . ." Remand Redetermination at 2. By definition, the court's finding that "Commerce's announcement of its decision to use partial AFA for the first time in the Final Results, and to offer no opportunity for SKF to respond, correct, or clarify while finding SKF had not cooperated to the best of its ability, is unsupported by substantial evidence and not in accordance with law," means that it did not address this issue fully on the record of the administrative review. *SKF*, 391 F. Supp. 2d at 1336. Accordingly, Defendant is attempting to reargue its prior position rather than to simply preserve the issue for appeal.[2]

(2) Defendant states that it disagrees with the "conclusion that the extra-record affidavits SKF submitted with its brief to the court was the first time SKF had an opportunity to obtain relief concerning its failures at verification." Remand Redetermination at 5. The court, in its opinion, made no determination as to the timeliness of SKF's arguments or the filing of the affidavits in its original Motion for Judgment Upon the Agency Record. *See SKF*, 391 F. Supp. 2d at 1333–39. The court originally found and continues to find that Commerce did not provide SKF adequate notice of its decision to use partial AFA in calculating SKF's margin. *See id.*

(3) Commerce argues that in its view, "it had considered the matter fully and addressed it during the normal course of its administrative proceeding." Remand Redetermination at 6. Defendant is rearguing issues previously reviewed and decided. *See* Paragraphs 1) and 2) *infra*.

(4) Defendant's statement that "neither of the offers which [SKF Employee A] testified she made at verification would have been suf-

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[2] Defendant states that it "has not had the opportunity, as an agency, to address the proceedings that have transpired before the Court." Remand Redetermination at 4. Although counsel for the Department of Justice has represented the Defendant, United States, at all stages of this litigation and counsel for the Department of Commerce has appeared before this court at all hearings, Commerce seems to believe that it was not afforded the opportunity to voice its position to the court. At oral argument, the attorney for the U.S. Department of Justice stated that he is counsel for the United States and not counsel for the Department of Commerce. As such, the attorney for the Department of Justice argued that the Department of Commerce had not had the opportunity to present its argument before the court until it filed its Remand Redetermination. Upon further questioning from the court, the attorney for the Department of Justice refused to address any discussions between it and Commerce citing attorney/client privilege. Even though this court disagrees with Commerce's position, this is not the appropriate juncture to address this particular stance of the Department of Commerce.

ficient to verify the accuracy of the quantity and value figures Sarma submitted to the Department" is an attempt to reargue, without permission of the court, issues which were or which should have been briefed previously. Remand Redetermination at 7.

(5) Defendant further argues that it is clear to "the Department that, if [SKF Employee A] made these offers, they were not remotely sufficient to support the line items the Department selected in Sarma's verification worksheet. Remand Redetermination at 12. As noted above, the question before the court was not the sufficiency of the underlying data and whether or not the data provided by SKF could be audited to the satisfaction of Commerce, but rather it was to determine whether or not offers were made to provide documentation to Commerce officials. *SKF* 391 F. Supp. 2d at 1329. This court relied on evidence presented to it at or in court during the November 19, 2004, hearing and was satisfied that offers were made by SKF officials to provide any requested documentation to Department officials. *See id.*; *see also* Hr'g Tr. at 61:13–64:16 (Test. of [SKF Employee A]); Hr'g Tr. 92:21–94:5 (Test. of [SKF Employee A]); Hr'g Tr. 156:8–11 (Test. of [SKF Employee B]); Hr'g Tr. 173:19–22 (statement of the court). Defendant's statement to the contrary directly mischaracterizes the ruling of this court.

(6) Defendant alleges that what it calls the court's "verification test" was not sufficient to satisfy Commerce's audit procedures. Remand Redetermination at 15. Defendant states that it "agrees with Mr. Schauer's testimony that one invoice is not sufficient to demonstrate that the totals presented in each line item were accurate." Remand Redetermination at 13. Commerce may not in its Remand Redetermination reargue without the court's permission issues previously decided. *See* Paragraph 5 *infra*.

(7) Defendant says that it "finds that the fact that both the documentation submitted in Court and [SKF Employee A]'s claimed offers would have been insufficient calls into question Sarma's preparedness, ability, and willingness to provide the requisite documentation during the February 2003 verification." Remand Redetermination at 14. Defendant may appeal this court's rulings, but its position that it may ignore them is directly contrary to the concepts of judicial review articulated in *Marbury v. Madison* 5 U.S. 137, 175–76, 1 cranch 137, 68–70, 2 L. Ed. 60 (1803). *See also United States v. Dalcour*, 203 U.S. 408, 420, 27 S. Ct. 58, 59, 51 L. Ed. 248 (1906) (holding that the Circuit Court of Appeals shall exercise appellate jurisdiction to review final decisions in the District Courts, et cetera, in all cases other than those provided for in the preceding section, "unless otherwise provided by law."); *Ex parte Watkins*, 32 U.S. 568 (1833) ("[t]he jurisdiction of the court can *never depend* upon its decision upon the merits of a case brought before it; but upon its right to hear and decide it at all . . . it is the essential criterion of appellate jurisdiction that it revises and corrects the proceed-

ings in a cause already instituted, and does not create that cause." (emphasis in original) (citations omitted)). In this instance this court was satisfied and continues to remain satisfied that [SKF Employee A]'s offers were sufficient to substantiate SKF's claim that it had the ability to provide data requested by Commerce. *SKF*, 391 F. Supp. 2d at 1333. Since the Court of International Trade has original jurisdiction over matters arising out of the administrative decisions of the Department of Commerce, its decision that SKF offered to provide documentation can be challenged via appeal but not via reargument without permission of the court. *See* 19 U.S.C. § 1516a.

(8) Defendant states that "[n]owhere on the record of the review or in the documentation presented before the Court was there any indication of preparation by SKF or Sarma personnel to provide such information during the February 2003 verification." Remand Redetermination at 15. SKF officials testified in open court on November 19, 2004, that they were prepared for verification as well as able and willing to provide any documentation requested by Commerce officials and the court found that there was sufficient indication of that intent. *See SKF*, 391 F. Supp. 2d at 1332–33; *see also* Hr'g Tr. 53:10–18; 57:11–22; 73:2–13 (Testimony of [SKF Employee A]); Hr'g Tr. 153:23–154:16 (Test. of [SKF Employee B]); Hr'g Tr. 210:4, 213:2–5; 218:9–14 (Test. of [SKF Employee C]). The court is satisfied that SKF offered to provide supporting documentation to the Commerce verifiers. If the Department disagrees with that determination it must appeal it or seek a rehearing. It may not reargue it without the court's permission.

V
Conclusion

For the reasons stated above, Defendant's Remand Redetermination is hereby affirmed in part and stricken in part. Paragraph 1 at page 5 through paragraph 1 at page 9, and paragraph 1 at page 12 through paragraph 2 at page 17, of Defendant's Remand Redetermination are hereby stricken on the grounds that those portions misconstrue, misstate and/or mischaracterize the court's findings.

Slip Op. 06–142

GUANGDONG CHEMICALS IMPORT & EXPORT CORPORATION, Plaintiff, v. UNITED STATES, Defendant.

Before: Jane A. Restani, Chief Judge
Court No. 05–00023

[Results of Department of Commerce remand determination sustained.]

Dated: September 18, 2006

Garvey Schubert Barer (*Ronald M. Wisla* and *William E. Perry*) for the plaintiff.

Peter D. Keisler, Assistant Attorney General; *David M. Cohen*, Director; *Jeanne E. Davidson*, Deputy Director, Commercial Litigation Branch, Civil Division, U.S. Department of Justice (*David S. Silverbrand*), *Arthur D. Sidney*, Office of the Chief Counsel for Import Administration, U.S. Department of Commerce, of counsel, for the defendant.

OPINION

Restani, Chief Judge: Plaintiff Guangdong Chemicals Import and Export Corporation ("Guangdong") challenged the results of an administrative review of an antidumping duty order on sebacic acid from the People's Republic of China ("China"). Following oral argument, the court remanded for the Department of Commerce ("Commerce") to reconsider the reliability of data used to calculate the surrogate value of sebacic acid, and also to explain its choice to deduct a by-product credit from normal value, rather than from manufacturing costs. On remand, Commerce reexamined its data, excluded aberrational values, and explained its decision to change its policy with respect to by-product credits. Following remand, Guangdong asserts that Commerce's exclusion of aberrational values does not justify its use of less product-specific data. Guangdong also argues that Commerce's practice of deducting by-product credits from normal value is arbitrary, capricious and unsupported by substantial evidence. The court finds that Commerce's choice of data set and its treatment of the by-product credit are reasonable and supported by substantial evidence.

I. Background

In 1994, Commerce issued an order imposing antidumping duties on sebacic acid from China. *See Sebacic Acid from the People's Republic of China*, 59 Fed. Reg. 35,909 (Dep't Commerce July 14, 1994) (notice of antidumping duty order). On December 16, 2004, Commerce completed an administrative review of that order for the period of review ("POR") from July 1, 2002, to June 30, 2003. *See Sebacic Acid from the People's Republic of China*, 69 Fed. Reg. 75,303 (Dep't Commerce Dec. 16, 2004) (notice of final results of antidumping administrative review) ("*Final Determination*"). Two of Commerce's actions taken during that review are at issue in this case.

The first issue involves Commerce's valuation of sebacic acid. Because Guangdong's supplier of sebacic acid, Hengshui Dongfeng Chemical Co., produces a co-product, capryl alcohol, Commerce must allocate the supplier's costs of manufacturing between the two products based on their relative sales values. *See Section C and D Response of Guangdong Chems. Imp. & Exp. Corp.* (Nov. 4, 2003), P.R. Doc. 21, at D–4 ("*Section C & D Response*"). Because India does not

produce sebacic acid, Commerce relied on statistics describing the price of sebacic acid imported into India from other countries. *Prelim. Valuation of Factors of Prod.* (July 30, 2004), P.R. Doc. 47 at 1–2. Commerce chose to use import statistics maintained by the Indian government, based on a six-digit Harmonized Tariff Schedule ("HTS") category ("Indian government data"). *Id.*, P.R. Doc. 47 at 4, Attach. 4. That category lumped together imports of sebacic acid with imports of azelaic acid. *Id.*, P.R. Doc. 47 at Attach. 4. Guangdong advocated the use of product-specific data maintained by the publication *Chemical Weekly* in its Chemicals Import and Export trade database index ("*Chemical Weekly* data" or "ChemImpEx"). *Submission of Publicly Available Data for Use as Surrogate Value* (Sept. 8, 2004), P.R. Doc. 62 at 2 ("*Surrogate Value Submission*"). That data was taken from a selection of information from the Indian government, but included a classification specific to sebacic acid. *Id.*, P.R. Doc. 62. Because Guangdong's data included limited data points (in fact, only two imports, both from Germany, totaling 1,400 kilograms), Guangdong submitted additional corroborating data to bolster its limited data set. *Id.*, P.R. Doc. 62 at 2, Attach. 1. Without considering the impact of the corroborating data on the veracity of either data set, Commerce rejected the *Chemical Weekly* data and adopted the Indian government data. *See* Issues & Decision Memorandum for the 2002–2003 Antidumping Administrative Review of Sebacic Acid from the People's Republic of China, A–570–825, at 6–9 (Dec. 10, 2004) *available at* http://ia.ita.doc.gov/frn/summary/prc/E4-3678-1.pdf ("*Issues & Decision Mem.*"). Because Commerce failed to consider Guangdong's corroborating data, the court remanded this issue for additional consideration. *Guangdong Imp. & Exp. Co. v. United States*, 30 CIT ___ , ___ , 414 F. Supp. 2d 1300, 1313 (2006).

The second issue involves a change in Commerce's treatment of by-product credits. Because Hengshui produces fatty acid and glycerine as by-products of sebacic acid, Commerce gave Guangdong a credit reflecting the value of the by-products. *See Final Redetermination Pursuant to Court Remand* (May 3, 2006), Remand P.R. Doc. 4 at 7 ("*Final Redetermination*"). In its preliminary determination, Commerce applied this credit to the cost of manufacturing sebacic acid. *See id.* In its final determination, Commerce applied the credit against normal value, after calculating overhead costs, "special general and administrative" ("SG&A") expenses, and profits. *See id.* Commerce failed to provide an opportunity for interested parties to comment on this change in methodology before issuing its final determination. *Id.* Commerce therefore requested a remand in order to explain its application of the by-product credit. *Id.*

Commerce issued its *Final Redetermination* on May 3, 2006. As described more fully below, the *Final Redetermination* continued to use the Indian government data to value sebacic acid, but adjusted the Indian government data to eliminate aberrational values. *Id.*,

Remand P.R. Doc. 4 at 3, 5. Commerce also explained the rationale behind its application of Guangdong's by-product credit. *Id.*, Remand P.R. Doc. 4 at 7. Guangdong argues that Commerce's choice of data set remains unreasonable, and that Commerce's application of the by-product credit is unreasonable in light of generally accepted accounting procedures. *See* Pl.'s Comments on Def.'s Final Determination Pursuant to Court Remand at 1–2 ("Pl.'s Comments"). The court addresses each issue in turn.

II. Commerce's Use of the Indian Government Data to Calculate the Normal Value of Sebacic Acid

Because India does not produce sebacic acid, Commerce relied on import statistics to estimate the value of sebacic acid. As mentioned, Commerce used statistics from the Indian Department of Commerce's Import/Export Data Bank, based on a six-digit basket category in the Indian HTS,[1] which includes both sebacic acid and azelaic acid. *Issues & Decision Mem.* at 3. During the review, Guangdong offered more product-specific data compiled in an import and export database maintained on the website of the Indian publication *Chemical Weekly*. *Guangdong Chems. Imp. & Exp. Co. Case Br.* (Sept. 20, 2004), P.R. Doc. 65, at 4–6. Guangdong proposed using the *Chemical Weekly* data, which was based on a portion of the Indian government's information, but was further subdivided and included a specific subheading for sebacic acid.[2] *Surrogate Value Submission*, P.R. Doc. 62 at 2. Based on this data, Guangdong argued that the value of sebacic acid in India during the POR was $3,551.73.[3] *Id.*, P.R. Doc. 62 at 2. Guangdong corroborated its proposed value with data from U.S. import statistics for sebacic acid, benchmark price data from the publication *Chemical Market Reporter*, and prices for oxalic acid, a chemical asserted to be similar to sebacic acid. *Id.*, P.R. Doc. 62 at 2–3.

In response to Guangdong's proposed data, Commerce conducted additional research to determine whether prices of azelaic and sebacic acid were similar. *See Comparison of U.S. Int'l Trade Comm'n Dataweb Values for Sebacic Acid & Azelaic Acid Imps. to the United States* (Dec. 10, 2004), P.R. Doc. 79 at 1 ("*Price Comparison Mem.*"). It concluded that the two products were similarly priced, varying only by $.30 per kilogram over a twenty-three-month period during which the price for sebacic acid ranged between $2 and $3 per kilogram. *Id.*, P.R. Doc. 79 at 1. Commerce therefore used the broader Indian government data to arrive at a surrogate value of $15,826.30 for sebacic acid. *See Issues & Decision Mem.* at 9 (electing

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[1] The six-digit Indian HTS heading is 291713.

[2] The eight-digit heading for sebacic acid is 291713.02.

[3] All prices are in U.S. dollars per metric ton unless otherwise stated.

to use Indian government data); *see also Prelim. Valuation of Factors of Prod.*, P.R. Doc. 47 at 4 (using Indian government data to arrive at $15,826.30 per-metric-ton value for sebacic acid). In rejecting the *Chemical Weekly* data, Commerce reasoned that it could not determine how the *Chemical Weekly* data were derived from the Indian government information, and that the *Chemical Weekly* data lacked "a sufficiently broad range of import values." *See Issues & Decision Mem.* at 7.

Guangdong filed suit in this Court to challenge the results of the administrative review. *See Guangdong*, 30 CIT at ___ , 414 F. Supp. 2d at 1300. Guangdong argued, *inter alia*, that Commerce had not supported its decision to use the Indian government data instead of the *Chemical Weekly* data. *Id.* at ___ , 414 F. Supp. 2d at 1303. Because Commerce did not explain why it rejected the *Chemical Weekly* data without consideration of the corroborating data submitted by Guangdong, nor explained why the Indian government data were not aberrational, the court remanded for Commerce to address these infirmities in its reasoning. *Id.* at ___ , 414 F. Supp. 2d at 1312–13.

In its *Final Redetermination*, Commerce retained use of the Indian government data, but "examined the U.S. import statistics, the European Union import statistics, and the *Chemical Market Reporter* data that Guangdong provided on the record for benchmarking purposes." *Final Redetermination*, Remand P.R. Doc. 4 at 5. Commerce noted that the value of sebacic acid in the *Final Determination*, $15,826.30, was significantly higher than the value of the "benchmark data," which showed a price of $3,061.54 for sebacic acid imported into the United States (excluding China, India and Korea), $3,098.42 for the European Union, and $4,187.60 developed from price quotes in the *Chemical Market Reporter*. *Final Redetermination*, Remand P.R. Doc. 4 at 5. On the basis of this evidence, Commerce found that its data for the POR were aberrationally high when compared with Guangdong's corroborating data. *Id.*, Remand P.R. Doc. 4. Consequently, Commerce reexamined its import data for India and determined that sales from the United States had skewed its results. *Id.*, Remand P.R. Doc. 4 at 5–6. After removing the aberrational data, Commerce found the Indian import price of sebacic acid to be $4,901.88. *Id.*, Remand P.R. Doc. 4 at 6. Despite these changes, Guangdong continues to argue that Commerce could not reasonably use the Indian government data when a more product-specific data set was on the record.

19 U.S.C. § 1677b (2000) provides that valuation of factors of production "shall be based on the best available information," but does not mandate that Commerce use any particular data source. *Id.* § 1677b(c)(1)(B). This gap in statutory authority leaves Commerce with considerable discretion in selecting a data source to calculate normal value. *See Nation Ford Chem. Co. v. United States*, 166 F.3d 1373, 1377 (Fed. Cir. 1999). The court will uphold Commerce's deter-

mination unless it is unsupported by substantial evidence on the record or otherwise not in accordance with law. 19 U.S.C. § 1516a(b)(1)(B)(i). The fact that the evidence on the record may support two inconsistent outcomes does not mean that the agency's selection of one alternative is unreasonable. *Goldlink Indus. Co. v. United States*, 30 CIT ___ , ___ , 431 F. Supp. 2d 1323, 1326 (2006) (citing *Consolo v. Fed. Mar. Comm'n*, 383 U.S. 607, 620 (1966)). Thus, "the court may not substitute its judgment for that of the [agency] when the choice is 'between two fairly conflicting views, even though the court would justifiably have made a different choice had the matter been before it *de novo*.' " *Id.* at ___ , 431 F. Supp. 2d at 1326 (quoting *Am. Spring Wire Corp. v. United States*, 8 CIT 20, 22, 590 F. Supp. 1273, 1276 (1984)).

In this case, Commerce identified "several factors, including the quality, specificity, and contemporaneity of the source information."[4] *Final Redetermination*, Remand P.R. Doc. 4 at 2. Commerce must "conduct a fair *comparison* of the data sets on the record" with regard to these factors. *Allied Pac. Food (Dalian) Co. v. United States*, 30 CIT ___ , ___ , 435 F. Supp. 2d 1295, 1313–14 (2006) (emphasis added). That is, Commerce's analysis must do more than simply identify flaws in the data sets it rejects. Commerce must also apply the same criteria to the data upon which it relies, and explain how the preferred data meet these criteria, or why a given criterion should not apply to the preferred data. The fact that a rejected data set is superior with respect to one criterion is not determinative so long as Commerce explains why the preferred data set is superior overall, and what steps were taken to ameliorate weaknesses in the preferred data.

This case involves two proposed data sets, the *Chemical Weekly* data and the Indian government data. The court's remand focused on Commerce's treatment of two criteria with respect to these data sets. First, the court remanded for Commerce to consider the "quality" of the Indian government data, i.e., its reliability in light of the evidence on the record. *Guangdong*, 30 CIT at ___ , 414 F. Supp. 2d at 1313 ("Having failed to consider whether the $15,826.30 figure derived from the basket category was aberrational despite evidence of its wide variation from the value of the same basket category in another year, Commerce failed to present substantial evidence supporting its surrogate value for sebacic acid."). Second, the court remanded for Commerce to explain its choice not to use the more

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[4] In its preliminary determination, Commerce stated that it will select, "where possible, the publicly available value which was (1) [a]n average non-export value; (2) representative of a range of prices within the POR or most contemporaneous with the POR; (3) product-specific; and (4) tax exclusive." *Sebacic Acid from the People's Republic of China*, 69 Fed. Reg. 47,409, 47,411 (Dep't Commerce Aug. 5, 2004) (preliminary results of antidumping duty administrative review and notice of partial rescission).

product-specific *Chemical Weekly* data set, in spite of Guangdong's corroborating data. *Id.* at ___ , 414 F. Supp. 2d at 1312 (remanding for Commerce to reconsider its "depart[ure] from its generally expressed preference for product-specific data" based on Guangdong's submission of corroborating evidence).

A. Commerce's Comparison of the Data Sets on the Record Was Reasonable

On remand, Commerce considered Guangdong's corroborating evidence and its implications for the "quality" of the Indian government data, which it had previously ignored. *See Final Redetermination*, Remand P.R. Doc. 4 at 5 ("In our *Final Results*, we did not address these data points that Guangdong provided for benchmarking purposes."). Commerce determined that Guangdong's corroborating evidence raised questions regarding the quality of the Indian government data. *Id.*, Remand P.R. Doc. 4 at 5 ("[W]e find that the period of review . . . average sebacic acid surrogate value from the Indian six-digit HTS category . . . is significantly higher than the average import value from the previous POR . . . and higher than the data provided by Guangdong from the European Union import statistics, the U.S. import statistics, and the *Chemical Market Reporter*."). Commerce chose to address this problem by excluding aberrational values.[5] *Id.*, Remand P.R. Doc. 4 at 5–6. The elimination of aberrational values has been held to be a reasonable means for compensating for flaws in a data set. *See Hebei Metals & Minerals Imp. & Exp. Corp. v. United States*, Slip-Op. No. 04–88, 2004 WL 1615597, at *12 (CIT July 19, 2004) (ordering exclusion of aberrational values from one country to avoid distortions in the overall value for a specific import category); Issues & Decision Memorandum for Final Determination in Steel Wire Rope from the People's Republic of China, A–570–859 (Feb. 14, 2001), *available at* http://ia.ita.doc.gov/frn/summary/prc/01-4895-1.txt (stating that Commerce "has excluded – where appropriate – aberrational data that appear to distort the overall value for a specific import category"). The court finds that Commerce's elimination of aberrational values constituted a reasonable step to compensate for some weaknesses in the Indian government data based on the evidence in the record.

Having adjusted the Indian government data, Commerce then performed a comparison of the Indian government data with the *Chemical Weekly* data offered by Guangdong. Commerce acknowledged that "it may appear that the eight-digit category developed by ChemImpEx is more specific than the six-digit [HTS] category," *Final Redetermination*, Remand P.R. Doc. 4 at 4, and also that the

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[5] Specifically, Commerce excluded imports from the United States, the price of which was ten-times greater than the price of imports from other countries during the POR. *Final Redetermination* at 5.

price of azelaic acid was, on average, about 18.75% higher than the price for sebacic acid during the POR. *Id.* at 6. Despite these relative strengths of the *Chemical Weekly* data, Commerce found that, on balance, the Indian government data were the best available information on the record. Commerce also found that Guangdong's corroborating information "d[id] not remedy the deficiencies in quality or the limited number of data points in the [*Chemical Weekly*] data provided by Guangdong for sebacic acid." *Final Redetermination*, Remand P.R. Doc. 4 at 5.

Commerce rejected the *Chemical Weekly* data primarily for two reasons. First, Commerce found that it was unclear how the data reported in *Chemical Weekly's* ChemImpEx database were selected. Although the parties appear to agree that the *Chemical Weekly* data were developed using information obtained from the Indian government, the *Chemical Weekly* data did not use all of the available data. *See* Pl.'s R. 56.2 Mot. J. Agency Record 16 (stating that the *Chemical Weekly* data were "derived from ship manifest data collected by Indian Customs authorities"); *Final Redetermination*, Remand P.R. Doc. 4 at 4 (stating that the *Chemical Weekly* data were "derived from the Daily Lists published by the customs authorities in India," and noting that "ChemImpEx does not provide the methodology on how the data was selected or from where the data [were] derived"). Only about half of the sebacic and azelaic acid imported into India is represented in the statistics from *Chemical Weekly's* database. *Final Redetermination*, Remand P.R. Doc. 4 at 4. Commerce found no information on the record showing why certain imports were included, while other imports were not. Consequently, Commerce could not be sure that the data were "truly representative of the full data set from which [they were] derived." *Id.*, Remand P.R. Doc. 4 at 4. A lack of information regarding the selection of data in a data set raises concerns distinct from concerns raised by the size of that data set. Without information on how transactions were chosen for inclusion in the *Chemical Weekly* data, Commerce could not be certain that the method used to select imports in the *Chemical Weekly* data was not biased.

Second, Commerce noted that the *Chemical Weekly* data included only two data points, consisting of two sales from the same company in Germany to India. *Id.*, Remand P.R. Doc. 4 at 4. By contrast, the Indian government data, even after removing aberrational values, represented imports from five different countries. *Id.*, Remand P.R. Doc. 4 at 6. The use of broader product categories is reasonable, despite the availability of product-specific data, if a greater variety of data provides greater reliability. *See Writing Instrument Mfrs. Ass'n v. U.S. Dep't Commerce*, 21 CIT 1185, 1195–96, 984 F. Supp. 629, 639–40 (1997) (approving use of basket category of import statistics from Pakistan, rather than more product-specific data from India, where Commerce found substantial evidence on the record suggest-

ing that the Indian data were "aberrational and unreliable"). The court therefore finds that Commerce's decision to use the Indian government data is supported by substantial evidence.[6]

B. Guangdong's Additional Arguments

Guangdong claims that Commerce's decision merely to adjust the Indian government data cannot be reasonable in view of the evidence Guangdong submitted showing prices of $32,045.58 for azelaic acid and $3,551.73 for sebacic acid. Pl.'s Comments at 4; *see also* Pl.'s R. 56.2 Mot. J. Agency Record at Attach. 1 (submitting data for azelaic acid). Guangdong argues that the presence of azelaic acid in the Indian government data must have skewed the price for sebacic acid upwards because the price of azelaic acid was almost ten-times that of sebacic acid. Pl.'s Comments at 4.

This argument assumes that the price of azelaic acid shown in the *Chemical Weekly* data is reliable. Commerce has explained that the prices in the *Chemical Weekly* data are unreliable because they do not account for all imports of sebacic acid or azelaic acid into India, and it is unclear how the selected data were chosen. *Final Redetermination*, Remand P.R. Doc. 4 at 4 ("Although the data [in *Chemical Weekly's* Chemicals import/export database] was originally derived from the Daily Lists published by the customs authorities in India, using a classification system that has been developed by *Chemical Weekly*, [it] does not provide the methodology on how the data was selected or from where the data was derived."). Morever, the evidence on the record supporting Guangdong's asserted price for azelaic acid is weaker than the evidence supporting Guangdong's asserted price for sebacic acid. Guangdong has not presented any evidence corroborating the *Chemical Weekly* data's price for azelaic acid. Evidence submitted by Guangdong shows that the price of azelaic acid exported to India from the United States was between four and eight times greater than the price of other azelaic acid imported by India in the same period. See Pl.'s R. 56.2 Mot. J. Agency Record at Attach. 1 (showing U.S. export price of 2855 rupees per kilogram of azelaic acid, as compared to 316 rupees per kilogram from Malaysia and 636 rupees per kilogram from Japan). In fact, as Guangdong points out, other evidence in the record shows that prices for azelaic acid in the United States were substantially lower than the $32,045.58 found in the *Chemical Weekly* data. Pl.'s Comments at 6 ("Commerce's own analysis shows that U.S. prices for both azelaic acid and sebacic acid are priced BELOW $3,000 per metric ton."). Finally, Commerce conducted its own analysis of the prices of azelaic acid and sebacic acid, and found a much smaller

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[6] Because the court finds that these reasons are sufficient to justify Commerce's choice of data sets, the court does not address Commerce's arguments concerning imports from Malaysia and the purity of sebacic acid imports in the *Chemical Weekly* data.

variation. *See Final Redetermination*, Remand P.R. Doc. 4 at 6, Attach. 1 (finding that the U.S. prices of sebacic acid were on average only 18.75 percent lower than those of azelaic acid during the POR). Commerce was therefore justified in concluding that inclusion of azelaic acid in the Indian government data did not skew the surrogate value of sebacic acid as much as Guangdong claims.

In a similar argument, Guangdong attacks Commerce's comparison of U.S. prices of azelaic and sebacic acid to establish the average variance in price between the two products. Pl.'s Comments at 5–6. Guangdong argues that Commerce has not adequately explained why it did not rely on the Indian prices from *Chemical Weekly* for the purpose of comparing the respective prices of sebacic and azelaic acid instead. *Id.* The impact of this argument is blunted by the absence of evidence corroborating the price of azelaic acid found in the *Chemical Weekly* data. Given the absence of evidence corroborating Guangdong's price, and the aberrationally high price of azelaic acid exported from the United States, it was reasonable for Commerce to conclude that U.S. domestic price data were the more appropriate benchmark for comparison. *See Timken Co. v. United States*, 26 CIT 434, 446–47, 201 F. Supp. 2d 1316, 1328 (2002) (stating that use of U.S. data as a benchmark to "determine the reliability of . . . surrogate data is within 'Commerce's statutory authority and consistent with past practice.' " (quoting *Peer Bearing Co. v. United States*, 22 CIT 472, 481, 12 F. Supp. 2d 445, 455 (1998))).

Finally, Guangdong argues that Commerce's surrogate value of sebacic acid cannot be reasonable because it exceeds the prices reflected in Guangdong's corroborating data. Pl.'s Comments at 5. The mere fact that Commerce's surrogate value is higher than one or all of Guangdong's benchmarks does not mean that that value is unreasonable per se. Guangdong notes that Commerce's surrogate value is 60 percent higher than U.S. imports of sebacic acid, 58 percent higher than European Union imports of sebacic acid, 17 percent higher than price in the *Chemical Market Reporter* data, and 38 percent higher than Guangdong's proposed surrogate value. *Id.* Still, Guangdong's own corroborating evidence exhibits similar levels of variation. For example, the value found in the *Chemical Market Reporter* data ($4,187.60) is 36.7 percent greater than the value established by the U.S. import prices, and 35.1 percent greater than the value of the imports into the European Union. *See id.* Moreover, Commerce's price is lower than the surrogate values for sebacic acid found in other administrative proceedings. *See* Issues & Decision Memorandum for Final Results of Changed Circumstances Review in Sebacic Acid from the People's Republic of China, A–570–825, at 17 (Mar. 23, 2005), *available at* http://ia.ita.doc.gov/frn/summary/prc/E5-1401-1.pdf (finding surrogate value of sebacic acid to be $5,459.72 during the POR of July 1, 2002, to June 30, 2003, and noting a surrogate value of $5,388.66 for the administrative review con-

ducted between July 1, 2000 and June 30, 2001, after adjusting for inflation). Given the variation among the corroborating data, the court finds that Commerce's surrogate value is not unreasonably high.

The court therefore affirms as reasonable Commerce's analysis of the reliability of the Indian government data in view of the corroborating evidence submitted by Guangdong.

III. Commerce's Application of the By-Product Credit to Normal Value

The remaining issue in this case arises from Commerce's treatment of by-product revenue from sales of fatty acid and glycerine made in the process of manufacturing sebacic acid. Congress has mandated that, in cases involving imports from non-market economies, Commerce must calculate the normal value of a respondent's factors of production using a surrogate data source from a country of similar size and economic development. 19 U.S.C. § 1677b(c)(4). The law requires Commerce to calculate normal value based on a number of factors of production, including labor, raw materials, energy used, and the cost of capital. *Id.* § 1677b(c)(3). After determining the costs of these materials, Commerce must also add "an amount for general expenses and profit plus . . . other expenses." *Id.* § 1677b(c)(1). These general expenses are calculated using "financial ratios" based on a surrogate's overhead costs, SG&A, and profits. *See Goldlink Indus.*, 30 CIT at ___ , 431 F. Supp. 2d at 1333. In this case, Commerce derived these ratios using data from the Reserve Bank of India Bulletin. *See Prelim. Valuation of Factors of Prod.*, P.R. Doc. 47 at 8. Commerce calculated the "overhead ratio" by dividing total factory overhead by the cost of "direct items" (including, *inter alia*, raw materials, power and labor). *See id.* at Attach. 8. For SG&A, Commerce divided total SG&A expenses by the sum of direct items and factory overhead. *See id.*, P.R. Doc. 47 at 8. Finally, to generate the profit ratio, Commerce divided the amount of pre-tax profits by the sum of direct items, factory overhead and SG&A. *See id.*, P.R. Doc. 47 at 8. These ratios were then applied to the respondent's surrogate values to determine the amount of overhead, SG&A and profits. *See generally Hebei Metals & Minerals Imp. & Exp. Corp. v. United States*, 29 CIT ___ , ___ , 366 F. Supp. 2d 1264, 1277 n.7 (2005) (describing calculation of financial ratios).

19 U.S.C. § 1677b(c) does not mention the treatment of by-products, nonetheless, Commerce sometimes grants a respondent a "credit" for a "by-product . . . generated in the manufacturing process [that is] either reintroduced into production or sold for revenue." *Final Redetermination*, Remand P.R. Doc. 4 at 7. Both by-products in this case are sold for revenue. *Id.* , Remand P.R. Doc. 4 at 12. In its preliminary results, Commerce deducted by-product revenues from manufacturing costs, before applying the financial ratios. *Id.*, Re-

mand P.R. Doc. 4 at 7. In its final results, however, Commerce determined that the by-product credit should have been deducted from normal value, after calculation of overhead, SG&A and profit amounts based on the cost of manufacturing. *Id.*, Remand P.R. Doc. 4 at 7.

In the past, Commerce's practice was to apply by-product credits against the manufacturing costs of the respondent, prior to the calculation of overhead, SG&A and profits. *See id.* Remand P.R. Doc. 4 at 7; *see also Union Camp Corp. v. United States*, 22 CIT 267, 270, 8 F. Supp. 2d 842, 846 (1998) (noting that in its 1996 antidumping administrative review of sebacic acid from China, Commerce subtracted by-product sales revenues from the manufacturing cost of sebacic acid). Because overhead, SG&A and profits are calculated based on manufacturing costs, a reduction in manufacturing costs reduces overhead, SG&A and profit amounts as well. Commerce recently adopted a new policy with respect to by-product credits. *Final Redetermination*, Remand P.R. Doc. 4 at 7–8. Commerce now looks to the financial statement of the company (or companies) used to calculate surrogate value and applies the by-product credit in the same manner as the surrogate does. *Id.*, Remand P.R. Doc. 4 at 7–8. In the event that the surrogate financial statement does not state how by-product revenue is applied, Commerce will "consider other information on the record, such as whether the by-product was re-introduced into the production process or sold for revenue purposes." *Id.*, Remand P.R. Doc. 4 at 8. In this case, Commerce found that deducting the by-product credit from normal value, after applying the financial ratios, was "appropriate . . . because it is reflective of the respondent's practice to sell the by-product as opposed to reintroducing it into the production process." *Id.*, Remand P.R. Doc. 4 at 8. This methodology does not reduce manufacturing costs prior to the calculation of overhead, SG&A and profit amounts, which in turn results in a higher normal value and dumping margin.[7] Guangdong argues that "[t]here is no rational basis for Commerce's departure from its longstanding administrative practice of applying the by-product offset as an adjustment to production costs." Pl.'s Comments 11.

Commerce claims that this methodology was approved as reasonable in *Sinopec Sichuan Vinylon Works v. United States*, 29 CIT ___ , ___ , 366 F. Supp. 2d 1339, 1351 (2005). *Sinopec* involved

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[7] For example, assume that a respondent has manufacturing costs of $1000, financial ratios of 20%, and receives a by-product credit of $100.

Using Commerce's old methodology, that company would have a normal value of $1080. ($1000 − $100 = $900; $900 + ($900 × .2) = $1080). Using Commerce's new methodology, and assuming the by-product was sold, that company would have a normal value of $1100. ($1000 + ($1000 × .2) = $1200; $1200 − $100 = $1100). The dispute in this case does not involve the size of the by-product credit itself, but whether a respondent should receive the added benefit ($20 in the example above) associated with reduced overhead, SG&A and profit amounts.

a respondent, Sinopec Sichuan Vinylon Works ("SVW") that produced polyvinyl alcohol ("PVA") in China. *Id.* at ___, 366 F. Supp. 2d at 1340. Commerce chose a company in India, Jubilant, which produced a precursor to PVA, polyvinyl acetate ("PVAc"), to act as a surrogate. *Id.* at ___, 366 F. Supp. 2d at 1340–41. SVW produced a by-product, acetic acid, when it converted PVAc into PVA. *Id.* at ___, 366 F. Supp. 2d at 1341. SVW "recover[ed] and reuse[d]" this by-product in its production process. *Id.* at ___, 366 F. Supp. 2d at 1351. Because Jubilant did not produce PVA, it did not produce acetic acid as a by-product of converting PVAc into PVA.[8] *Id.* Commerce determined that SVW should receive a by-product credit for producing acetic acid, but because Jubilant did not produce acetic acid as a by-product of converting PVAc to PVA, Commerce determined that it should not apply the by-product credit before applying Jubilant's financial ratios to the cost of manufacture. *Id.* at ___, 366 F. Supp. 2d at 1349–50. Commerce's practice was not intended to account for additional costs associated with the production of acetic acid, however, but to ensure that deduction of the by-product credit did not artificially distort the overhead, SG&A and profit expenses associated with the production of PVAc. *Sinopec*, 29 CIT at ___, 366 F. Supp. 2d at 1348 (stating that Commerce's determination to apply the by-product credit after the financial ratios was intended "to equate the base on which the ratios were calculated with the base to which they were applied").

Commerce's reasoning in *Sinopec* was entirely different from its reasoning in the *Final Redetermination*. In this case, Commerce never suggested that the application of financial ratios to cost of manufacturing data before deduction by-product revenues would mischaracterize Hengshui's cost of manufacturing sebacic acid. Rather, Commerce applied the by-product credit after the financial ratios to reflect the fact that, where a by-product is sold, "the by-product necessarily incurs expenses for overhead, SG&A, and profit." *Final Redetermination*, Remand P.R. Doc. 4 at 12. Thus, the reasoning behind *Sinopec* does not support Commerce's determination in this case.

Turning to Commerce's explanation in the *Final Redetermination*, the court finds that the remainder of Commerce's analysis provides a reasonable basis for its decision to apply by-product credits after a surrogate's financial ratios where the by-product is sold. Hengshui sells two by-products, revenue from which may be used to offset the cost of producing sebacic acid. Where a by-product is sold, Commerce assumes that the respondent would incur overhead, SG&A and profit expenses in selling the by-product. *Final Redetermination*, Remand P.R. Doc. 4 at 12. The Reserve Bank of India statistics, from

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[8] Jubilant produced acetic acid as a by-product, but not at the relevant stage of production. *Id.* at ___, 366 F. Supp. 2d at 1351.

which Commerce derived its surrogate financial ratios, include "selling commission[s]," "bad debts," and advertising as sales expenses. *See Prelim. Valuation of Factors of Prod. Mem.*, P.R. Doc. 47 at Attach. 8. A respondent's sales of a by-product would appear to incur each of these costs over and above what a surrogate spends to sell its primary products. If the surrogate does not produce a similar by-product, it would be reasonable for Commerce to conclude that the surrogate would not incur these expenses. Therefore, it is reasonable for Commerce to adjust a by-product credit to reflect the additional sales expenses incurred by the respondent.

Guangdong argues that Commerce could not reasonably have chosen to account for separable costs associated with the sale of a by-product by changing the point at which it applies the by-product credit. Guangdong notes that, as a matter of accounting procedure, by-products are commonly subtracted from the cost of manufacturing a main product. *See* Pl.'s Comments at 11 ("[G]enerally accepted accounting principles . . . normally treat both by-product income and by-products consumed in the production process as offsets to manufacturing costs.") (emphasis removed); *see also* Charles T. Horngren & George Foster, *Cost Accounting: A Managerial Emphasis* 490 (6th ed. 1987) ("The estimated net realizable values of [by-products and scrap] are best treated as deductions from the cost of the main products.") (emphasis removed). Nevertheless, it appears that "[c]onsiderable variation exists in accounting for by-products." Wayne J. Morse & Harold P. Roth, *Cost Accounting* 157 (3d ed. 1986). Indeed, in some circumstances, by-product sales may be credited to miscellaneous income. *Id.* at 158.

The court's opinion in *Magnesium Corp. of America v. United States*, 20 CIT 1092, 1107–08, 938 F. Supp. 885, 900 (1996), supports Commerce's treatment of the by-product credit. In that case, in its preliminary determination, Commerce subtracted a by-product credit from the respondent's cost of materials, before calculating the cost of manufacturing.[9] *Id.* at 1106, 938 F. Supp. at 899. In its final determination, Commerce changed its practice and applied the by-product credit after calculating the cost of manufacturing, thus increasing the amount of factory overhead. *Id.* Commerce did this to reflect "the by-product processing costs, thereby eliminating the need for valuing any additional processing-related elements." *Id.* (quotations omitted). Plaintiff argued that separable by-product processing costs should have been deducted from by-product revenues, and that the by-product revenue should have been deducted before calculating manufacturing cost. *Id.* The court disagreed, finding that Commerce's decision to change the timing of the application of the

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[9] Cost of manufacturing is composed of the cost of materials plus factory overhead, which is calculated by multiplying cost of materials by a factory overhead ratio. *See Magnesium Corp.*, 20 CIT at 1106, 938 F. Supp. at 899.

by-product credit was a reasonable means of "account[ing] for . . . costs related to by-product processing" while avoiding "costly accounting procedures" not warranted for by-products. *Id.* at 1107, 938 F. Supp. at 900. Similarly, Guangdong's argument implies that Commerce should have calculated a separate overhead, SG&A and profit amount for Hengshui's by-products, deducted that amount from the by-product credit, and then deducted the remaining by-product credit from manufacturing costs. This would require Commerce to engage in just the "costly accounting procedures" that the court in *Magnesium Corp.* found to be unnecessary. As in *Magnesium Corp.*, Commerce's decision to change when it applies the by-product credit is a reasonable alternative means of accounting for additional overhead, SG&A and profit expenses associated with Hengshui's sale of by-products. Even if Guangdong's alternative approach to implementation of the statute were reasonable, the court could not substitute its own view of the statute for Commerce's reasonable interpretation or implementation. *Id.* (citing *Chevron, U.S.A. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 844 (1984)).

Therefore, the court upholds Commerce's decision to account for separable costs associated with by-product sales by applying a by-product credit after application of financial ratios to manufacturing costs.

IV. Conclusion

The results of the remand determination are sustained in their entirety.